LAW AS A MEANS TO HUMAN FLOURISHING: LAW, MORALITY, AND NATURAL LAW IN POLICY-ORIENTED PERSPECTIVE

CHRISTIAN LEE GONZÁLEZ*

> *People need to be equipped with the knowledge of how democratic doctrines can be justified . . . No democracy is even approximately genuine until men realize that men can be free . . . [and t]here is no rational room for pessimism about the possibility of putting morals into practice . . .*[1]

> *[Policy-Oriented Jurisprudence] declares a . . . truce on proselytizing in the name of . . . metaphysical systems, and join[s] with those who are prepared to accept the dignity of the individual and who find that they have enough in common to agree . . .*[2]

Introduction

Friendships can be uneasy without ceasing to be friendships. Because the "pie" of law and morality's relationship can be sliced in many ways and to different yields, in what follows, I consider the simultaneously unexplored, uneasy, and yet promising relationship between the Natural Law tradition and Policy-Oriented Jurisprudence

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* J.D. Candidate (2019), St. Thomas University School of Law, Miami, Florida & J.D. Editor-in-Chief of the *Intercultural Human Rights Law Review*, St. Thomas University School of Law; B.A., University of Puerto Rico. I would like to thank Professor Siegfried Wiessner for his mentorship, friendship, and comments on this article. I would also like to congratulate Professors John and June Mary Makdisi on their retirement and emeriti status, as well as thank Professor John Makdisi for his conversation, advice, and academic example.

[1] Harold Lasswell & Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 225 (1943).

[2] HAROLD LASSWELL & MYRES MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY 761 (1992). Throughout this paper, I refer to this work of McDougal and Lasswell as "Free Society."

(or "New Haven"),[3] hoping that doing so will partially illuminate aspects of the relationship between morality and the law more generally. My aim is to describe *what* and *how* New Haven School founders Myres McDougal and Harold Lasswell thought about Natural Law.[4] As it will become clearer below, despite their critical appraisal of Natural Law, there is a sufficient overlap of interests and commitments between the two Schools, so as to regard them as natural

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[3] Variously called "Law, Policy, and Science," "policy-oriented," "policy-relevant," "contextual," and "configurative" jurisprudence, this way of thinking about the law has also been called the "New Haven School," due to the fact that it was founded at Yale Law School in New Haven, Connecticut. Throughout this paper, I call the school "Policy-Oriented Jurisprudence" and "New Haven" interchangeably. For the relevant introductory literature on New Haven, see Michael Reisman, Siegfried Wiessner, & Andrew Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007); Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 45 (2010); Frederick Samson, *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*, 14 VA. J. INT'L L. 535 (1974); Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1 (1974); Michael Schmitt, *New Haven Revisited: Law, Policy and the Pursuit of World Order*, 1 U.S. A.F. ACAD. J. LEGAL STUD. 185 (1990); Oona Hathaway, *The Continuing Influence of the New Haven School*, 32 YALE L. INT'L L. 553 (2007); Molly Land, *Reflections on the New Haven School*, 58 N.Y.L. SCH. L. REV. 919 (2014); Laura Dickinson, *Toward a New New Haven School of International Law*, 32 YALE J. INT'L L. 547 (2007); Harold Koh, *Is There a "New" New Haven School of International Law*?, 32 YALE J. INT'L L. 559 (2007); Janet Levit, *Bottom-up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INTL'L L. 393 (2007); Joseph Brooks, *Jurisprudence: The New Haven School and the Emergence of Secondary Authority – Is Number Two Trying Harder*, 41 FLA. L. REV. 1031 (1989); Jack Van Doren, *McDougal-Lasswell Policy Science: Death and Transfiguration*, 11 RICH. GLOBAL L. & BUS. 125 (2012).

[4] Although I consider Lasswell's and McDougal's joint—as well as separate—works bearing on either Natural Law or human nature, I do focus more extensively on McDougal's. For an overview of McDougal's specific contributions to New Haven, *see* TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL (Michael Reisman & Burns Weston eds., 1976); Richard Falk, Rosalyn Higgins, Michael Reisman, & Burns Weston, *Myres Smith McDougal (1906-1998)*, 92 AM. J. INT'L L. 729 (1998); Oran Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60 (1972); Eugene Rostow, *Myres S. McDougal*, 84 YALE L.J. 704 (1975); W. Michael Reisman, *Myres S. McDougal: Architect of a Jurisprudence for a Free Society*, 66 MISS. L.J. 15 (1996).

allies.

Odd as the pairing of Natural Law and a form of Legal Realism may seem,[5] a number of reasons make the choice quite relevant. First, although most accounts of New Haven's debut as a legal theory trace it back to McDougal's and Lasswell's joint work on legal education reform reacting to Positivism,[6] and to McDougal's work on the relationship between law and power, reacting to *Realpolitik*,[7] McDougal's earliest published work on legal theory seems to have actually been his public diatribe against Natural Law philosopher Lon Fuller,[8] sometimes even omitted in his bibliographies.[9] It was a debate

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[5] John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not To Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 90 (1995) (describing New Haven as an "outgrowth" of the Realist movement); Dan Priel & Charles Barzun, *Legal Realism and Natural Law* 1, 1 (Osgoode Hall Law School Legal Studies Research Paper No. 14, 2007) (describing the pairing of Natural Law and Realism as "odd"). For a brief overview of legal Realism generally, see Brian Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009); Michael Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005). I am unaware of any extant, focused consideration of New Haven's treatment of Natural Law specifically and, therefore, this paper represents a propaedeutic attempt to lay down somewhat of a foundation in this regard, especially in response to the suggestion of vocal critics. *See, e.g.,* Hengameh Saberi, *Love it or Hate it, but for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Rights*, 35 B.C. INT'L & COMP. L. REV. 59, 133 (2012) (observing that, "[t]o find marks of natural law in the New Haven Jurisprudence would demand a canvassing of the intellectual background and heritage of its founders – a task yet to be fulfilled by any critic").

[6] *See, e.g.,* Falk et al., *supra* note 4, at 730 (referring to the joint essay, *Legal Education and Public Policy: Professional Training in the Public Interest* of 1943); Tai-Heng Cheng, *Making International Law Without Agreeing What It Is*, 10 WASH. U. GLOBAL STUD. L. REV. 1, 12 (2011).

[7] Siegfried Wiessner, *Introduction, in* GENERAL THEORY OF INTERNATIONAL LAW 1, 21 (Siegfried Wiessner ed. 2017) (referring to McDougal's *Law and Power* essay of 1952 and his reaction to Morgenthau's work); Lasswell & McDougal, *supra* note 2, at 32 (criticizing Neorealism in international law for conceiving law as "fraudulent moralizing"); John Norton Moore, *The Legal Tradition and the Management of National Security in Toward World Order and Human Dignity, in* TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL 321, 322, 327 (Michael Reisman & Burns Weston eds., 1976).

[8] Myres McDougal, *Fuller vs. the American Legal Realists: An Intervention*, 50 YALE L.J. 827 (1941).

[9] *See, e.g.,* Editorial, *Myres S. McDougal: A Selected Bibliography*, 108 YALE

that impacted Policy-Oriented Jurisprudence in ways that set it apart from other post-realist movements. Second, the revival of Natural Law in the Twentieth Century coincided with the ascendency of legal Realism and the decline of Positivism after the Second World War,[10] and produced a continuous exchange between the two movements—at times critical, at times constructive, informing McDougal's theoretical understanding and sparking interest to this day. Third, both New Haven and Natural Law see law as necessarily embodying an overlap of power and morality to some extent.[11] Lastly, the very theme of this volume highlights the academic and personal legacies of professors John and June Mary Makdisi. Recognizing their intelligent defense of moral reasoning in law, especially in the form of Natural Law, this volume honors them by fostering the exercise of such reasoning.

In what follows, I first introduce what I take to be the two foundational insights of Policy-Oriented Jurisprudence, to wit: that law is a *means* that should be defined and studied from the perspective of the *political superior* or sovereign as inherently a type of decision made in social context that is ideally someone's creative and rational choice. Second, I introduce New Haven's distinction between theories *of* law and theories *about* law as framing its assessment of alternative legal theories, including Natural Law. Third, I explore Lasswell's and McDougal's *attitude* toward Natural Law, as well as the *sources* from which they derived their understanding of the tradition. Fourth, I describe New Haven's critical assessment of Natural Law. In doing so, I consider Lasswell's and McDougal's determination that Natural

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L.J. (1999).

[10] *See generally* Johannes Messner, *The Postwar Natural Law Revival and Its Outcome*, 4 NAT. L.F. 101 (1959); Irisi Topalli, *The Role of Natural Law after World War II (Case of Nuremberg Trial)*, 2015 ACTA U. DANUBIUS JUR. 87 (2015); Robert N. Wilkin, *Natural Law: Its Robust Revival Defies the Positivists*, 35 A.B.A. J. 192 (1949). McDougal was early-on deeply interested in this revival of Natural Law. Priel, *supra* note 5, at 715.

[11] *See, e.g.,* Lasswell & McDougal, *supra* note 2, at 57, 717 (describing law as the overlap of ethics and power); Donald McConnell, *The Nature in Natural Law*, 2 LIB. U. L. REV. 797, 839 (2008) (describing a similar overlap). For a discussion of the "overlap" and "separability" theses, see, e.g., Wibren van der Burg, *Two Models of Law and Morality*, 3 ASSOCIATIONS 61 (1999).

Law lacks the intellectual tasks necessary for a rational jurisprudence, as well as engage with some of the challenges posed by the latter to New Haven. Lastly, I offer some concluding observations on the most salient areas of agreement between the two Schools of jurisprudence.

The Bad Man, the Sovereign, and the Law

Any viable theory of law will inevitably assume or defend certain basic facts about *humans*, *sovereigns*, and the *law*.[12] Before I describe what New Haven has had to say about Natural Law theory, I'd like to point out certain features of the School that serve as *foci* or lenses through which it looks at the world. Policy-Oriented Jurisprudence, no less than Natural Law theory, recognizes certain basic facts about society. I begin with the last two—*law* and *the sovereign*. Professor Michael Reisman has pithily remarked that many legal theories trace their origins to a *single* insight.[13] New Haven's radical reorientation of jurisprudence can truly be said to have been the outgrowth of two insights concerning the nature of law and the sovereign respectively that, in turn, shoulder the weight of the School's massive theoretical architecture, like an Atlas-strong steel-frame. They also serve as magic thread to hold onto in the exploration of the labyrinth-like terrain of morality and the law. They are complementary—almost the *converse* of each other, and together they express core commitments of New Haven in the greater context of jurisprudential thought.[14]

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[12] Samuel Stumpf, *Maximum and Minimum Theories of Natural Law*, 3 RELIGION & PUB. ORD. 237, 240 (1965).

[13] Michael Reisman, *Theory about Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 935 (1999).

[14] For an overview of New Haven's place in the greater context of twentieth century legal philosophy, see William Morrison, *Myres S. McDougal and Twentieth Century Jurisprudence: A Comparative Essay, in* TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL 3 (Michael Reisman & Burns Weston eds., 1976); John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968); Jordan Paust, *The Concept of Norm: A Consideration of the Jurisprudential Views of Hart, Kelsen, and McDougal-Lasswell*, 52 TEMP. L.Q. 9 (1979).

What Bad Men Teach Good Men About the Law

McDougal was a card-carrying legal realist in the early 1930s.[15] The first foundational insight of Policy-Oriented Jurisprudence, as a post-realist movement,[16] was that law is a *means*; one that can be empirically and rationally inquired into, as well as normatively informed. Justice Holmes—patron-saint of Legal Realism[17] and early source of inspiration for Lasswell and McDougal[18]—first gave the idea its impetus in Twentieth century American jurisprudence:

> The first thing for a businesslike understanding of [law] is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law . . . If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[19]

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[15] Van Doren, *supra* note 3, at 126.

[16] For a discussion of the New Haven School as a post-realist movement, *see* Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 825-827 (1986); Moore, *supra* note 14, at 664-66.

[17] Green, *supra* note 5, at 1984 (n. 234).

[18] Rostow, *supra* note 4, at 708-9; Reisman, *supra* note 13, at 936; Alfredo Garcia, *The Dean's Welcome Address*, 4 INTERCULTURAL HUM. RTS. L. REV. 3, 4 (2009).

[19] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

Although he concedes that law reflects social morality, Holmes warns that *predicting* the decisions of courts ("prophecy"), not moral pontification, is what knowing the law consists of.[20] Such an approach is a *functionalist* one, defining law by *what* and *how* it *does* what it does, rather than by *why* it does it. It cares for what the real grounds of decision actually were in any given process of decision, and not for what decision makers could or should have done.[21]

Holmes was interested in a "businesslike" understanding of the law, and so were Lasswell and McDougal. Relying on Holmes' passage, they understood the value of his conception of law to reside in its emphasis on law as a *social process* involving human *decision*, and regarded it a fruitful *base* for *objective* and *comprehensive* inquiry about law.[22] To the extent that Holmes' "Bad Man" analogy contributes to an analysis of how power is effectively distributed in our complex legal systems, it can truly be said that it is useful, vital, and one of the saving graces of his own brand of Positivism.[23] New Haven is also "unequivocally functionalist."[24] Lasswell and McDougal regarded functionalism as a *realistic* account of law.[25] They agreed with Holmes' concession that, although the real grounds of decision are not exclusively normative, but empirical, they can be traced back to subjective views on public policy.[26] What bad men teach good men about the law is what social scientists, legal realists, and sociologists teach strict positivists and others: that law is both a process and an instrument, not pre-existing, and not set in stone. However, cognizant of contemporary criticism, McDougal followed Holmes' realist insight down a path quite different from his own.[27]

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[20] *Id*. at 457-8.

[21] Edmund Ursin, *Clarifying the Normative Dimension of Legal Realism: The Example of Holmes's the Path of the Law*, 49 SAN DIEGO L. REV. 487, 494-5 (2012).

[22] Lasswell & McDougal, *supra* note 2, at 58. For a discussion of the emergence of this "decision theory" of law in the writings of Felix Cohen and Jerome Frank, *see* Green, *supra* note 17, at 1967.

[23] Anthony Sebok, *The Path of the Law 100 Years Later: Holmes' Influence on Modern Jurisprudence – Introduction*, 63 BROOK. L. REV. 1, 4-5 (1997).

[24] Lasswell & McDougal, *supra* note 2, at 388.

[25] *Id*. at 88.

[26] *Id*. at 89.

[27] Van Doren, *supra* note 3, at 127-8 (describing McDougal's falling away

Unlike Holmes, who—despite this intuition—still regarded the social events from which law arises as an "unfathomable process,"[28] New Haven considers social processes to be quite fathomable and amenable to empirical study, as well as defines law as both a product and continuing process, and not just as a preexisting body of rules.[29] Moreover, following Felix Cohen's early criticism of Holmes, New Haven conceives of a functionalist approach as including a consideration of the goals and needs served by operative law in testing the functioning of legal systems: that is, the *why* of the law matters *no less* than the *what* and the *how*.[30] Legal description without the guiding light of theory of values is "blind."[31]

New Haven's first insight may be summarized as follows. Although Positivism is correct that morality and law are not coextensive, it is irremediably wrong in thinking there is no necessary connection between them and in conceiving of law only as a body of rules.[32] Although Realism is correct that law is not only a body of rules, but encompasses decision-making processes at its core and is best understood by how it functions, it is wrong in regarding such processes as *beyond* empirical or rational inquiry, and fails to incorporate normative considerations and preferences in its objective study of such processes.[33] Law is something that pertains to power, and both the good and the bad man can hope to understand it and wield it, as much as they are expected to suffer it, but only if they look at it like the bad man does: as a *means* to achieve *something*. What precisely is that *something* to be achieved by law is, of course, the subject of a different insight.

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from Legal Realism).

[28] Holmes, *supra* note 19, at 478.

[29] Lasswell & McDougal, *supra* note 2, at 61.

[30] *Id.* at 61; Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 CORNELL L. REV. 1032, 1042-3 (1981).

[31] Lasswell & McDougal, *supra* note 2, at 61.

[32] For this positivist "separability" thesis, *see, e.g.,* Jules Coleman, *Negative and Positive Positivism*, 11 J. L. STUD. 139 (1982); Leighton McDonald, *Positivism and the Formal Rule of Law: Questioning the Connection*, 26 AUSTL. J. LEG. PHIL. 93 (2001).

[33] Reisman, *supra* note 13, at 936.

Turning the Tables on Austin's Sovereign

The second fundamental insight of New Haven, sometimes called its "Copernican Revolution," was that its unseating of bodies of rules as the mechanism of legal decision entailed the installation of all human beings, to varying degrees, as deciders.[34] If law is a human *instrument*, the question arises, of course, of who should wield it and to what purpose. Because our conception of law influences the roles we assume, the methods we use, and the ethics we adopt with regard to it,[35] New Haven uses the answer to this question to inform the point of view from which it looks at and defines law generally.

John Austin, the foremost exponent of Positivism, defined law as "a command that obliges a person to a course of action," proceeding from "superiors, and to bind or oblige inferiors."[36] The sovereign's *will* is not only the law, but also the very standard for *justice*:

> True, we speak of law and justice, or of law and equity, as opposed to each other, but when we do so, we mean to express mere dislike of the law, or to intimate that it conflicts with another law, the law of God, which is its standard. According to this, every pernicious law is unjust. But, in truth, law is itself the standard of justice. What deviates from any law is unjust with reference to that law, though it may be just with reference to another law of superior authority.[37]

Lasswell and McDougal thought Austin was here defining the entire character of law based on merely one aspect of it, letting the fact of the legislator's desire to enact the law take away from the process of his free, rational choice and other objective aspects of the law.[38] Austin's "thin" concept of legality as the standard for justice, as well

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[34] *Id*. at 937.

[35] Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118, 119 (1992).

[36] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DEFINED 29 (W.E. Rumble ed. 2001).

[37] *Id*. at 162.

[38] Lasswell & McDougal, *supra* note 2, at 53.

as his unempirical notion of law as disconnected from the actual processes by which it is generated, are problematic and seem to amount to a conception of rule "by" law, as opposed to rule "of" law.[39]

The idea of law as simultaneously whatever the "sovereign" desires[40] and a body of rules existing independently of those who are to obey is part of the ideological mindset of those who see themselves as "political inferiors."[41] Because New Haven is committed to the liberal and democratic tenet that we all have the potential to function as Machiavelli's prince or Austin's "political superior," it has developed a number of intellectual tools to best empower individuals and communities to understand and shape the legal order.[42] As Professor Reisman explains:

> Positivism views law from the perspective of the receiver of commands, the "political inferior." From this perspective, law is a body of commands. This perspective assumes the independent moral value of obedience. The essential technical problem is properly identifying the content and meaning of the command and the circumstances and procedures for obedience to it. An entirely different perspective . . . is that of the person charged with making decisions. From the perspective of the decision maker, the technical and moral problems that are confronted are not framed in terms of obedience but rather in terms of making choices that are appropriate for the relevant community. The body of rules that serves to provide the positivist with strict commands requiring obedience does not disappear, but from the perspective of the decision maker those rules are more complex communications, conveying . . . community policies of varying weights that must be assessed . . . and shaped

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[39] *Cf.* Siegfried Wiessner, *The Rule of Law: Prolegomena*, ZDAR ABSCHIEDSHEFT 82, 82 (Juni 2018), *and* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CH. L. REV. 1175 (1989).

[40] Lasswell & McDougal, *supra* note 2, at 53.

[41] Reisman, *supra* note 35, at 121.

[42] Reisman et al., *supra* note 3, at 577.

> into a decision. The technical and moral problems associated with obedience recede.[43]

Whereas positivist approaches task legal thinkers and even decision makers with identifying what must be obeyed at any given time and what the source for the obligation is, New Haven understands jurisprudence as a theory about making certain social choices.[44]

New Haven reserves the word "law" for processes of decision making that are both consistent with the expectations of rightness held by members of a community and effective.[45] Although New Haven replaced impersonal rules with human choice, and calls for such choices to be rational, this does not mean it shares the commitments of current rational choice theory, libertarianism, or laissez-faire liberalism.[46] By "rational," New Haven means the "[u]s[e of] appropriate means for a desired end."[47] Holmes' functionalist Positivism and early Realism not only *distinguished* law from morals, but outright *divorced* them,[48] regarding law as settled at any given moment and any appeals to "higher" law as mistaken and referring but to our "keenest pleasures."[49] As seen below, New Haven believes they are to be *temporarily* and *methodologically* distinguished, but not permanently divorced, since value aspirations are central—not peripheral or external—to the legal decision making process. Whereas Austin's command theory posited that, by definition, there *cannot* exist unjust laws,[50] and Natural Law theory asserts that there *can* and

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[43] Reisman, *supra* note 35, at 119.

[44] *Id*. at 120.

[45] *Id*. at 121.

[46] Reisman, *supra* note 13, at 937.

[47] Lasswell & McDougal, *supra* note 2, at 22 (n 36).

[48] Jasmin Angel, *The Divorce of Law and Morality*, 8 THE WESTERN AUSTRALIAN JURIST 427, 437 (2017).

[49] Mark Kielsgard, *Critiquing Cultural Relativism: A Fresh View from the New Haven School of Jurisprudence*, 42 CUMB. L. REV. 441, 476 (2011); Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569, 571 (1945). *But see* Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CH. L. REV. 51, 67 (1971) (otherwise describing this attack on Holmes as "extreme").

[50] Samuel Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 VAND. L. REV. 117, 127 (1960).

often do exist unjust laws,[51] New Haven sides with Natural Law. Instead of only claiming a right to *disobey* such laws, however, it calls on participants in legal process to *change* them.[52] New Haven does not think law is merely a function of politics and power, but one of human agency.[53] This is why one of Lasswell's and McDougal's definitions of what they mean by offering a "functionalist" theory of law is to encourage everyone to constantly ask themselves how would the world of today be different, if one legal norm rather than another was adopted or abandoned.[54]

Just as Realism inspired New Haven to abandon the notion of law as a body of rules, New Haven's inspiration for turning Austin's definition of law on its head came in fact from the Natural Law tradition,[55] although this requires considerable qualification.[56]

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[51] Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 CAN. J. L. & JURISPRUDENCE 201, 201-2 (2007).

[52] Reisman et al., *supra* note 3, at 577; Wiessner, *supra* note 39, at 84. For Natural Law as also championing the changing of unjust laws, *see* Elmer Gelinas, *The Natural Law According to Thomas Aquinas*, 16 TRINITY L. REV. 13, 25 (2011).

[53] Hathaway, *supra* note 3, at 558 (calling this a "central feature" of the School).

[54] Lasswell & McDougal, *supra* note 2, at 265.

[55] Reisman, *supra* note 35, at 119.

[56] Although a thorough consideration of this thesis is beyond the scope of this paper, I must make some preliminary observations, since the statement has never been fully substantiated. It is true that, on its face, Natural Law does consider the role of the political superior. Thus, Aquinas teaches that Natural Law is said to be "in" a person in two ways: in the ruler *as ruler* and in the ruled *as ruled*. THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, Q. 91, Art. 2. With respect to both, law is something "pertaining to reason," *id*., that is to be enacted as a useful thing to human beings. *Id*. at I-II, Q. 95, Art. 3. To the extent that Natural Law ultimately derives from Divine Law, and Divine Law represents God's rational—if not humanly graspable—governance of creation, and his radically free, creative, and true judgments, it can be said that Natural Law contained the potential for effectuating New Haven's turning of Austin on his head. However, Natural Law has historically recoiled from drawing the necessary conclusion from this and has continued to define law primarily as a body of rules, often unchanging, *see, e.g., id*. at I-II, Q. 94, Art. 5, which is not consistent with a ruler's perspective. Unlike New Haven, for which the individual and the community are both sources of the normative content of law, Julien Cantegreil, *Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror*, 60 ME. L. REV. 97, 109 (2008), it is not clear that Natural Law has developed any such perspective, or used

Together, then, these two complementary insights about law and the sovereign stand for the proposition that *law is a means to be used and shaped by all participants in the social process from which it originates, where that use is informed by empirical and rational inquiry and guided by certain goal values.* Exploring what Lasswell and McDougal said about Natural Law will both flesh out this core commitment some more and present us with New Haven's basic assumptions about human nature and flourishing. A third insight of New Haven about the nature of legal thinking and theory is here in order, however, and frames its view of Natural Law and other competing legal philosophies.

The Distinction Between Theories of and About Law

A third idea following these two insights *in tandem* is the distinction made by Lasswell and McDougal between theories *of* law and theories *about* law. It framed their interest in—and assessment of—competing legal theories and, accordingly, sets the stage for their recurring observations about Natural Law theory.

Lasswell and McDougal identify five criteria they believe any useful theory of law will meet. The first consists of the self-identification of the scholar or observer in relation to the events observed and his or her standpoint and purposes.[57] This specifically requires an academic observer analyzing legal phenomena to clearly

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it to define law generally. Although Natural Law recognizes that law is in one sense defined by the ruler's perspective, it only embraces that perspective in describing the divine mind or human rulers, and declines to define law generally in such terms, preferring to define law rather as a set of rules. New Haven, on the contrary, primarily defines law as the rational choice of decision-makers, and only secondarily as a body of commands that the rest must heed. To the extent that Immanuel Kant can be said to meaningfully belong to the Natural Law tradition, as some assert, Patrick Capps & Julian Rivers, *Kant's Concept of Law*, 63 AM. J. JURIS. 259 (2018), then it can surely be said that the tradition serves as a source for New Haven's perspective. However, I personally do not agree that Kant's system and legislator's perspective in conceiving of law can be truly be identified with the mainstream Natural Law tradition. *See generally* Gunnar Beck, *Autonomy, History and Natural Law in the Practical Philosophy of Immanuel Kant*, 16 J. R. E. 371 (2008).

[57] Lasswell & McDougal, *supra* note 2, at 3.

distinguish herself from the more active participants in the social processes observed.[58] A lack of clarity in standpoint has caused many scholars to create theories of—rather than about—law, "[m]erely shadowy and ambiguous fragments of the data under observation."[59] The difference between theories of and theories about law tracks the difference between the objective sought (enlightenment or power) and the role assumed (observer or participant) by the one analyzing the legal problem.[60] While theories about law facilitate the employment of relevant intellectual tasks by the scholar in pursuit of enlightenment or accuracy, theories of law are—more restrictively—employed by participants in legal processes for guidance and justification of what they actually do.[61] Sometimes, of course, they may overlap. Recalling the two foundational insights of New Haven, at the bottom of its rejection of Positivism and Natural Law lies its observation that both schools, opposed as they are, rely on a conception of law as essentially a body of rules, which renders them theories *of* law for the most part.[62]

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[58] *Id.*

[59] *Id.*

[60] *Id.* (n. 7).

[61] *Id.*

[62] Lasswell & McDougal, *supra* note 2, at 9. Moreover, in the case of Positivism, it is a theory of law at odds with itself, since it subscribes to two fundamentally irreconcilable propositions, to wit: that its rules about law express some truth, but also that all law is someone's command. On Lasswell's and McDougal's suggestion that Positivism specifically engages in an impossible enterprise, *see* W. L. Morison, *Some Myth about Positivism*, 68 YALE L.J. 212, 223 (1958):

> As Myres S. McDougal has indicated, an empirical theory about law consisting of an exposition of legal principles as commonly understood is an impossibility. To arrive, as Austin intended, at an empirical account of what actually happens in the legal field, one must, following Austin's procedure, identify legal rules in some empirical way and then go on to examine the part these rules play in decision-making. At this point, conceivably, some general propositions about rules may emerge; but they will be propositions *about* rules, not mere expressions *of* the rules. In this connection, Austin's own theory that a legal rule expresses only the content of a command is thoroughly inconsistent with the notion that legal rules themselves describe some sort of truth.

(emphasis in original).

While theories of law rely on those assumptions that legal actors and participants make about legal processes and their likely or unlikely results—focusing on what legal actors are *supposed* to do, as opposed to what they are *actually* doing,[63] *jurisprudence* is most usefully conceived of as a theory *about* law.[64] This is so much so that New Haven *identifies* "theories about law" and "schools of jurisprudence," differing from theories of law in that the former amount to a meta-language or theory used for analysis of law generally, while the latter only encompass the very legal language or system being observed and explained by the former.[65] From a therapeutic perspective, the proper role of systematic jurisprudence is to *discover* and *disestablish* the contradictions, confusions, and mistakes of unsystematic conceptions of law.[66] New Haven views true jurisprudence as being both *critical* and *constructive*. Importantly, it views jurisprudence as a *system*, which the aggregate body of best practices and guesses of participants in legal process on which theories of law are based can never come close to be. New Haven seeks to tailor its theory about law to underlying and falsifiable social facts, rather than building a theory to which the facts are expected to conform or otherwise be themselves declared invalid, which traditional jurisprudence—Natural Law theory no less than Positivism—tends to do.[67] Before I turn to New Haven's substantive criticisms of Natural Law, however, I offer a description of Lasswell's and McDougal's *sources* for Natural Law theory, what they thought "natural law" *meant*, as well as their overall *attitude* toward it.

New Haven's Sources for Natural Law Theory

Lasswell and McDougal drew from various sources in addressing the Natural Law tradition. The most important writers they

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[63] Wiessner, *supra* note 3, at 46.

[64] Harold Lasswell & Myres McDougal, *Jurisprudence in Policy Oriented perspective*, 19 U. FLA. L. REV. 486, 486 (1967).

[65] Moore, *supra* note 14, at 666-67.

[66] Lasswell & McDougal, *supra* note 64, at 488.

[67] Anthony D'Amato, *The Relation of Theories of Jurisprudence to International Politics and Law*, 27 WASH. & LEE L. REV. 257, 258 (1970).

relied on include the Presocratics,[68] Plato,[69] Aristotle,[70] St. Augustine,[71] St. Thomas Aquinas,[72] Grotius,[73] Heinrich Rommen,[74] Passerin d'Entreves,[75] Anton-Hermann Chroust,[76] Leo Strauss,[77] Lon Fuller,[78] and Ronald Dworkin,[79] among others. Before considering New Haven's criticism of Natural Law theory, it is useful to know just *what* Lasswell and McDougal understood by the term, in light of these sources. Two pictures of Natural Law emerge from New Haven's sources: first, that depiction contained in McDougal's early diatribe against Lon Fuller; second, Lasswell's and McDougal's analyses of Aquinas and other writers in their *magnum opus* later-on.

Lon Fuller and the "Pale Moonshine of Metaphysics"

During the interwar period, when McDougal was a young realist, the two major alternatives offering students a choice to understanding law were Hans Kelsen's Pure Theory of Law and Roscoe Pound's Realism.[80] With Lon Fuller's publication of *The Law in Quest of Itself* in 1940, however, McDougal took to the press to "intervene," framing Fuller's as an attempt to falsely redefine that choice:

> The choice which we all—judges, lawyers, teachers, and students (and legislators and administrators?)—

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[68] Lasswell & McDougal, *supra* note 2, at 40.

[69] *Id*. at 685.

[70] *Id*. at 770-72.

[71] *Id*. at 71 (n. 25).

[72] *Id*. at 772-76.

[73] Myres McDougal & Siegfried Wiessner, *Law and Peace in a Changing World*, 22 CUMB. L. REV. 681, 688 (1992).

[74] Lasswell & McDougal, *supra* note 2, at 70 (n. 23).

[75] *Id*. at 51 (n. 5).

[76] *Id*. at 71 (n. 25).

[77] *Id*. at 231 (n. 68).

[78] *Id*. at 77 (n. 234).

[79] Lasswell & McDougal, *supra* note 2, at 242 (n. 101).

[80] Frederick S. Tipson, *From International Law to World Public Order: Who Studies What, How, Why*, 4 YALE J. INT'L L. 39, 44-6 (1978).

> have to make, the choice which determines how we will spend our working days, is, as Professor Fuller sees and poses it, between "natural law" and "positivism."[81]

Although McDougal finds Fuller's choice "uninviting," it is his impression of what Fuller meant by "natural law" that matters here.[82] As to Fuller's idea of Natural Law, McDougal observed:

> The "natural law" . . . is – as [Fuller] expounds it with a truly "variable content" – a philosophical "attitude" which views "law" as "reason applied to human relations" and "denies the possibility of a rigid separation of the *is* and the *ought*." Bowing to the "obscurity of nature" which does not "present us with the *is* and the *ought* in neatly separated parcels," it "tolerates a confusion of them in legal discussion" and does not dissipate energies "in a fruitless attempt to separate the inseparable." "In the field of purposive human activity . . . value and being are not two different things, but two aspects of an integral reality."[83]

McDougal understood Fuller to mean that Natural Law corresponded to certain ethical principles, but that was as much as he claims Fuller *clearly* communicated.[84]

In response to Fuller's criticism of Positivism and Realism as unduly separating law from morals, McDougal agreed, but defended realists like himself from the charge:

> [Realists] do not deny that the law-in-fact (rules and behavior) embodies somebody's ethical notions (how absurd it would be to deny it!); on the contrary, they are the people who have been most insistent that it has too often embodied an ossified ethics, inherited from previous centuries and opposed to the basic human

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[81] McDougal, *supra* note 8, at 828.

[82] For a brief discussion of McDougal's exchange with Fuller, see Rostow, *supra* note 4, at 713-14.

[83] McDougal, *supra* note 8, at 828.

[84] *Id.* at 831.

> needs of our time. More clearly than any of their critics, the realists have appreciated that legal rules are but the normative declarations of particular individuals, conditioned by their own peculiar cultural milieu, and not truths revealed from on high. Most of their writing has, in fact, been for the avowed purpose of freeing people from the emotional compulsion of antiquated legal doctrine and so enabling them better to pursue their hearts' desires.[85]

Although McDougal, therefore, agreed that law *is* and *must* be expressive of social and ethical values, he failed to understand what Fuller meant by Natural Law, stressing that students and colleagues could not understand it either,[86] and approvingly referencing a critic's characterization of Natural Law as the "pale moonshine of metaphysics."[87]

Instead, McDougal opted for Pound's realist alternative.[88] To the extent that Lasswell's and McDougal's statement of what they sought reflects on what Fuller failed to offer, it merits recalling their observation that, "[l]egal scholars will require a comprehensive guiding theory and intellectual techniques adequate to perform certain specific functions [that form] the elements of a 'policy-oriented' approach to the study of law."[89] Nevertheless, because even Realism did not provide a comprehensive, affirmative, and empirical method, McDougal became disenchanted with it.[90] As McDougal came to see it, a new method for legal analysis was needed as a third alternative to the known choice between determinist positivism, on one hand, and sheer arbitrariness, on the other.[91] In response, McDougal and Lasswell developed a jurisprudence that they sought to measure up against contending alternatives, Natural Law theory being the "oldest"

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[85] *Id*. at 834.

[86] *Id*. at 830 (n. 9).

[87] *Id*. at 827 (n. 2).

[88] Tipson, *supra* note 80, at 55.

[89] Myres McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 140 (1954).

[90] Lasswell & McDougal, *supra* note 2, at xxxvi.

[91] *Id*. at 267.

and "most continuously influential" one among them.[92]

New Haven's Shifting Definitions of Natural Law: Aquinas and Everyone Else

Because several parts of Lasswell's and McDougal's *magnum opus—Jurisprudence for a Free Society: Studies in Law, Science, and Policy* ("Free Society")—come from previously published essays, and since their *only* known treatment of Aquinas is contained therein, it is truly representative of the bulk of their thought on Natural Law specifically. Accordingly, and with few exceptions, I limit my analysis to this work. *Free Society* displays a two-fold understanding of Natural Law. First, it paints a picture of Natural Law based on sources other than Aquinas throughout the first volume, which volume otherwise contains the bulk of New Haven's *criticism* of Natural Law theory. Aquinas is not cited once.[93] Second, in its second volume, *Free Society* shifts and engages in a brief *exposition* of Aquinas' thought and texts without engaging in meaningful criticism. It does

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[92] *Id*. at 6.

[93] Lasswell and McDougal do not seem to have believed that there was any meaningful difference between Aquinas' version of Natural Law and others preceding and following it, for purposes of their critical assessment of Natural Law generally. Whether this is because they thought that the various authors they instead drew from captured or shared Aquinas' version, or that this made no difference, can only be a matter of speculation. It is not unlikely that they considered it irrelevant whether the often irreconcilable Natural Law theorists they relied on were faithful to Aquinas' ideas, since they seem to criticize *essential* features of Natural Law theory *generally*, rather than doctrinal points. It is also reasonable to say that they simultaneously thought that Aquinas represented the *towering* development of Natural Law theory *and* that Aquinas did *not* have an exclusive claim to the doctrinal contents of natural law theory, as can be readily inferred from the fact that they did not cite Aquinas once throughout the first volume of *Free Society*'s sustained criticism of Natural Law and other legal theories, relying instead on other writers, but dedicated a few pages exclusively to Aquinas in the second volume, describing his thought as the "most systematic and effective." Lasswell & McDougal, *supra* note 2, at 769. Their lack of direct reliance on Aquinas throughout their criticisms of Natural Law will be seen as limiting and less valuable by Natural Law thinkers who prefer Aquinas' doctrinal development of Natural Law theory to other kinds.

not cite any sources other than Aquinas.[94] Since the two definitions of Natural Law that emerge are different and the purposes for their reference are seemingly opposed, any assessment of the School's relationship to Natural Law must bear in mind this difficulty.

As to the first definition of Natural Law that *Free Society* seems to rely on, in order to criticize it as a theory *about* law, an aggregate definition is discernible from the various—and at times *disparate*—sources used. Out of a pastiche of voices—some inside, some outside the tradition—Lasswell and McDougal seem to identify Natural Law with a number of propositions, to wit:

(a) a type of trans-empirical[95] or mystical[96] analysis;

(b) a type of logical, derivational analysis;[97]

(c) a type of derivational analysis linked to theology and metaphysics requiring humans to put into effect on earth the requirements of divine will or of transcendental essences;[98]

(d) a type of analysis concerned with the bases of obligation;[99]

(e) a body of metaphysical notions and transcendental categories extracted by *a priori* procedures;[100]

(f) a set of autonomous, context-free rules about human behavior;[101]

(g) a set of derived transcendental essences,[102] whether from a deity, nature, or autonomous reason;[103]

(h) a set of rules embodying eternal laws written in the heavens

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[94] Lasswell & McDougal, *supra* note 2, at 772-77.

[95] *Id.* at 7.

[96] *Id.* at 52.

[97] *Id.* at 7, 179.

[98] *Id.* at 7.

[99] Lasswell & McDougal, *supra* note 2, at 183.

[100] *Id.* at 9 (n.17).

[101] *Id.* at 10, 19, 121.

[102] *Id.* at 7.

[103] *Id.* at 51.

or printed on man's spiritual nature;[104]

(i) a set of higher, objective standards by which human, positive laws can be appraised;[105]

(j) a conception of law as static, not dynamic;[106]

From these it follows that *Free Society's* first volume defines Natural Law as both a *type or mode of moral reasoning* and the *body of principles and conclusions* that such a mode of analysis relies on and yields.[107] The volume goes on to systematically criticize Natural Law in both senses.

Notably, the first volume does not identify the Natural Law tradition with St. Thomas Aquinas, which explains why the authors resort to a variety of writers inside and outside the tradition. The authors take Natural Law theory for a tradition spanning twenty-five centuries, from the Presocratics to the likes of Lon Fuller.[108] Since *Free Society* aims at assessing Natural Law theory as a theory about law, it seems appropriate to take into consideration definitions of Natural Law that precede and follow Aquinas.[109] The definitional range of Natural Law illustrated above is truly an attempt to identify on a higher level of abstraction certain common denominators to the otherwise different but equally pivotal incarnations of Natural Law theory, including Plato, Aristotle, Cicero, St. Augustine, Hobbes, Locke, Rousseau, Kant, and even Hegel.[110]

Perhaps the best contrast between Policy-Oriented Jurisprudence and Natural Law theory described in *Free Society's* first volume is illustrated by Lasswell's and McDougal's approving quotations of Havelock's and Chroust's characterizations of Natural

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[104] Lasswell & McDougal, *supra* note 2, at 66-7.

[105] *Id*. at 70.

[106] *Id*. at 122.

[107] It is beyond the scope of this paper to assess whether and to what extent *Free Society's* aggregate definition of Natural Law in the first volume is one that does justice to every source cited, the overall tradition, or Aquinas. My aim here is, for the most part, to be descriptive and concise.

[108] Lasswell & McDougal, *supra* note 2, at 70.

[109] This, of course, does not explain why Aquinas is not cited in the first volume.

[110] Lasswell & McDougal, *supra* note 2, at 71.

Law. Relying on Havelock, for example, the authors repeat that:

> [I]n the West . . . the prevailing temper has been to think of morality and law in a priori terms as resting on principles which are independent of time, place, and circumstance, whether these principles are viewed as inherent in the structure of the universe, or as expressions of the divine will and purpose . . . The united influence of Greek philosophy and religious revelation built up the conviction that man has an unchanging spiritual nature which is either itself the source, or is created by the source, of a moral law both timeless and complete.[111]

Moreover, in quoting Chroust, the authors further assert that:

> From its very inception Natural Law has been primarily the quest for the ultimate and absolute meaning of law and justice . . . [I]t seeks certain comprehensive ideas or values transcending the multifariousness of merely "given" empirical data and facts . . . [i]t never ceases to search for a unifying higher point of view which would endow the notion of law with something above its naïve "givenness"; and . . . it is intended to discover on a higher plane the "law" among "laws."[112]

In the second volume of *Free Society*, on the other hand, the authors' definition of Natural Law revolves almost exclusively around Aquinas. Part of the authors' "Note on Derivation" chapter, their treatment is more expository than critical, a brief exercise in arm-chair philosophy, rather than the sustained rapid fire of the first volume. Aquinas' and Aristotle's modes of analysis are described as identical in structure, that is, derivational. Aquinas' doctrinal contributions, however, are treated separately.

With regard to Aquinas' conception of Natural Law *as a method*, Lasswell and McDougal assert that it consists mostly of logical derivation.[113] By "derivation" the authors understand "[t]he

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[111] *Id*. at 70.

[112] *Id*. at 71.

[113] *Id*. at 759-60.

operation by which a statement of a social value is justified in the name of theology or metaphysics."[114] They explain:

> The derivational operation follows a logical mould since it presents a less general proposition as deducible from a more general statement. It is a doctrine of "ought" (demand) in which the assertion is made that preferences and obligations relating to the social process should be in accord with the Divine mind. If the key symbol of ultimate reference is "Nature" rather than "God," the logical format remains the same. The same is true of the terms that may be substituted for "the one God" (many Gods) or for "one transcendent force" (many transcendent forces).[115]

Aquinas is said to have "overwhelmingly" preferred this method,[116] ultimately relying on "God" as the term permitting the maximum derivation of "ought" statements from the system: because God is the preordaining cause of all things, and since God is also pure goodness, it follows that all things directed to the good are ultimately directed toward God himself.[117]

With regard to Aquinas' conception of Natural Law *as a body of moral knowledge* and a picture of the world, the authors underscored that he turned Aristotle on his head.[118] Aquinas' system places God at the center as the preordaining cause of all events and as endowing all things with their characteristics and ends.[119] God gives all things that which is proper to their condition and preserves their nature in the order and with the powers that properly belong to them.[120] The place of humans in this system is to "[a]ct in accord with [their] nature in fulfillment of the divinely determined end."[121] Because humans are rational creatures, they strive toward closeness

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114 Lasswell & McDougal, *supra* note 2, at 759.

115 *Id.*

116 *Id.* at 772.

117 *Id.* at 773.

118 *Id.* at 769.

119 Lasswell & McDougal, *supra* note 2, at 773.

120 *Id.*

121 *Id.*

with God by understanding and love.[122] The degree of knowledge accessible to humans in life, however, is not a function of merit, but grace, because of their fallen state.[123] Although humans are said to have free will to choose what is to be sought and shun what is to be avoided, they are also said to be predestined by God.[124] Because the precise scope of freedom that we may meaningfully be said to have is not determined, this has left room for a wide range of conflicting interpretations.[125]

As to the origin of Natural Law, the authors observe:

> [F]rom the "Eternal Law" is derived "Natural Law," which includes "everything to which a man is inclined according to his nature." The natural law forms a moral imperative in the shaping of all human conduct: "all acts of virtue are prescribed by the natural law: since each one's reason naturally dictates to him to act virtuously." Human laws are in turn derivable from "Natural Law."[126]

Positive law, in turn, is not law unless it be derived from—or not in contradiction of—Natural Law.[127] This is the extent of *Free Society's* expository treatment of Aquinas.

Free Society's disjointed treatment of Natural Law schools still yields a general understanding of Natural Naw as exhibiting the distinctive characteristic of "[i]nsist[ing] upon some set of standards, different from actual practice, and often meta-empirical, by which community decision and individual behavior are to be evaluated," whether the guidance takes place by reference to divine will, the good, natural justice, human needs, or the common interest.[128]

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[122] *Id.*

[123] *Id.* at 774.

[124] Lasswell & McDougal, *supra* note 2, at 774.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 776.

[128] *Id.* at 220.

Lasswell's and McDougal's Tone and Attitude Toward Natural Law Theory

A word on Lasswell's and McDougal's tone and attitude toward Natural Law is also instructive. An overview of their work reveals a complex, oscillating, and ambivalent attitude toward the Natural Law tradition.

McDougal's earliest treatment of Natural Law described Fuller's enterprise variously as "lend[ing] to obscurantism,"[129] a "pseudo-dilemma" made up of a "misleading abuse of words,"[130] a "futile shuffling and reshuffling of equivalent ambiguities,"[131] and even "muddled discourse."[132] McDougal's perceived derision of—and hostility to—old Natural Law solutions in facing new legal challenges makes some sense in light of his jurisprudence's "visceral" and "unequivocal" functionalist view of law,[133] and was sustained, direct, and not nuanced.

Free Society's characterization of Natural Law is more complex. Whether directly or indirectly, the authors do describe Natural Law theory variously as "transcendental nonsense,"[134] "animist belief,"[135] "mystical,"[136] "elitist,"[137] "unchangeable faith,"[138] "mystical teleology,"[139] "transcendental baggage,"[140] displaying analytical "abiding difficulties,"[141] and as of "questionable utility."[142]

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[129] McDougal, *supra* note 8, at 827 (n. 2).

[130] Lasswell & McDougal, *supra* note 2, at 829 (n. 7).

[131] *Id*. at 830 (n. 9).

[132] *Id*. at 831.

[133] Cantegreil, *supra* note 56, at 98; Lasswell & McDougal, *supra* note 2, at 388.

[134] Lasswell & McDougal, *supra* note 2, at 42.

[135] *Id*. (n. 12).

[136] *Id*. at 52.

[137] *Id*. at 66-7.

[138] *Id*. at 72.

[139] Lasswell & McDougal, *supra* note 2, at 269.

[140] *Id*. at 72 (n. 28).

[141] *Id*. at 7.

[142] *Id*. at 197.

The authors do, however, simultaneously praise Natural Law theory as "continuously influential,"[143] a "great historic contribution" in its appeals from the realities of naked power and its emphasis on the relevance of goal values,[144] producing "extensive and indispensable" contributions to contemporary theories and frameworks of constitutive power,[145] "aiding" in the development of international law,[146] and achieving a conception of the larger community of humankind and of a common nature despite its early and unsophisticated origins.[147]

The alternating critical and laudatory attitudes reveal an ambivalence that may follow necessarily from the objective nature of the authors' appraisal of the Natural Law School's merits. For one, it shows an absence of inconsistency and explains their overall genuine estimation of Natural Law theory and jurists as otherwise allies and co-workers against Positivism and its divorce of morals and values from law and legal analysis.[148] In contrast with earlier attitudes, *Free Society*, for example, endorses Fuller's conception of all law as somehow necessarily resting on moral reasoning and tames its criticism to merely pointing out that Fuller's position needs further clarification,[149] which explains why some consider Fuller a "natural ally" of New Haven.[150] As shown below, *Free Society* does not *reject* normative reasoning as displayed by Natural Law, but *deemphasizes* it,[151] emphasizing instead clarity in procedure and method.[152] The very purpose of deemphasizing logical derivations as a means of justifying values such as human dignity is precisely to "[s]eek[] a working relationship among men and women of many religious faiths and metaphysical traditions . . . [W]e do not presume to adjudicate among the claims of [such traditions], apportioning an accolade of

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143 *Id*. at 6.
144 Lasswell & McDougal, *supra* note 2, at 7.
145 *Id*. at 99.
146 *Id*. at 6.
147 *Id*. at 179.
148 *Id*. at 34, 194.
149 Lasswell & McDougal, *supra* note 2, at 233.
150 Rostow, *supra* note 4, at 714.
151 Lasswell & McDougal, *supra* note 2, at 40.
152 *Id*. at 42.

part-truth or the special contribution that each can make to the whole truth as we conceive it."[153]

Much of Lasswell's and McDougal's choice of words in their criticism was truly not peculiar to them.[154] McDougal, on the other hand, had a reputation for being an *enfant terrible*,[155] having an "iconoclastic persona,"[156] being a "love[r of] verbal combat,"[157] and displaying "furious tenacity," often leaving the "bones of many 'irresistible' objects strewn among the footnotes."[158] Indeed, most of the negative epithets used against Natural Law are buried in the footnotes of McDougal's earlier work on Fuller and of *Free Society*. Lasswell, on the other hand, described himself as the very opposite of McDougal in this regard.[159] For all the flare, such epithets amount to nothing more than a bombastic way of saying of Natural Law theory what was said of all other theories assessed in *Free Society*: that it was *partial*, *incomplete*, and *unreliable*.[160]

Free Society's Substantive Criticisms of Natural Law Theory

Because every theory about law will inevitably assume certain facts about people and society, a good such theory must study such facts rationally.[161] Accordingly, Lasswell and McDougal posited that any theory about how law comes into being must itself display certain characteristics ensuring its rationality, to wit: establishing an

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[153] *Id.* at 761.

[154] *See, e.g.,* Moore, *supra* note 14, at 90 (describing the Realist movement's recurring characterization of natural law as engaging in "word-magic" and "transcendental nonsense"). In this regard, see Lasswell & McDougal, *supra* note 2, at 42 (n. 12) (mentioning some of the schools of thought from which New Haven draws inspiration, all critical of natural law theory).

[155] Reisman, *supra* note 13, at 939.

[156] Cheng, *supra* note 6, at 12.

[157] Lasswell & McDougal, *supra* note 2, at xxxvii.

[158] *Id.* at xxxvi.

[159] *Id.* at xxxvii.

[160] *Id.* at 5. In this regard, McDougal's is no different than say, Jerome Frank's notoriously hostile treatment of Natural Law. *See* Priel, *supra* note 5, at 12.

[161] Lasswell & McDougal, *supra* note 2, at 119.

observational standpoint, delimitating its focus of inquiry, formulating particular problems for inquiry, explicitly postulating public order goals, and performing certain *intellectual tasks* relevant to both making and inquiring about law and its relation to social processes.[162] Such a jurisprudence is, of course, one that would effectively serve those who would both *understand* and *affect* the legal process.[163] Its intellectual tasks—the *method* recommended by any such theory, in turn, are economic and effective procedures,[164] consisting of the clarification of goal values, the study of past trends in decision, the study of the factors conditioning such past decisions, a projection of future trends in decision, and the invention of alternatives.[165]

The bulk of *Free Society's* criticism of Natural Law—no more than its assessment of other competing theories—amounts to a systematic exposition of how the latter fails to display such intellectual tasks and even seems to be incongruous with them.[166] Natural Law is deemed to lack the tools of contemporary cultural anthropology, sociology, and political science, and since *what* and *how* a jurisprudence *observes* what it does is a function of its conception of law, it necessarily fails to adequately perform these tasks.[167] I follow Lasswell's and McDougal's own design in grouping their criticisms of Natural Law by each intellectual task entailed by their method and discussed *in tandem* with their functional equivalents in other Schools throughout *Free Society*.

A. Balanced Emphasis on Authority and Control Elements of Law

Free Society defines law as a decision made in social process exhibiting *authority* and *control*.[168] So defined, the right jurisprudence must emphasize the study of both elements in a

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[162] *Id.* at 17-8, 21.
[163] *Id.* at 17.
[164] *Id.* at 18.
[165] *Id.* at 35.
[166] Lasswell & McDougal, *supra* note 2, at 7, 102.
[167] *Id.* at 269-70.
[168] Lasswell & McDougal, *supra* note 2, at 26.

balanced way.[169] It is not necessary to stipulate a single ratio of coincidence of authority and control as necessary for law to take place, but to ascertain the empirical patterns in their relation that have occurred, will probably occur, can be made to occur, and are recommended to occur in certain contexts.[170] By "authority," *Free Society* means participation in legal decision in accordance with community *perspectives*, *expectations*, and *behavior* about *who* is to make decisions, by what *criteria*, and by what *procedures*.[171] By "control" is meant the *effective* participation in the *making* and *enforcement* of decision (i.e., the degree to which the aim of choice is materialized).[172] Natural Law, however, is said to have contributed the least to clarity in focus on the facts of authority and control in an empirical way, or to the specification of intellectual procedures whereby such facts may be ascertained.[173] Most Natural Law theories have primarily focused on—and overemphasized—authority, in the sense of a search for "higher" standards by which human law may be assessed, while some have stressed some of the controls or forces from which humans apparently cannot escape.[174] Because such Schools have also defined both elements in transempirical terms, rather than in terms of features of social processes, they make no contribution to a comprehensive, empirical inquiry into law *as it arises* in social contexts.[175]

B. Postulation and Clarification of Goal Values

Law always requires a *choice among values* and has *some* impact upon the distribution of such values within a community.[176] Postulation is the *opposite* of underhanded *assumption* or hiding the

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169 *Id.* at 26-7.
170 *Id.* at 27.
171 *Id.* at 26, 66.
172 *Id.* at 26.
173 Lasswell & McDougal, *supra* note 2, at 69.
174 *Id.* at 70.
175 *Id.* at 72.
176 *Id.* at 217.

ball: it requires the scholar or decision-maker to state *as systematically as possible* and with *sufficient empirical reference* the goals and values that law serves generally and that the community she is concerned with also seeks.[177] Such values need clarification, which amounts to the explicit, deliberate, and detailed specification of the postulated goals of law or inquiry in terms which make clear empirical reference to preferred events or values, relying on the concurrent performance of all other tasks.[178] Clarification requires scholars and decision-makers to examine the demands of particular actors in terms of their congruence with the common interest, expressed as preferred patterns of production and distribution of every value within a system of stable minimum order.[179] New Haven differs from Natural Law in *how* it arrives at and clarifies such values, as well as in *what* value goals it posits as guiding the moral assessment of law.

B.1. Postulation versus Derivation

As a method to "find" values, New Haven emphasizes *postulation* and *clarification* of goal values in contrast to "infinitely regressive logical derivations from premises of transempirical or highly ambiguous reference contribute little to the detailed specification of values, in the sense of demanded relations between human beings, which is required for rational decision."[180] According to Lasswell and McDougal, all logical derivations are ultimately somewhat grounded in metaphysics or theology and, to that extent, non-empirical.[181] An example of logically deriving, say, the goal of human dignity is as follows:

> *Theological Grounding*
>
> I ought to adopt the social values that accord with Divine Will.

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[177] *Id*. at 219, 229.

[178] Lasswell & McDougal, *supra* note 2, at 36.

[179] *Id*. at 229; Reisman, *supra* note 35, at 123.

[180] Lasswell & McDougal, *supra* note 2, at 34.

[181] *Id*. at 759.

God values the dignity of every soul (or confers it).

Therefore, I should value human dignity.[182]

Metaphysical Grounding

I can know the preferences of Nature (or History).

Nature (or History) prefers human dignity.

I ought to prefer whatever Nature (or History) prefers.

Therefore, I should value human dignity.[183]

This operation follows the same progression regardless of whether one substitutes "Nature" for "God," or "Human Nature."[184] These are the "key symbols" of the syllogism, whether in the major or minor premises.[185] Contrary to the same use of logical derivation in other contexts, what makes these derivations non-empirical is that at least one key symbol ("nature," "God") is not amenable to empirical specification and reference: that is, the term is not subject to modification in the light of data.[186] Such a term's *reference*—and, consequently, such a premise's *truth*—is truly an act of faith and an assumption of "ultimate" truth: a truth not susceptible to final demonstration.[187] New Haven, on the other hand, recommends derivational exercises where the key symbols and terms are all "taken as 'hypotheses' to be made subject to empirical evidence, with the intention of modifying basic definitions," by the way of scientific inquiry.[188]

The functional distinction between empirical analysis and nonempirical derivation does not hinge on *whether* the terms "God" or "Nature" are used, but on *how* they are used in derivation:

> The salient distinction is whether the propositions refer to a presently known truth that transcends empirical

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[182] *Id*.

[183] *See id*. at 731 (adapted to the value of human dignity and otherwise originally referring to "value X" only).

[184] *Id*. at 759.

[185] Lasswell & McDougal, *supra* note 2, at 759.

[186] *Id*. at 760.

[187] *Id*.

[188] *Id*.

> methods of description. If God's will is elaborated as a set of hypotheses about observable events (and no claim of transcendental truth is put forward), the system is "scientific" despite the use of "God" . . . [T]he expression of "God's will" is a convenient label for the hypotheses that have a degree of confirmation by scientific methods . . . [Likewise] even when the term "God" does not appear the system may be derivational , not scientific . . . Affirmations of absolute certainty [either way] indicate that the image of the universe [proposed] is treated as something other than a working hypothesis . . . In conventional terms we assume that any doctrine in the name of "God" is derivational and every proposition in the name of "science" is empirical inquiry. In functional terms, however, this may not hold true.[189]

From the point of view of an external observer, these expressions of goals appear merely to be statements of intense preference for which one is not willing to assume personal responsibility.[190] In all such syllogisms, those who define law as the will of the sovereign, for example, uncritically introduce and assume the truth of the proposition that it is good to obey the sovereign's will, while those who define law in terms of actually prevailing demands or interests assume the undisclosed principle that such demands ought to be satisfied.[191] On the other hand, empirical derivations or justifications are as follows:

Empirical Grounding I

I prefer value X.[192]

Empirical Grounding II

Some—or all—people prefer value X.

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[189] *Id.* 760-1.

[190] Lasswell & McDougal, *supra* note 2, at 220.

[191] *Id.* at 219 (n. 27).

[192] *Id.* at 731.

I prefer what they prefer (i.e., X).[193]

McDougal insists that he prefers Empirical Grounding I, because unlike II, the observer is taking personal responsibility for his or her choice by stating his or her preference or persuasion, and not masking it by reference to others. Neither empirical grounding, however, attempts to justify the subjective event of commitment to the value at issue by a further subjective event of reference to metaphysics or theology.[194] This is New Haven's postulation model, and it differs from transempirical acts of faith in that one does not expect to acquire new knowledge by the postulation alone, but by the systematic exercise of the other complementary and necessary intellectual tasks.[195]

Far from altogether condemning or evading[196] the enterprise of derivation or philosophical grounding[197] of ultimate goal values—say, of the value of human dignity, New Haven merely *deemphasizes* it, because it recognizes that,

> [m]en of many faiths and philosophies have demonstrated that they can achieve a large measure of agreement on social values irrespective of the transcendent source from which such values are derived. We are concerned with expediting agreement

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[193] Lasswell & McDougal, *supra* note 2, at 731.

[194] *Id.*

[195] *Id.* at 35.

[196] Saberi, *supra* note 5, at 133-35 (n. 379); White, *supra* note 16, at 827 (explaining that McDougal's solution for the fact/value dichotomy was to ignore it, because he was intellectually backed into a corner by his inherently contradictory subscription to the Realist belief in the coexistence of value premise deconstruction and the value of empirical research). *But see* McDougal, *supra* note 8, at 838-9 (n. 36) (stating that far from "eliminating the normative" or "minimizing the force of ideas," realists like McDougal "seek to use all of the skills and insights known to public relations experts, propagandists, and psychiatrists and include 'normative statements' and 'ideas' in the naturalistic phenomena about which they hope to gain more information. For them the exact interrelation of material and ideological factors in social change is another problem to be investigated, not by nebulous speculation, but by careful, scientific observation and analysis").

[197] Lasswell & McDougal, *supra* note 2, at xxxi (describing New Haven's mission as partly "[g]iv[ing] empirical meaning to the common value categories of ethical philosophers and other normative specialists," not rejecting them altogether).

> and action by emphasizing the values sought by specifying what is meant, rather than by criticizing existing justifications or with creating new systems of derivation."[198]

McDougal simply does not want to wait until a perfect such derivation can be conceived of to everyone's liking before sprawling into action.[199] In fact, *Free Society* recognizes that derivational thinking is rightly influential in society, calls for a truce on metaphysical proselytizing, and joins with those who are prepared to recognize the dignity of individuals and with whom it has enough in common so as to agree on concrete specifications of that value.[200] Lasswell and McDougal actually "leave the task to others" to develop transempirical procedures for justifying New Haven's commitment to human dignity and basic human values.[201] The authors do not reject philosophy; they simply expect much less from it than others do.[202] They conceive of the right jurisprudence as displaying more the attitude of objective inquiry than that of polemic.[203]

As to the clarification of such values, McDougal notes D. D. Granfield's observation of a consensus between Natural Law and Policy-Oriented Jurisprudence as to the intellectual procedures necessary for it.[204] Granfield notes that ideals such as justice, right, human dignity, or subsidiarity, however broadly accepted, need clarification and a detailed specification and particularization conditioned by their context and community interests.[205] McDougal quotes Granfield extensively in his assertion that this is exactly what Aquinas meant by "prudence:"

> Prudence, though formally intellectual, does not concern itself primarily with generalities but with

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198 *Id.* at 761.

199 Morrison, *supra* note 14, at 50.

200 Lasswell & McDougal, *supra* note 2, at 761.

201 *Id.* at 759.

202 *Id.* at 135-7 (seeking the contributions of anthropology, social psychology, sociology, political science, and economics instead).

203 *Id.* at 736.

204 *Id.* at 234.

205 *Id.*

> singulars. A specific goal can be reached only by specific means. A great mass of contingencies must be considered in the making of any sound decision. Prudence perfects the intellectual processes by which one sits through the factual complexities of a situation in the task of ascertaining the proper norm and its balanced application.[206]

Such an exercise in prudence entails for Aquinas—no less than for McDougal—the central skills of memory, understanding, sagacity, reasoning, docility, foresight, circumspection, and caution that are at play in goal clarification and specification.[207] New Haven, of course, deems the procedures involved in clarification to be so "intimately" bound with the current discoveries of various sciences that they must one way or another resort to and be informed by the latter.[208] McDougal criticizes Natural Law for not always carrying out a clarification or specification of its logically derived goals in empirical terms.[209]

A second and central criticism of Natural Law is that its logical derivation of values is inherently and normatively ambiguous, that is, it is capable of yielding contradictory results.[210] McDougal offers Aquinas' system as an example. According to McDougal, one may reach opposite and equally compelling positions on slavery within Aquinas' framework.[211] An argument in favor of slavery would be as follows:

> God's plan requires unquestioning acceptance of hierarchical authority.
>
> This may even require seemingly unmerited punishment by God as "medicinal infliction" for the sickness of the soul that results from being a member of the human species.

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206 Lasswell & McDougal, *supra* note 2, at 234.

207 *Id*. at 234-5.

208 *Id*. at 16.

209 *Id*. at 7.

210 *Id*. at 102.

211 Lasswell & McDougal, *supra* note 2, at 775.

> Nothing hinders one from being with such penalties for the sin of another by God or man.
>
> A slave owes a duty of obedience to his or her master, since God's grace in this life is not to free one's body, but one's soul.
>
> Everyone seeks self-fulfillment only in subordination to the segment of society to which one belongs, which in turn seeks its own collective end.
>
> If the greater good of the community requires slavery as an institution, then a slave must submit.[212]

McDougal stresses that Aquinas' conception of Natural Law, however, can and has been used to defend the opposite, including a constitutional and liberal conception of political society that respects and fulfills the rights and needs of human beings.[213] *Free Society* does not conclude from this inherent ambiguity that Natural Law is not useful in advancing human dignity and needs, it simply observes that it does not yield *consistent* and *objectively ascertainable* results. Lasswell and McDougal also observe that this may obstruct, rather than facilitate, intercultural clarification of values, as each group will cling with fidelity to its own conceptions.[214] Hence the need for an empirical and "rigorously secular" clarification technique.[215]

B.2. The Content of Human Dignity and Universal Values

Although New Haven prefers postulation, the contents of its

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[212] *Id*. (relying on SUMMA THEOLOGIAE I-II, Q. 87, Art. 8; II-II, Q. 104, Art. 6; I, Q. 94, Art. 4; and *Summa Contra Gentiles* III, 98). For an overview of the controversial relationship between Aquinas' version of Natural Law and slavery, *see* Joseph Capizzi, *The Children of God: Natural Slavery in the Thought of Aquinas and Vitoria*, 63 THEOLOGICAL STUDIES 31 (2002); James Muldoon, *Spiritual Freedom - Physical Slavery: The Medieval Church and Slavery*, 3 AVE MARIA L. REV. 69 (2005); Roy L. Brooks, *Ancient Slavery versus American Slavery: A Distinction with a Difference*, 33 U. MEM. L. REV. 265 (2003).

[213] Lasswell & McDougal, *supra* note 2, at 776.

[214] *Id*. at 197.

[215] *Id*.

postulation are not *arbitrary*. The values law serves must be somehow *justified*, whether grounded in empirical or transempirical terms.[216] New Haven offers an empirical conception of law that relies on empirical inquiry as to the expectations people have of what is lawful, but this does not mean that *Free Society's* concerns are not normative as well.[217] While New Haven *justifies* the overarching value goals of law by postulation alone,[218] it *defines* human dignity and its values in empirical terms, distinguishing between its unwavering commitment

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[216] *Id*. at 728.

[217] In this regard, I believe Susan Haack's characterization of Holmesian Pragmatism as foundationalist to be correct in the limited sense that "legal rules, to be (in a non-epistemic sense) justified, must be grounded in some relation to (presumably, moral) values," *On Legal Pragmatism: Where Does "the Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71, 104 (2005), and that it is also true of New Haven's pragmatic approach, and as such illustrates its normative bent.

[218] W. L. Morison best summarizes it:

> The first task they see is the clarification of their own values, which generally they state to be the achievement of the "shaping" – or building – and sharing of values on the widest possible basis within the community. They do not put these values forward on the basis that they have any claim to acceptance beyond that they are believed to represent something prominent in the common man's approach to these matters. So, on the Anderson approach, they do. We all have productive tendencies which naturally seek to find common ground with others in the pursuit of constructive enterprises along with tendencies of an opposite kind in our complex make-up. The connection with the Andersonian approach to ethics is confirmed by Lasswell's and McDougal's insistence that they seek to communicate their values – to propagate their recommendations – by appeal and persuasion in terms of what in the addressees' attitudes may be responsive to the recommendations. There is a rejection of physical or mental coercion of any kind, including the degree of mental coercion which is ordinarily associated with moralistic approaches. A further connection with Andersonian views is to be found in that Lasswell and McDougal do not pretend that their general recommendations can be logically applied to solve all problems about what is to be done in all circumstances. An approach in a particular spirit is not a cure-all of the kind moralism pretends to be. Much is left to specification in individual circumstances.

W. L. Morison, *Law and Images of History – A Reminiscence*, 11 SYDNEY L. REV. 114, 131 (1986).

to human dignity and its readiness to compromise on the specifications through which its values are implemented in each community. The empirical reference for human basic goods and values lies in multidisciplinary observations about human nature and political communities.

New Haven's Picture of Human Nature

As to the overarching goal of law, New Haven conceives it as human dignity, which it defines as the "reciprocal tolerance and honoring of freedom of choice about participation in the shaping and sharing of all values."[219] As such, New Haven distinguishes between two meanings of "value." In one sense, "values" mean those statements of preference expressed by an observer or decision-maker. In another, it is a designative referent to events in social process.[220] This second meaning goes to the core of the School's conception of human nature.

Lasswell and McDougal believed that the scientific study of human conduct improves the validity of our estimates of personality and our ability to direct law toward the common interest.[221] Various empirical sciences have gradually come to revolutionize and inform our conception of human nature.[222] Such knowledge supplements and corrects the conceptions and preconceptions of legal and moral philosophy.[223] Human beings are concerned with at least eight types of value or goods, to wit: well-being, enlightenment, power, skill, affection, respect, rectitude, and wealth.[224] These are universal in that they seem to be categories useful for analyzing social dynamics across cultures.[225] The goal of human dignity, however, is capable of recognizing some local differences in the order and even number of

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[219] Lasswell & McDougal, *supra* note 2, at xxxi.
[220] *Id*. at 266.
[221] *Id*. at 592.
[222] *Id*. at 591.
[223] *Id*. at xxxi.
[224] Lasswell & McDougal, *supra* note 2, at 337.
[225] *Id*. at 229.

these values, and is not *per se* incompatible with such differences, since any substantial disparities are to be mitigated or reconciled by appropriate specifications.[226] These values are alternatively described by *Free Society* as "basic"[227] human needs, wants, and desires[228] sought by people as *both* ends and means.[229] As categories, they cover the whole range of human preferences,[230] since *rights* are also reducible to demands for values.[231] Values can describe: (a) the *events* in community processes that precipitate claims and appeals to decision-makers; (b) the very *claims* or *demands* presented to decision-makers by others; and (c) the *choices* made by decision-makers themselves in response to such claims and demands.[232] Their *greatest production* and *widest possible distribution* of values among human beings is what the overarching goal of law entails, according to New Haven.[233]

Despite New Haven's criticism of Natural Law as positing a single purpose to biological entities such as human beings in relation to the attainment of which they are judged good or bad,[234] the School agrees that there *are* several competing and important purposes or goals that human beings pursue and in relation to which they judge law to be good or bad. Law is an instrument that serves human demands, beginning with biological needs that are fundamentally alike for all.[235] Thus, far from denying a human nature, McDougal criticizes Natural Law's conception of human nature as *unchanging* and *timeless*,[236] since personality is clearly socially modifiable, despite its

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[226] *Id.* Some authors have seen a Hegelian streak in McDougal's thought in regard to his assumption that most—if not all—cultural clashes of or differences between values can be reconciled. *See, e.g.,* Saberi, *supra* note 5, at 88.

[227] Lasswell & McDougal, *supra* note 2, at 595.

[228] *Id*. at 375-6.

[229] *Id*. at 340.

[230] *Id*. at 188.

[231] *Id*. at 242.

[232] Lasswell & McDougal, *supra* note 2, at 189.

[233] *Id*. at 35.

[234] *Id*. at 42 (n. 12).

[235] *Id*. at 67.

[236] *Id*. at 70.

biological roots.[237] The values we seek are operative at two different and overlapping levels of our existence as rational animals: on the one hand are the values we seek because they relate to the *one* biological entity each of us is, while on the other are the values that we seek as a function of our inevitably multiple social *identities*.[238] New Haven offers a "sketch of *man* pursuing *values* through *institutions* using *resources*."[239] It is precisely the testimony of our shared history that bears witness to an increasingly shared vision of the conditions indispensable to achieving a dignified and humane existence that significantly meets our demands, whether biological or social.[240]

The values that New Haven attributes to human nature and the attainment of which translates into human flourishing find empirical reference in several sources. First and foremost, they derive from cultural anthropology.[241] They trace back to Lasswell's observations about human behavior and institutional practices, whether we speak of the goals sought by secluded indigenous communities, or the New York City masses.[242] Second, they are interpreted as the legacy bequeathed to us by all the great democratic movements across civilizations,[243] as well as the culmination of many converging trends of thought, both secular and religious,[244] best expressed today by the international consensus on basic human rights.[245] Although the list of eight values is meant to be comprehensive,[246] it is also meant to be brief,[247] and is subject to revision.[248] McDougal elsewhere writes that "[o]ne ought not disregard human nature," including human demands for values, identifications with others, and expectations about the

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237 Lasswell & McDougal, *supra* note 2, at 349.
238 *Id.* at 351.
239 *Id.* at 375 (emphasis in the original).
240 *Id.* at 144.
241 *Id.* at xxxi.
242 Wiessner, *supra* note 3, at 51.
243 Lasswell & McDougal, *supra* note 2, at 34.
244 *Id.* at 195.
245 *Id.* at 228-9.
246 *Id.* at 388.
247 *Id.*
248 Lasswell & McDougal, *supra* note 2, at 266.

conditions affecting the achievement of such values.[249] At the heart of our nature is the operation of the "maximization postulate," that is, New Haven's postulation that human action and choices—except under certain conditions—always expect to yield net value advantages: we all strive to be better off.[250]

New Haven's concept of human flourishing as a function of human nature is not far removed from that of Natural Law.[251] As

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[249] McDougal, *supra* note 64, at 6. *See also* Myres McDougal & Harold Lasswell, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486, 489 (1967); Myres McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345, 1347 (1947).

[250] Lasswell & McDougal, *supra* note 2, at 369.

[251] Some assert that McDougal's interest in the revival of Natural Law in his time betrayed an interest in building a type of *secular* Natural Law for modern America and the world community, recognizing his kinship with those who sought the same goals as he within the religious tradition. Rostow, *supra* note 4, at 715. *But see* Wiessner, *supra* note 3, at 53 (conceiving of a narrower notion of Natural Law as a body of immutable rules and observing: "New Haven is not another theory of natural law. On the one hand, it is not natural law in the sense that its content is always the same – unchangeable, immutable. Second, it is not natural law in the sense that it would have only one solution to a problem, arrived at through either the interpretation of the will of a supreme being, or of axiomatic postulates proposed by humanists such as Kant"). This narrower interpretation of human nature as unchangeable in Aquinas is the majoritarian view among Natural Law theorists themselves. Gelinas, *supra* note 52, at 28. Nevertheless, Aquinas' concept of human nature may be closer to New Haven's than *Free Society* recognizes, since Aquinas states that, while certain physical and psychological laws govern human nature, the latter is changeable (*natura hominis est mutabilis*). *See* Gelinas, *supra* note 52, at 28-9 (defending the minority view that this is the better interpretation of Aquinas). I myself agree with the majoritarian view that Aquinas conceived of human nature as fundamentally (if not absolutely) unchangeable. Regardless of this debate, to the extent that New Haven grounds its concept of human *flourishing* in *some* conception of human *nature*, it may be harmonizable with "minimum" theories of natural law, despite McDougal's dislike of Natural Law's reliance on metaphysics and theology. *See, e.g.,* Stumpf, *supra* note 12, at 240 (arguing that it is possible to fashion a theory of natural law which requires a minimum number of assumptions about human nature and still arrives at nearly all the objectives of the most sophisticated theological versions of Natural Law). In fact, some even use this overlap between New Haven's concept of basic human values and the Natural Law as a ground for criticism. *See, e.g.,* Saberi, *supra* note 5, at 75. Although I cannot develop the argument for lack of space, I do not believe that New Haven can be adequately characterized as a secularized version of Natural Law theory, despite the

Professor John Makdisi explains:

> In a world that defines human beings as determined to no particular end, the mere existence of these capabilities is what dictates the excellence of a human being . . . the value of that life is dependent on having different types of life to choose from, having the freedom to choose any one of these different types of life, having the use of his own practical reasoning power to decide on this life, and having a supportive community within which to live one's life . . . Aquinas defines human flourishing in a different manner. The value of one's life is dependent on the end to which one directs one's life, which in turn guides the way in which one uses one's capabilities as functionings. One must strive to have, and the legal system should work to ensure that one has, the capabilities to function in a well-ordered life . . . But even if one's capabilities are deficient, it is the end that one chooses to have, regardless of the deficiencies in one's capabilities, that determines one's flourishing. What is that end towards which a life of excellence is directed? It is charity. According to Aquinas, one who loves with the virtue of charity realizes the perfection of himself. Charity itself is what makes a person excellent. Charity is a gift from God that is offered to a person for his acceptance, and one accepts this gift through an exercise of one's powers of understanding and willing to make the free choice to love.[252]

Lasswell and McDougal would probably disagree that true charity or affection is a divine gift, but they would certainly agree that human life has objectively and rationally ascertainable ends, that the recognition of those ends and their attainment determines human flourishing, regardless of one's capabilities at any given moment, and

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theoretical overlap between the two schools.

[252] John Makdisi, *Uncaring Justice: Why* Jacque v. Steenberg Homes *Was Wrongly Decided*, 51 J. CATH. LEG. STUD. 111, 137-8 (2012).

that charity or affection is *one* of those ends. How one goes about "finding" ends and values in life, whether as an individual, a scientific observer, or a decision-maker, is, however, an enduring challenge for both Schools and every society.

Deriving "Ought" From "Is": Moral Expectations as Grounding Legal Authority

Although Lasswell and McDougal leave it to others to develop a non-empirical justification of their goal of human dignity or its values,[253] they do purport to justify their value choices by empirical means (i.e., by postulation and empirical reference). This is true, however, not only of their justification of the value goals of law generally, but also—if less developed by the authors—of their

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[253] Lasswell & McDougal, *supra* note 2, at 759. For a very suggestive interpretation of Lasswell and McDougal as partially engaging in a non-empirical justification of human dignity and values, see David Little, *Toward Clarifying the Grounds of Value-Clarification: A Reaction to the Policy-Oriented Jurisprudence of Lasswell and McDougal*, 14 VA. J. INT'L L. 451, 453-4 (1974) (arguing that, by "postulating" human dignity, New Haven means to assert it as a rational, self-evident, and self-justifying concept), observing:

> [A] system of human dignity turns out to be self-justifying by the following process of reasoning: since a rational decision-maker seeks to pursue his values free of frustration (or coercion), and since he seeks to satisfy them as widely as possible, and since human dignity is understood as that social process which, by definition, maximizes free choice and the widest possible range of value-attainment for all individuals, it follows that rational decision-makers will espouse human dignity. Or, to put it another way, they will find human dignity to be unavoidable or "necessary" – that is, if they remain rational. The analytical methods of Lasswell and McDougal for clarifying values and scrutinizing decisions are also justified by the same procedure because they are advanced as enabling decision-makers to be more rational and to do more satisfactorily what every decision-maker attempts to do anyway. Yet because Lasswell and McDougal have not carefully distinguished these two uses of postulation-the arbitrary sense and the self-justifying sense-they have caused some confusion in their general discussion of the nature of justification.

intellectual procedure for *identifying* what is a *legal* norm in any given community and the values that such a norm actually serves.[254] That is, for New Haven, an observer's identification of what an authoritative norm is in any given context is an example of the quite possible derivation of "ought" from "is."

Natural Law theorists and other Schools have historically been concerned about the "ultimate" justification for value subscriptions or the legality of given norms, questioning the success with which New Haven or any other School *can* ground normative considerations empirically or non-normatively.[255] This concern for the strictly normative grounding of one's normative commitments is an age-old philosophical one, and casts serious doubts not only on Lasswell's grounding of specific values in empirical observations, but more generally on New Haven's ability to ground the *authority* of law—and, therefore, our *duty* to obey it—in empirical phenomena *per se*. Because the sparse literature on this specific challenge of traditional jurisprudence to New Haven has yielded irreconcilable alternatives and purports to have thrown a wrench at McDougal's systematic jurisprudence, it is worth to carefully consider *Free Society's* response.

Lasswell and McDougal believed that it is misleading at best to speak of human beings as needing to "find" or "justify" their values,

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[254] As I propose below in more detail, Lasswell and McDougal seem to suggest that, in performing the intelligence function inherent to both the first and second intellectual tasks (i.e., postulation and clarification of values and description of past trends in decision), the scientific observer's seemingly descriptive act of identifying authoritative norms and decisions in any given community is a function of both the postulation of a thin, procedural conception of the rule of law in the form of a rule of recognition and an empirical inquiry into the prevalence of those perspectives of authority that comport with it, whether they are of a first or second order.

[255] *See, e.g.,* Saberi, *supra* note 5, at 133-5. For a brief overview of the literature on legal theory and normativity, see George Glos, *The Normative Theory of Law*, 11 WM. & MARY L. REV. 151 (1969); Mitchell Berman, *Of Law and Other Artificial Normative Systems* 1 (University of Pennsylvania Law School Faculty Scholarship Research Paper No. 1923), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042669; Robert Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – a Synthesis and Critique of Our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861 (1981).

as Natural Law seems to require, since:

> If the [requirement] is intended to imply that individuals are ever without value demands, it is inaccurate. From the earliest years each of us is overwhelmed by a flood of impulses toward completing acts in ways that bring into existence a pattern of events whose realization is to maximize value outcomes . . . By the time anyone is old enough to raise the problem of value goal as a theoretical question, he is in the grip of value orientations imbedded by years of experience. The very act of posing the question in general terms testifies to the deep involvement in the ideological presuppositions of particular forms of civilized society. To face the problem . . . is to engage in a sequence of activities . . . conditioned in advance.[256]

Lasswell and McDougal, however, do not attempt to "escape" the question by recourse to "conventionalism"—which they deem to be "philistinism," or to diminish the power of thought, asserting instead that to ridicule the possibility of giving such an account is "pedestrian."[257] New Haven "builds" upon the value characterizations of philosophy, social science, and anthropology,[258] and is committed to being a *rational*[259]—and not just *policy*-oriented[260]—jurisprudence.

First, New Haven's separation of "is" and "ought," or law and morals, is only temporary and methodological.[261] It is meant to prevent an observer or decision-maker from obscuring his or her understanding of the means required to implement measures conforming to overarching goals, and not to encourage him to dismiss the "ought" or moral content he or she confronts. Legal analysis must distinguish what the current law-in-action is first, as opposed to the

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256 Lasswell & McDougal, *supra* note 2, at 726.

257 *Id*. at 727.

258 *Id*. at 189.

259 *Id*. at 200.

260 *Id*. at 199.

261 Lasswell & McDougal, *supra* note 2, at 226.

law-as-it-should-be—which is to be performed separately and subsequently.[262] New Haven opposes an observer's beginning of legal analysis by pondering what the law "really is," generally and in and of itself, or in the realm of moral thought, since an inquiry thus begun is seldom completed, running into infinitely regressive thinking, and yielding no practical result.[263] This is something Natural Law is especially prone to do.[264] Unlike Natural Law, and as evidenced by McDougal's early exchange with Fuller, New Haven does not think that either methodologically or metaphysically law and morals are *one and the same thing*.

Second, unlike Natural Law[265]—and as a variety of legal Empiricism, New Haven asserts that it is possible to derive "ought" from "is" in the context of legal analysis, that is, to rationally justify our conclusion that what gives law its morally binding content is a function of *whether* and *how* individuals of flesh and bones *perceive* law as *authoritative*.[266] McDougal observed:

> Some . . . have been befuddled by the oft-cited position of Hume that it is not possible to derive an "ought" from an "is." Whatever the soundness of this proposition on a syntactic level, it can have little semantic reference to the world of interacting human beings which both creates the problem for which clarification is required and affects the predispositions

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[262] *Id.*

[263] *Id.*

[264] *Id.* at 231.

[265] *See, e.g.,* Henry Veatch, *Natural Law and the Is - Ought Question*, 26 CATH. LAW. 251, 253 (1981) (commenting on "Finnis' pronouncements that it is futile and illogical to suppose that propositions about man's duties and obligations can be derived from propositions about his nature, or that moral norms and standards can ever be based on considerations concerning the nature of man, or the nature of things").

[266] Joshua B. Fischman, *Reuniting Is and Ought in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 119 (n. 14) (2013) (describing McDougal's and other early legal empiricists as displaying "worthy ambitions," but "meager accomplishments" in this regard). In general, Fischman's description of the importance of empirical modes of thinking and legal normative content is thoroughly in sync with New Haven's approach.

and resources of the individuals seeking solution.[267]

McDougal means to say that on a strictly logical and abstract level, concerned only with the necessary interrelations of argument ("syntax," according to New Haven),[268] it may very well be impossible to justify any one argument deriving a norm from a fact or series of facts, but logical analysis tells us nothing about the truth of the propositions with which natural calculus is concerned[269] and, therefore, on a "semantic" level concerned with what it means for a norm to be in fact articulated at any given moment by someone, the observation carries no weight.

Third, claiming—as critics do—that a theory about law must give a normative account of normative concerns poisons the well by monopolizing the content of law in the first place, while attempting to then "objectively" define it.[270] This is why New Haven also purports to be a designative or descriptive science of law, rather than purely a "normative" one in the traditional sense: it leaves certain considerations on the side, so as to prevent the normative ambiguity of traditional schools.[271] New Haven does not exalt the empirical symbol "law" into an expression of *unvarying* goodness since, as a rule, the crucial problem in establishing a good public order is which law to enact, not whether to have or not any law whatsoever.[272] However, as shown below, New Haven is *not* relativistic and *does* exalt "law" as embodying a certain *minimal* goodness—potentially grounded in the values of freedom and autonomy, but in fact merely comprising a thin, procedural conception of the rule of law that, in turn, serves as a normative *baseline* or criterion of legality or rule of recognition for the otherwise empirical task of trend description.

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267 Lasswell & McDougal, *supra* note 2, at 243.

268 *Id*. at 392.

269 *Id*. at 393.

270 *Id*. at 408.

271 *Id*.

272 Lasswell & McDougal, *supra* note 2, at 408.

New Haven's Procedural Conception of Rule of Law as a Criterion of Legality and Baseline for Authority Expectations

The rule of law has been described as a "contested" and "elusive" concept, no different from the idea of the "good:" we are all for it, but we all mean something different by it.[273] All definitions seem to be either *procedural* or *substantive* in nature, each embodying a range of formulations spanning from the "thin" to the "thick" in terms of their content.[274] At a minimum, *formal* or *procedural* definitions identify the rule of law with the *mere* use of "law" as an instrument of government action.[275] The more a formal definition adds to its content (say, by requiring that such laws be *general*, *prospective*, *clear*, and their enforcement *certain*, or by further including the requirement that such laws be the product of *public consent*—and therefore, a *democratic* regime), the "thicker" it becomes.[276]

At some point, however, a formal or procedural definition includes so much that it becomes a *substantive* one. This happens, at a minimum, when the rule of law is defined as additionally requiring *property*, *contract*, *privacy*, or *autonomy* rights and protections.[277] Moreover, depending on how much more content they embrace, substantive definitions can also become "thicker," such as, for example, those requiring the rule of law to respect rights to *dignity* and *justice*, or to include *social welfare* rights and even *substantive equality* before the law.[278]

The dominant conception of the rule of law is that of formal or procedural legality,[279] defining the rule of law as encompassing both

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[273] Brian Tamanaha, *The History and Elements of the Rule of Law*, 2012 SING. J. L. STUD. 232, 232 (2012).

[274] BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1, 91 (2004); Wiessner, *supra* note 39 (explaining these two polar conceptions of the rule of law).

[275] BRIAN TAMANAHA, *supra* note 274, at 91.

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] Tamanaha, *supra* note 272, at 240.

a *system of rules* (albeit, one that: (a) publishes its laws in advance; (b) crafts them in general terms; (c) ensures that they are generally understood and known; (d) not impossible to comply with; and (e) equally applied) and a *system of mechanisms or institutions* that effectively enforce the rules when they are broken.[280] Procedural or formalistic conceptions are also attuned to a positivistic view of the law. An example of a recently proposed formal definition of rule of law is that of a state of affairs where government officials and citizens are both *bound* by and *actually abiding* by the law.[281] The meaning of "bound" in this definition partly entails that, even if otherwise legitimate governments wish to change law, such a change must be within certain limits and restrictions, whether such limits be deemed to be imposed by Natural Law, custom, or a Constitution.[282]

New Haven defines law as essentially displaying and partaking of *authority*.[283] Authority is defined as those patterns of *expectations* of community members about what decisions *will* be taken (by *whom*, by what *criteria*, under what *circumstances*, etc.), which are empirically observable features of social process.[284] This means that, in the course of legal inquiry, an observer or decision-maker must ascertain what norms are involved in the problem under consideration, and determine *whether*, *how*, and *what* facts in the social process implicated suggest that such norms are *actually* expected by the community to control.[285] Schools like Natural Law have traditionally refused this analysis by positing that, in performing this task, the question is what perspectives "ought" to be held in said context.[286] What matters, according to Natural Law, is whether the norm analyzed is in itself "binding" or "obligatory." McDougal, however, does not believe anything is binding in itself, but becomes binding in social

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[280] *Id*. at 233.

[281] Tamanaha, *supra* note 272, at 233.

[282] *Id*. at 237.

[283] *Id*. at 400. For Natural Law's equal emphasis on authority as an essential component of law, *see, e.g.,* Peter J. Riga, *Prudence and Jurisprudence: Authority as the Basis of Law according to Thomas Aquinas*, 37 JURIST 287 (1977).

[284] Lasswell & McDougal, *supra* note 2, at 63.

[285] *Id*. at 400.

[286] *Id*. at 64.

process, and can only be ascertained as binding through an empirical estimation of the actual expectations of community members.[287] How exactly does one arrive at the conclusion that a norm is binding – based on how many individuals actually believe it—is fraught with difficulty.[288] Because human demands for values are also made up of patterns of expectations about them,[289] positing specific values as the legitimate concern of law is susceptible to the same problem.

McDougal's is a *living* conception of authority, that is, authority is thought to be predicated on the fact that living individuals display subjective perspectives of conviction that a given norm or legal enactment is "authoritative" (i.e., consistent with prior expectations about *whether* and *how* norms or decisions are to be enacted or made respectively).[290] The criterion is empirical and *Free Society* states that it is a matter of the *frequency* of such perspectives,[291] explaining that this is why the School is critical of Natural Law's disregard for—and diminishment of—the relevance of secular community expectations in ascertaining the legality of norms or decisions.[292] Yet, Lasswell and McDougal insist that the normative desirability or authority of a norm or decision—say, the value of human dignity—is not subject to popular vote,[293] since a choice of goal cannot be completely settled by reference to factual information.[294] This is consistent with New Haven's central contention that law is not reducible to naked and arbitrary power, devoid of authority.[295]

How can norms generally be deemed authoritative without any reference to characteristics inherent to them, and solely on the basis of prevailing subscription to them? Furthermore, even if this is possible, how can New Haven's definition of "law" not become so over-

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[287] *Id*. at 65.
[288] *Id*. at 401.
[289] Lasswell & McDougal, *supra* note 2, at 595.
[290] *Id*. at 16.
[291] *Id*. at 67, 90, 97, 183.
[292] *Id*. at 39.
[293] *Id*. at 762.
[294] Lasswell & McDougal, *supra* note 2, at 729.
[295] *Id*. at 400.

inclusive as to lose all efficiency as a referent,[296] or avoid doing precisely what it forbids and not dignify naked power with the label of "law"? Most importantly, how are we to reconcile New Haven's assertions that, while the authoritativeness of norms is to be determined empirically by reference to the prevalence of certain subjective expectations, such authority and what makes a norm "legal"—as opposed to anything else—is not wholly subject to vote or convention? These are certainly legitimate questions that not only provide for adherents of the School with an opportunity to engage with traditional jurisprudence and philosophy, but actually imposes an intellectual duty to do so.

A potential clue to Lasswell's and McDougal's answer is appropriately—if unfortunately—placed at the heart of *Free Society's* first volume, buried in an analysis of "power" far removed from the prior and subsequent more exciting chapters. Law is deemed to be a component of power.[297] Indeed, it is power itself where such power is *at once* both authoritative and controlling.[298] Where norms and decisions display authority, but not control, such power is merely pretended and simulated.[299] Where they display control, but not authority, they are simply naked power.[300] In analyzing a norm or decision:

> The scientific inquirer who detects many degrees of conformity between occurrence and prescription must "draw the line" somewhere if he intends to classify patterns into "authoritative" or "nonauthoritative." *The line is a matter of convenience and not of principle, and calls for the selection of some minimum frequency of*

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[296] For the concern that a broad and exclusively empirical definition of authority by New Haven risks over-inclusiveness, see Jean d'Aspremont, *Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship*, 46 VANDERBILT J. TRANSNAT'L L. 1119, 1139 (2013) (describing the concern that international law, for example, would consequently "come[] to be encapsulating of any decision made by any international decision maker," generating uncertainty).

[297] Lasswell & McDougal, *supra* note 2, at 339.

[298] *Id*. at 400.

[299] *Id*.

[300] *Id*.

> *coincidence*. (If conformity falls below this frequency, the authority of the rule is not established).[301]

McDougal recognizes that analyzing *who* is authorized to make decisions in a community is difficult. "Agreement" on authority means that *most*, *nearly all*, or a *considerable amount* of community members share the same expectations.[302] This, of course, suggests that, whatever the "minimum" frequency an observer chooses, it must be *some majority* of such perspectives by those who dominate the situation termed "legal order."[303] This is consistent with New Haven's egalitarian and democratic commitments, privileging the demands and perspectives of majorities over those of elites.[304] True expectations of legality also display a certain subjective *intensity*, with the most intensively demanded displaying the character of fundamental or constitutional values.[305] The fact that McDougal states that an observer's baseline is one of *frequency* and that its determination (i.e., the choice of *what* frequency amount will do) is *less* a matter of "principle" than "convenience" *may* suggest or give the impression that there are no normative or prescriptive considerations that an observer engages in with regard to his or her classification of norms as authoritative in any given context.[306] McDougal and Lasswell appear to have contradicted this stance.

Although New Haven's empirical conception of "law" "[m]akes it possible to identify institutions which, though accepted as lawful by a local population, do not meet the minimum criteria required by our recommended conception of a public order of human

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[301] *Id.* at 401 (emphasis added).

[302] Lasswell & McDougal, *supra* note 2, at 401.

[303] *Id.* at 87.

[304] *Id.* at 16, 66-7.

[305] *Id.* at 98.

[306] This is in fact what many prominent New Haven theorists themselves believe, interpreting all intellectual tasks except the last one as encompassing only descriptive exercises of the intelligence function, not prescriptive or evaluative ones. *See, e.g.,* Wiessner, *supra* note 3, at 48 (observing that "[t]he first four steps of this intellectual framework, from the delimitation of the problem to the prediction of future decisions, are basically analytical; the fifth one is evaluative and prescriptive, in essence normative"); Reisman et al., *supra* note 3, at 577 (labeling the tasks aggregately as engaging in "systematic description").

dignity,"[307] Lasswell and McDougal knew that convention alone—even absolute collective agreement—cannot turn what otherwise is an exercise of naked power into "law," even for purposes of the descriptive tasks, and their attack on non-empirical methods of authority and value identification is meant not to affirm conventionalism and relativism, but to discredit such derivational and normative methods as ineffective.[308] Contrary to assertions that New Haven sidesteps the universal intuition we all share that legal validity does not equate an obligation to obey the law, or that it does not have a framework for situations where an unjust norm becomes authoritative and effective in a community,[309] Lasswell and McDougal neither sidestep the problem, nor fail to provide a framework to address it.

One *essential* consideration in an observer's otherwise descriptive and frequency-driven identification of authoritative norms or decisions is to ascertain whether *order* is established to begin with.[310] "Order" means *more than the mere absence* of *disorder*,

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[307] Lasswell & McDougal, *supra* note 2, at 408.

[308] W. L. Morison understood this in succinctly observing that:

> This is not to say that they do not attach great importance to theoretical criticisms, from an empirical point of view, of the pretences of those in power, and their adherents, to base their decision making upon theories, like the evolutionary-utilitarian approach currently dominant, which on close examination turn out not only to be unsound but have the potentiality to be vehicles of evil. Lasswell and McDougal are especially concerned to expose those approaches which pretend to base themselves upon principles which by their nature are regarded as having an absolute authority for everyone: which evolutionary and utilitarian ethical theories commonly claim to have. In their constructive, as distinct from critical, notions of the scope of the intelligence function, Lasswell and McDougal do not attempt to proceed to what "ought to be done" from any absolute principles from which the proper or "just" decision can be derived. They do not believe that the just decision can be discovered in all cases by way of derivation from any principle which commands the allegiance of all.

Morison, *supra* note 218, at 130.

[309] Eduardo Peñalver, *The Persistent Problem of Obligation in International Law*, 36 STAN. J. INT'L L. 271, 277-8 (2000).

[310] Lasswell & McDougal, *supra* note 2, at 401.

protest, or *disobedience*. When there is order, *arbitrariness is in fact limited*, and even absolute power is typically expected to *operate within limits*, acceding to the weight of custom, nature, God, or fundamental prescriptions, depending on the community.[311] An authoritative rule is one that is obeyed by more than empty gestures.[312] After an observer ascertains that a *community* agrees on *who* makes decisions, the next step is to determine *whether* there is agreement on *how* and *when* the decisions will be made.[313]

Because New Haven gives "full deference" to the "fundamental" role of community expectations in defining and applying an observer's criteria of capriciousness or norm-applying conduct, it calls for much attention to the problems of inference and procedure that arise in characterizing systems of personal and collective expectation.[314] By emphasizing expectations as subjective events, McDougal seeks to bring into the open assumptions otherwise left unexamined that the law is in some text out there, when its latent meaning could only refer to the subjective expectations distributed among members of a community, as well as *recent* and *potential* decision-makers.[315] Although an observer is to give "full deference" to subjective expectations, this need not mean that all of them are regarded the same. The interests reflected by those expectations refer to events expected to harmonize with value demands.[316] Interests are "valid" when the component expectations are *warranted by evidence available to inquiry*, and merely "assumed" when they are not

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311 *Id.*

312 *Id.* at 402.

313 *Id.*

314 *Id.* at 410. Morison observes the justification for this deference as lying in the fact that, for New Haven, perspectives of authority,

> [m]ay be acceptable to the addressees if they have a direct appeal to their own objectives or because the objectives of the addressee include a respect for the source as such. There is never any absolute entitlement of either a source, or the content of a recommendation, to respect in the nature of things.

Morison, *supra* note 307, at 131.

315 Lasswell & McDougal, *supra* note 2, at 411.

316 *Id.* at 360.

warranted.[317] Interests are "expedient" if they are instrumental to the maintenance of the structure and function of the entity involved, and "principled" if they are compatible with comprehensive goals.[318] "Common interests" are inclusive when the events involved are of considerable importance for all.[319] To the extent that a scientific observer is to determine which norms are legal in a given community, he can measure the intensity and reasonableness of any underlying perspectives of authority as factors. After all, it is with the *reasonable* demands of claimants that law has to do in any given community.[320]

In considering the problem of legality and authority *per se*, McDougal offers a hypothetical bandit-run city to illustrate New Haven's answer:

> [A]ssume that [a] bandit chief settles himself and his followers on a hill overlooking a village, and builds a castle. Suppose further that there is no pretense on anybody's part that the exactions of the village are based on anything more profound than simple intimidation. Assume further that the chief remains utterly capricious in his expectations, and refuses to evolve or apply any explicit prescriptions. There are, therefore, no "limitations on self by self" so far as the bandit and his gang are concerned. Imagine that the inhabitants come to expect the existing state of affairs to continue indefinitely, or even that they reconcile

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[317] Lasswell & McDougal, *supra* note 2, at 360. Some criticize New Haven's purported lack of empirical evidence for the eight values it proposes. *See, e.g.,* Saberi, *supra* note 5, at 132-3. *But see* Kielsgard, *supra* note 49, at 483-4 (arguing that a comparative analysis of values across cultures provides for empirical proof in this regard); Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 VA. J. INT'L L. 725, 728 (2007) (describing Lasswell's insights as "permit[ting] the rational inquirer to identify, both empirically and normatively, the centrality of the individual in accounting for the rights and obligations of the individual in the national and global environment").

[318] Lasswell & McDougal, *supra* note 2, at 360.

[319] *Id*.

[320] Myres McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NAT. L.F. 53, 63 (1956).

> themselves to the situation by murmuring that Divinity or disgruntled ancestors or mysterious Nature has imposed [a] just scourge as a result of community neglect of traditional ceremonies. *As scientific observers, must we agree that the naked fact of despotism is now cloaked in the dignity of law?*[321]

McDougal answers negatively, unmistakably echoing St. Augustine's remark that kingdoms without justice are mere—if complex—robberies,[322] and his reasoning bears the marks of a response to the question that faces us. He insists that New Haven's definition of law is *not only* a question of the expectations that in fact *prevail* among members of a given society.[323] Because New Haven is interested in *comparing all societies*, it draws distinctions that may lie *outside the conscious experience* of some of them.[324] I call these concepts or distinctions that come from outside the community observed "second order expectations," as opposed to those concepts about authority that are observable among the members of the community under study, which I call "first order expectations." According to McDougal, one such second order expectation is the concept that law is *restrictive of arbitrariness*,[325] and it informs an observer's understanding of any community. By this is meant a "minimum degree of order that begins to cover the nakedness of control with a cloak of authority."[326] This is the essential point of interpreting law as a kind of *order*: the useful kernel of the notion of order is that there is "[s]ome stability of expectation (absence of capriciousness) about *what* is demanded of and by decision makers, and *how* it is demanded (including how the decision-making group replenishes itself)."[327] This explains why, overall, decisions produced

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[321] Lasswell & McDougal, *supra* note 2, at 408-9 (emphasis added).

[322] For a discussion of Augustine's statement and its relationship to the idea that law may not *ensure* justice in any regime, but does *promise* it, see Jeremy Waldron, *Does Law Promise Justice?,* 17 GA. ST. U. L. REV. 759 (2001).

[323] Lasswell & McDougal, *supra* note 2, at 409.

[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] *Id.* (emphasis in original).

in power processes are of two types only: *either* those of naked power and mere expediency, *or* those made from perspectives and expectations of authority.[328]

McDougal stresses that the importance of this distinction between merely *acquiesced*[329] order and minimal *legal* order is conspicuous where the controlling group *makes a point* of proceeding "within a framework of legality."[330] The best example of a village bandit chief evolving such a technique in attempting to preserve the semblance of authority was Nazi Germany.[331] Instead of killing political enemies outright, for example, the Gestapo ceremoniously took prisoners in the custody of ordinary courts as a "loan" for "inquiry" and never returned them.[332] The Nazi practice of nullifying "genuine order" by opposing one rule with another led to many to correctly deny that Nazi rule was, in fact, law at all, according to McDougal.[333] This practice of nullification is actually believed by McDougal to be an anthropological constant called "system[s] of evasion," displayed by societies across cultures.[334] Evidence of a genuine, minimum order, therefore, may arise from the mostly *negative showing* that there exist no systems or patterns of *evasion or nullification* in a given legal system.

Although McDougal does not term this "genuine" or "minimum" *legal* order "rule of law," this is precisely what it is. Despite McDougal's early skepticism about the positivist conception of "rule of law," he had already developed a conception of minimum

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[328] Lasswell & McDougal, *supra* note 2, at 142, 150. This, however, does not mean that there do not exist numerous gradations and degrees to the legality of a rule or decision. Although, from a conceptual and categorical perspective, the decisions and products of power are either legal or extralegal, from an empirical perspective, however, there are many combinations of authority and control that allow for a broad conception of law as operative in any given context and is not binary in any way. *See* Cheng, *supra* note 6, at 16.

[329] Lasswell & McDougal, *supra* note 2, at 90 (recognizing authority as implying more than mere acceptance).

[330] *Id.* at 409.

[331] *Id.*

[332] *Id.* at 409-10.

[333] *Id.* at 410.

[334] Lasswell & McDougal, *supra* note 2, at 410.

order:

> There is no such phenomenon in human society as "the rule of law" in the literal sense of that term; force rules always, and the question on which the difference between good government and bad depends is always whether force is behind the law or elsewhere. Our common phrase "law and order" inverts the true order of priority, both historically and logically. Law never creates order, the most it can do is to help to sustain order when that has once been firmly established, for it sometimes acquires a prestige of its own which enables it to foster an atmosphere favourable to the continuance of orderly social relations when these are called upon to stand a strain. But always there has to be order before law can even begin to take root and grow. When the circumstances are propitious, law is the sequel, but it is never the instrument, of the establishment of order.[335]

The picture McDougal paints is that a certain social and political order is required before a genuine, minimum legal order can, in turn, arise and be described as authoritative "law," regardless of the control element.[336]

Evidence of this genuine, minimum order, which Nazi Germany failed to display, can also consist, however, of a *positive showing* of a certain *stable* and *sufficiently prevalent* pattern of expectations among members of a community regarding not only *who* (i.e., an individual or body *designated* or *replenished* by certain *procedures*) makes decisions and *how* (*i.e.*, by what *criteria*, with what

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[335] Myres McDougal, *The Role of Law in World Politics*, 20 MISS. L. J. 253, 259 (1949).

[336] Philosophically, this makes sense for Lasswell and McDougal to believe, since their system is an offshoot of Realism and Instrumentalism. Similar to how—given the humanist and reformist foundations of realist instrumentalism—the idea is rejected that moral preferences, no matter how rational and informed, can be the *sole* guide of social welfare, Hanoch Dagan, *Normative Jurisprudence and Legal Realism*, 64 U. TORONTO L.J. 442, 449 (2014), New Haven cannot rely on the *fact* of certain perspectives as the *sole* criterion for their authority or legitimacy. This recognition ultimately is grounded in the autonomy of individuals and communities as intrinsically valuable. *Id.*

policy content, at what *times*, through which *mechanisms*, etc.), but also *that* such decisions *will* be made by such decision makers and in such a fashion. The egalitarian and communitarian commitment behind this conception makes clear that McDougal identifies this genuine, minimum order baseline with what contemporary theory regards as a procedural conception of the rule of law.[337] Thus, minimum order is McDougal's criterion of legality *per se* and, therefore, a primary rule of recognition.

It is not clear, however, that McDougal intended to define the rule of law itself—domestic or international—*only* by its minimum threshold. Elsewhere in McDougal's work on international law, the ideas of *minimum* and *optimum* order emerge, and they may complement *Free Society's* thin criterion of legality:

> A distinction is sometimes made between "minimum order," in the sense of the minimization of unauthorized violence and coercion, and "optimum order," in the sense of the greatest access of the individual human being to the shaping and sharing of all the values of human dignity. It would appear, however, that both these kinds of allegedly different public order goals are indispensable to any workable conception of peace. Even when conceived in the minimum sense of freedom from the fact and expectation of arbitrary violence and coercion, peace may be observed increasingly to be dependent upon maintaining people's expectations that the processes of

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[337] *See, e.g.,* Tamanaha, *supra* 272, at 234-5 (arguing for a procedural conception of rule of law that does not include democratic institutions or human rights and relying on Rawls as an example of this conception):

> According to Rawls, such societies can be legitimate when they are well-ordered and people enjoy minimum rights to sustenance, security, property, formal equality and freedom from forced labor. Rawls added: "The system of law [must be] sincerely and not unreasonably believed to be guided by a common good conception of justice. It takes into account people's essential interests and imposes moral duties and obligations on all members of society." What he had in mind was a genuinely communitarian-oriented government and society.

> effective decision in public order will be responsive to their demands for a reasonable access to all the values we today characterize as those of human dignity. When peace is more broadly conceived as security in position, expectation, and potential with regard to all basic community values, the interrelationship of peace and human rights quite obviously passes beyond that of interdependence and approaches that of identity.[338]

It is possible to interpret McDougal's twofold concept of "minimum" and "optimum" order in the international law context as functionally equivalent to *Free Society's* concept of a "minimum" and "optimum" order in the domestic context.

In the domestic context, McDougal speaks of minimum order as representing that state of affairs where arbitrariness, coercion, and naked force are in fact restricted by "law," while describing the "security in position, expectation, and potential with regard to all values" represented by international optimum order as the subject matter of optimal domestic public order.[339] This best reconstructs McDougal's sketches of the rule of law in *Free Society* and in his other works. Moreover, to the extent that McDougal's conception of an optimum legal order is defined precisely in the same terms as the overarching goal of law generally is—i.e., human dignity, whether domestic or international, it follows that it stands for a *substantive* conception of the rule of law.[340] Lasswell and McDougal, however, chose to designate minimum order—and not optimum order—as the criterion of legality. I call it a "criterion of legality," because at the core of an observer's identification of the authority of rules and decisions is a determination of whether they exhibit a "legitimate basis

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[338] Myres McDougal, *Law and Peace*, 18 DEN. J. INT'L L. & POL'Y 1, 6 (1989).

[339] Lasswell & McDougal, *supra* note 2, at 153, 401. This explains why New Haven is said to offer a homogenous and consistent explanation of law generally without making any distinction between domestic and international law as inherently or radically different in nature. Koh, *supra* note 3, at 560.

[340] For a recent and propaedeutic statement of a similar thick conception of the rule of law as preferable within the New Haven tradition, see Wiessner, *supra* note 39.

from which to proscribe"[341]—that is, legitimacy becomes a core component of the analysis. Minimum order, thus, represents the threshold or criterion of legality per se (i.e., rule of recognition), described in terms of procedural rule of law, while optimum order represents rule of law as a goal and is substantive in nature. Thus, although McDougal and Lasswell recognize two types of rule of law—procedural and substantive, minimum and optimum, they identify the criterion of legality at the heart of authority expectations with the procedural, minimum notion, and not with the goal-oriented notion.
By "criterion of legality" I mean the functional equivalent to Hart's concept of a "rule of recognition,' defined as "[a] social rule or custom constituted by a regular pattern of conduct and by a 'distinctive

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[341] Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 VA. J. INT'L L. 725, 761 (2007). I disagree with those who interpret McDougal's work as standing for the proposition that *effectiveness* is the *only* criterion whereby New Haven pretends an observer should attribute "legal" character to a norm. *See* Peñalver, *supra* note 309, at 277 (stating that McDougal purportedly thought the question of obligation or authority was a theoretical "waste of time"); Robert Sloane, *More than Courts Could Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs* 519 (Boston University School of Law Working Paper No. 09-39, 2009), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1496&context=faculty_scholarship (observing that McDougal deemed interest in a rule of recognition "fanciful"). New Haven cannot consider this a waste of time, because it regards legality as tied to human dignity and the legality of a human dignity order to be at odds with bare power:

> Jurists, then face the possibilities in the growing tolerances for naked power and its exercise that their common quest for serving global order, for accommodating and adjusting the differences of opposing social orders, and for helping to shape strategies and the global social order itself toward peace and security, will falter or fail. Such jurists will be diverted from an effective pursuit for the optimization of the value demands of peoples, projected in the civilizing and law-oriented claims for human dignity, and the quest to uncover and overcome the obstacles in achieving these goals.

Almond, Harry H., *The Interaction of Public Legal Orders: Impacts Upon Each Other and Upon the Emerging Public Order of Space* 1, 1 (1985), http://digitalcommons.unl.edu/spacelawdocs/1 (describing New Haven).

normative attitude' accepting the rule of recognition. This normative attitude is the rule of recognition's 'internal aspect.'"[342]

Based on the foregoing, it is incorrect to state that New Haven "[c]laims merely to describe successful lawmaking practices," since law is only "effectively what binds," and that it thus "[d]oes not provide a conceptual framework that can even make sense of an individual (or state) asking whether one really ought to obey this or that authoritative decision."[343] It is emphatically *not* the case that New Haven deems the perennial questions of "Is this law just?" and "Must I obey this unjust law?" as "meaningless."[344] McDougal's was not the Vienna Circle.

The crux of the theoretical challenge to McDougal's criterion of legality, however, is best expressed by the open-ended questions of: (a) precisely *how* does an observer *gain knowledge* of such concepts lying "outside the conscious experience" of any given community—such as "genuine, minimum order" (I call this the Epistemological Question); (b) *whether* there exist more second order expectations and concepts to be discovered and resorted to in inquiry (I call this the Ontological Question); and (c) *when* does an observer conclude that any second order expectation or concept is operative and warranted vis-à-vis the community observed (I call this the Methodological Question)? Although all three questions represent an undeveloped area of New Haven scholarship, I venture a few observations.

First, as to the epistemological question, *Free Society* seems to be theoretically coherent in its empiricism even on this particular. An empirical account of second order expectations of authority can be offered to justify an observer's cognition of those concepts or distinctions that exist outside the conscious experience of a given community. Just as Lasswell and McDougal give empirical content to

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[342] Cheng, *supra* note 6, at 22. McDougal's concept of law's dignity depending on minimum or procedural order is analogous to Thomas Franck's conception of a rule of recognition based on "right process" that is a prerequisite (and not derived from) the legal process and confers legitimacy (and not just efficiency) to other rules. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 193-4 (1990). *See also* discussion in Michael Byers, *Custom, Power, and the Power of Rules*, 17 MICH. J. INT'L L. 109, 123 (n. 40) (1995).

[343] Peñalver, *supra* note 309, at 277.

[344] *Id*. at 278.

the values of human dignity by observing that they are *naturally occurring* (linked to our transcultural human nature, itself a function of our social and biological selves, and changing in many respects through time), *empirically ascertainable* (by means of economic, psychological, and sociological metrics), and *rationally justifiable* (whether by postulation or other means), the notion of genuine, minimum order or "restriction of arbitrariness" can and should be given similar content. Just as the material or evidentiary source for the values of human dignity consists of an observer's acquaintance with the intercultural facts of universal human behavior and of the ever increasing agreement on and demand for certain legal and political goods, one's knowledge of a concept such as genuine, minimum order tracks a similar empirical analysis.

McDougal himself relied on anthropological findings about "systems of evasion" in supporting his conception of a genuine, minimum order. To the extent that such intercultural constants are empirically ascertainable and speak to intercultural legal order, they rule out and trump any contrary features in the parochial legal order under study. As such, these constants rest on the perspectives and expectations of authority of the members of the world arena and, in resorting to them in his or her identification of legal norms or decisions in a given community, an observer relies on them as second order patterns of expectation with regard to authority that qualify those of the community under study. In functional terms, these second order expectations of rightness or authority are as naturally occurring, empirically ascertainable, or even subject to postulation as value goals generally, or the patterns of authority expectations of local community members specifically.

Second, as to the ontological question, *Free Society* seems to be consistently committed to some form of moral realism or foundationalism, even on this particular. Just as, in subscribing to an *unalterable* conviction of human dignity and its values, New Haven is not relativistic, but believes that such values are justified or "true" in some meaningful way—especially in light of empirical analysis,[345] an observer's cognition of intercultural second order expectations of

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[345] *See generally* Kielsgard, *supra* note 49.

authority presupposes and attributes to them a similar degree of objectivity. Moreover, although McDougal implies that there may be more second order patterns of expectations or conceptions outside the conscious experience of given communities to be resorted to by an observer, they need not be too many, and an analogy here would be the amount of international norms that are regarded as *jus cogens* vis-à-vis those that are not. The content of second order expectations, furthermore, cannot be said to be that of human rights or substantive conceptions of the rule of law. This is because McDougal's language speaks of such expectations as "begin[ning] to cover the nakedness of power with the cloak of authority," whereas a society that respects human rights has not only "begun" to cover naked power, but has actually already buried it several feet in the ground. The language of genuine, minimum order is also the exact functional equivalent of the features of thin procedural due process, and does not suggest any political requirements (say, a democratic system) or legal content (human rights protections, as opposed to mere due process, etc.).

Third, as to the methodological question, *Free Society* seems to be consistent in its commitment against the normative ambiguity of some legal theories. An observer's reliance on such second order expectations of authority does not render the first or second intellectual tasks non-empirical or strictly normative, which would certainly poison the well and erode the scientific merit of what is the propaedeutic work of tasks that build up and lead to the final appraising, normative one. It does not do so, since what an observer does in relying on such second order expectations entails the same types of processes and exercises in intelligence whereby he is to conduct the first and second tasks, especially with regard to his or her identification of patterns of authority in describing past trends in decision. Such an identification, although resorting to second order expectations, does not resort to strictly normative or nonempirical considerations, since the very identification of such second order expectations is conducted by the same procedures for identifying first order expectations, relying on the *frequency*, *intensity*, and *quality* of such patterns of expectations.[346] Moreover, such an observer need

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[346] This last observation, however, introduces a *logical* concern. Since second

only resort to second order expectation patterns when confronted by a community the norms and decisions of which either display systems of evasion or actually fail to display genuine, minimum order.

Prominent New Haven figures already recognize, for example,

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order expectations are resorted to by McDougal, in order to deal with regimes such as Nazi Germany, the question arises: how would an observer deal with a society such as, say, the United States, in a world where Nazi rule was the international, intercultural norm? McDougal would be confronted with several alternatives. On the one hand, he may assert that the world community could never reach such a state, since, if second order expectations are grounded in human nature, and human nature is best captured by a comparative analysis across cultures, it is always more likely than not that the larger a number of human communities, the more constants of human patterns of authority expectations are visible and prevalent, and thus minimum order would always be the case somewhere. This, however, reflects a commitment to an ultimately prevailing goodness of human nature that is not borne by the facts of history or anthropological study. In fact, for the very same reasons that such second order patterns of expectation may be lacking in the first place in a given community, they may be absent or insufficiently apparent in the world community at some time or another in history. Nobody would dispute that for millennia the world community did not display the patterns of authority that McDougal regarded as second order expectations providing for a genuine, minimum order. On the other hand, conceding that the world community could stop displaying the second order expectation of minimum, genuine order—what I deem a procedural rule of law, McDougal may assert that, in such cases, the procedures of description, focusing on identifying the frequency, intensity, and quality of patterns of expectations can still more often than not yield a reliable finding of authoritative, legal norms or decisions in a given community. This, however, is not the case, since a Nazi village analyzed by an observer in a Nazi world community will have to agree that its bandit chief is a lawful decision-maker and that the acquiesced order he or she has imposed is a legal one, contrary to McDougal's suggestion in discussing his bandit-run village hypothetical. It seems that either logical regression, logical impossibility, or an unempirical trust in human nature are the only alternatives to the dilemma presented by a slight twist on McDougal's hypothetical. Moreover, whether defining legality in terms of rule of law makes McDougal's conception of law generally a "moving target," Young, *supra* note 4, at 65, or whether McDougal's suggestion of a relationship between the criterion of legality and reasonableness replaces the predictability of the rule of law with "ex post facto rationalization," Saberi, *supra* note 5, at 76, is beyond the scope of this paper. I note, however, that, because an observer belonging to the New Haven School, however, is not interested in the identification of legal norms for its own sake, but in making a recommendation of what should be the norm or decision, Cheng, *supra* note 6, at 17, whatever logical problems may be implicated in his descriptive task will not undermine the aggregate value and result of an observer's analysis as flowing from all five intellectual tasks.

that an observer's identification of patterns of authority entails a consideration of several factors, including whether the decision-maker is properly endowed with such power, whether he or she is pursuing proper public objectives, rather than personal goals, whether the decision or norm supports world values, such as *jus cogens*, and whether the decisions are made in a proper physical, temporal, and institutional context.[347] Professor Tai-Heng Cheng summarizes some of the questions that arise at this juncture:

> There is one more element of the New Haven conception of law that needs explanation. The ideas of authority and law are entwined with the goal to which the process of law is directed. The New Haven School has designated the promotion of human dignity to be the preeminent goal. The normative quality of law comes in part from the values it promotes. These values are designated in shorthand form by the phrase – human dignity. This capacious term includes values such as affection, respect, and wellbeing. *At its margins, scholars may debate whether a value is intrinsic to human dignity, such as an overly expansive or idiosyncratic notion of democracy. But there are clear instances in which an otherwise authoritative and controlling decision would not be law because the decision is abhorrent to human dignity.* If an award purported to authorize a state to commit genocide as a self-help measure to reclaim its territory, the award would not be regarded as lawful. Its lawless nature would *not be due only to the Genocide Convention and jus cogens* prohibiting genocide. *It would also be due to the self-evident policy against genocide*.[348]

Indeed, the interpretation of Lasswell and McDougal that I propose on this narrow issue is by no means the only one available. There seems to be somewhat of an intramural debate over whether New Haven relies on a procedural or substantive conception of the rule

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[347] Cheng, *supra* note 6, at 15.

[348] *Id*. at 17 (emphasis added).

of law in defining an observer's criterion of legality (or rule of recognition) and in characterizing that observer's resort to what I call "second order patterns of authority expectations." Professor Cheng, for example, suggests that an observer may ascertain such second order patterns of expectation in a non-empirical, derivational way, by reference to their self-evidence.

It must be further noted that the problem of authority I address takes place on two different levels. On the one hand, there is the hermeneutic and historical question of what Lasswell's and McDougal's position in fact was with regard to this issue. This I call the Doctrinal Question. On the other hand, there is the question of what is the best answer that New Haven can or should provide on this issue, regardless of whether it can be attributed to Lasswell or McDougal. This I call the Philosophical Question. I am here interested mostly in the doctrinal question, which is why I have endeavored to track as closely as possible the thought of New Haven's founders. With regard to this question, then, I take stock of some of the known alternative answers to the problem of authority and legality.

With regard to the rule of law, Professor Winston Nagan, for example, explains:

> Law involves an implicit acceptance and internalization of social authority which is reflected in the constitutionalization, that is to say, the acceptance of the allocation of fundamental decision making authority for society which generates shared expectations about the shaping and sharing of human values. Law codifies the most enduring values which emerge as social norms and customary practices accepted by the community, often representing the "living law" of the society. Indeed, public acceptance of basic expectations is a crucial aspect of law. Unless the community accepts the legitimate authority of its authorized decision makers and their prescription, application and enforcement of law, such authority may lose its authoritative foundation and be compelled to resort to coercive force to maintain the status quo. Unless those laws reflect accepted norms and

> expectations, such acceptance is unlikely. Thus, rule of law is based on the major expectations which the community holds about the exercise of authority and control in the common interest. Law as codified strives to be the embodiment of the basic values reflected in the public conscience of what the collective of human beings agree to accept, that is to say, the collective fundamental expectations about authority, control, and the respect for basic values.[349]

Professor Nagan suggests that, as democracy and human rights become more prevalent sources of authority, they limit exercises of power domestically as well.[350] This is so because he believes that the international or global rule of law operates to limit and impart meaning to domestic rule of law.[351] He further observes:

> From the perspective of the New Haven School, language might mask certain important components of what counts as law because it arguably provides an effective cover by which the exercise of naked power is disguised by a myth system of authority, and power and control are thus open to abuse. *This means that much more is required to appropriately understand the communications process, which underlies the global public order system to ensure that its untenable myths are challenged*; myths that are productive or useful for human understanding might thus be similarly promoted.[352]

He asserts that everyone's assumption of the authority of a given state's sovereignty is actually rooted in the perspectives of all peoples in the global community, and that their demands include the prevention of war, respect for social progress according to the rule of

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[349] Winston Nagan & Garry Jacobs, *New Paradigm for Global Rule of Law*, 1 CADMUS 1, 4 (2012).

[350] *Id.* at 3, 8 (describing human rights as morally binding on all peoples).

[351] Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT'L L.J. 429, 502-4, (2012).

[352] Nagan, *supra* note 341, at 802 (emphasis added).

law, and higher standards of living.[353] This seems to suggest that Professor Nagan's interpretation of Lasswell's and McDougal's concept of a criterion of legality not only allows for an observer to resort to second order expectation patterns, but to do so with regard to human rights protections specifically, which would render it analogous to a substantive—and not procedural—conception of rule of law. For the following reasons, however, although I agree that New Haven provides for a criterion of legality that allows observers to rely on second order expectations of authority, I disagree that those expectations are to be substantive in nature.

Professor Adeno Addis has addressed New Haven's challenge with regard to authority and legitimacy in a focused and sustained—if brief—fashion.[354] Conceding that whatever authority a decision-maker enjoys stems from his or her audience, Professor Addis wishes to know how do audiences endow decision-makers with such authority or withdraw it from them.[355] Although Professor Addis is almost exclusively with the philosophical question, inevitably he attributes New Haven certain theoretical commitments and thus addresses the doctrinal question as well. The School's description of the process whereby an observer makes such a determination as "empirical," rather than "conceptual," also requires explanation, according to Professor Addis, since Professor Reisman qualifies such a descriptive task as being more than merely documentary, nonetheless.[356] Professor Addis conceives of two ways in which New Haven could explain the empirical process whereby first order expectations of authority arise and are identified as controlling by an observer in a given community.

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[353] Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 155 (2004).

[354] Adeno Addis, *Law as a Process of Communication: Reisman Meets Habermas, in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 1, 33 (Mahnoush Arsanjani, Jacob Katz, Robert Sloane, & Siegfried Wiessner eds., 2011). Although Professor Addis focuses on Professor Reisman's own contributions, his observations admittedly extend to New Haven more generally.

[355] *Id*. at 39.

[356] *Id*. at 39-40.

First, one could subscribe to a "precedential" view of authority expectations.[357] According to such a view, the source of authority is an expectation that is shaped by a similar communication from the particular communicator (decision-maker) in the past, where that communication invariably led to a circumstance that had made it clear that the communicator was willing and able to make his preferential expression effective.[358] A shortcoming of this view is that, upon reflection, it is not the precedential aspect of the communication that renders it authoritative, but the communicators' willingness and ability to make it effective.[359] This realization, moreover, threatens to render the independent element of authority superfluous and to collapse it into control.[360]

Second, one could subscribe to a "cultural" view of authority expectations.[361] According to this view, a communicator (decision-maker) derives his or her authority not from the fact of who he or she is, but from the fact that he or she sends the policy content at issue through a signal that is familiar and often employed at the micro level among the audience.[362] Legitimacy, therefore, is not institutional, but cultural, since the communicator's command is authoritative in so far as he or she is performing a culturally expected or appropriate act.[363] Two shortcomings of this view, however, are that: (1) in a world where countries are themselves increasingly more culturally diverse, reliance on cultural expectations would defeat the effectiveness of authority expectations, as they would become disputed; and (2) it fails to answer the question of how an observer or decision-maker could resolve a conflict among legal norms (whether between micro laws, or between micro and macro laws).[364]

Professor Addis interprets Professor Reisman's view of

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357 *Id*. at 40.

358 *Id*.

359 Addis, *supra* note 354, at 40.

360 *Id*.

361 *Id*.

362 *Id*.

363 *Id*.

364 Addis, *supra* note 354, at 41-2.

authority to be consistent with the cultural view.[365] He notes that Professor Reisman suggests not ruling out macrolegal intervention where there is "serious and persistent injustice [because of the operation of microlaw]."[366] According to Professor Addis, New Haven seems to suggest that inconsistency between legal norms is resolved not on account of whether one or the other is "true" law, but rather on the ground that one is or is not consistent with what is postulated to be the ends (goal) of law: "[d]ispute as to what is or is not legitimate law (emanating from legitimate authority) is resolved outside the communication process that gives law its life. In other words, disputes are resolved substantively not procedurally."[367] Professor Addis recognizes New Haven's observation that the exact mix of authority and control necessary for a norm to be legal varies from context to context, but notes that this does not precisely explain *how* authority expectations become legitimate.[368] He interprets New Haven's solution to legal expectations conflict as involving both descriptive and normative operations that are not fully reconciled or integrated.[369] Because Professor Addis believes that "[t]he more substantive the means of resolving disputes the more likely the disputes will not be resolved easily or durably,"[370] he prefers a different approach, whereby legitimate authority is inherent to the legitimate process of communication itself, and not external to it, and which view of authority will recommend "processes or institutional structures that allow all stakeholders to engage . . . such that the addressees could genuinely view themselves as authors of the communication as well."[371]

To the extent that Professors Reisman and Nagan can be interpreted as asserting that Lasswell's and McDougal's system requires or allows observers performing the second intellectual task of describing past trends to resort to second order expectations of

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365 *Id.* at 40-1.
366 *Id.* at 42.
367 *Id.*
368 *Id.* at 46.
369 Addis, *supra* note 354, at 47.
370 *Id.* at 42.
371 *Id.*

authority that are substantive in nature, this is not only inconsistent with *Free Society's* treatment of this specific issue, but is open to the legitimate criticisms raised by Professor Addis and others.[372] The detailed discussion of *Free Society* above renders less reasonable Professor Addis' interpretation of New Haven's second intellectual task's identification of patterns of authority expectations as entailing both descriptive and normative considerations that are not fully integrated, if by "normative" he means "not empirical." Otherwise, however, his observation is apt, if "normative" is understood also in empirical terms. Although *Free Society* suggests that such a task does entail normative considerations, and those considerations are no less empirical than the rest of the descriptive exercise, it does not clearly explain where one consideration stops and the other one begins.

Most importantly, what Professor Addis describes as the more preferable solution to the authority and legitimacy problem—a certain procedural conception of rule of law that is not external to a given legal system in its normative commitments and bright lines, and what he faults New Haven for not clearly proposing, is *exactly* what Lasswell and McDougal in fact proposed in *Free Society*, as discussed above. In sum, as to the doctrinal question of what the actual ideas of Lasswell and McDougal were on this issue in light of a reasonable interpretation of *Free Society*, I disagree with those readings that suggest that they subscribed to a substantive criterion of legality, whereby observers confronted with cases like Nazi Germany could rely on second order expectations of not only a procedural and institutional nature (such as McDougal's "genuine, minimum order"), but also of a substantive one. As to the philosophical question of what should be New Haven's response to this issue, regardless of what *Free Society* intended to say about it, I must agree with Professor Addis that, not only is a procedural conception of the criterion of legality and

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[372] Whether defining legality in terms of rule of law makes New Haven's conception of law generally a "moving target," Young, *supra* note 4, at 65, or whether McDougal's suggestion of a relationship between the criterion of legality and reasonableness replaces the predictability of the rule of law with "ex post facto rationalization," Saberi, *supra* note 5, at 76, are questions of interest, but rely on an understanding of McDougal and Lasswell similar to that of Professor Addis, with which I disagree and which, therefore, I need not address further.

the legitimacy of authority better in theory and practice—as well as more easily integrated to New Haven's inherently descriptive tasks dealing with authority, but here it is also possible to harmonize New Haven's core intuitions with the leading philosophical discourse on law as communicative action.[373]

To the extent that New Haven posits a thin, procedural conception of the rule of law as the absolute genuine, minimum order and criterion of legality (or rule of recognition) that a system can display before it can merit the adjective of "legal," it is also in agreement with prominent Natural Law thinkers.[374] Moreover, although New Haven seems to be in agreement with those natural law writers who describe an appropriate conception of the rule of law as neither amoral nor too moralized, but as embodying a "spectrum of

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[373] Addis, *supra* note 354, at 49-50. I agree with Professor Addis that Jürgen Habermas' work is relevant to New Haven. Habermas' proposal of a procedural conception of rule of law universally determinative is not hard to reconcile with Lasswell's and McDougal's thought. *See, e.g.,* JÜRGEN HABERMAS, LAW AND MORALITY: THE TANNER LECTURES ON HUMAN VALUES 279 (1986) (proposing a procedural conception of the rule of law as the criterion of legitimacy). However, to the extent that Habermas believes democratic arrangements are essential to a procedural conception of rule of law and the criterion of legality, *id*., his would be a thick procedural conception, and would not seem to be in line with *Free Society* as things stand. Nevertheless, a theoretical defense could be mounted on behalf of New Haven's inclusion of democratic arrangements in its procedural criterion of legality, despite McDougal's own preferences.

[374] *See, e.g.,* Robert George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249 (2001); Bruce Frohnen, *The Irreducible, Minimal Morality of Law: Reconsidering the Positivist/Natural Law Divide in Light of Legal Purpose and the Rule of Law*, 58 ST. LOUIS U. L. J. 467, 478 (2014) (describing most modern theories of rule of law as thin conceptions, regardless of whether they are positivistic or moralistic). Some Natural Law thinkers, moreover, do identify the rule of law under Natural Law to be substantive in kind. I have argued that certain Natural Law conceptions of the rule of law are not only entirely harmonizable with constitutional regimes like the United States, organized partly under the principle of separation of powers, but actually supportive of meaningful judicial review enforcing unenumerated rights deemed fundamental to human dignity, if in a self-restrained fashion. *See* Christian Lee González, *A Governmebt by Men, Not Nature: A Natural Law Case for Limits on the Enforcement of Natural Law and Unenumerated Rights under the Constitution*, 25 TRINITY L. REV. (forthcoming May 2019).

law-likeness,"[375] it certainly disagrees with Aquinas and Hobbes, to the extent they deemed the rule of law to be a conceptually impossible limitation on the sovereign.[376] One limitation of Natural Law in this regard is that, although it commends the common interest and common needs, it refuses to offer indices by which the same can be identified at lower levels of abstraction or consistent procedures for clarifying them.[377]

Interesting as the content of value postulation and clarification is, as well as the more narrow theoretical problem of legitimacy and authority, Lasswell and McDougal also criticized Natural Law with regard to the remaining four intellectual tasks they deemed necessary for a rational jurisprudence.

Description of Past Trends in Decision

New Haven further posits as a second intellectual task of jurisprudence the historical examination of the degree to which a goal postulated and clarified has been achieved in the past, by identifying trends in all relevant, authoritative, and controlling decisions.[378] This entails a comparison of decisions and their consequences across time and space, the events which precipitate recourse to authoritative decision, the immediate and longer-term consequences of decision, the detailed claims which participants make to such decision, and the factors which appear to condition decision, all in terms of their conformity to clarified policies.[379] It is as part of this task that observers and decision makers, for example, analyze and describe what the operative law (and relevant control and authority expectations) is in any given context, which I have described above in detail with regard to the hyper specific issue of authority expectations. According to *Free Society*, although natural lawyers cannot escape

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[375] Frohnen, *supra* note 374, at 468.

[376] *Id*.

[377] McDougal, *supra* note 64, at 13.

[378] Lasswell & McDougal, *supra* note 2, at 36-7; Reisman, *supra* note 35, at 123.

[379] Lasswell & McDougal, *supra* note 2, at 37.

substantial recourse to past events and present context, they do not characteristically offer theory or procedures for the systematic and disciplined description of past trends in decision.[380] Like Fuller, many fail to analytically distinguish the "is" from the "ought" in this context, and fuse the descriptive and prescriptive tasks into a single exercise in derivation.[381] Instead of basing their recommendations on the lessons of past experience in relation to future probabilities, they base them on timeless teleologies grounded either in nature or religion.[382] In their quest for moral absolutes or universals, they ignore the interrelations of segments of community process moving through time.[383]

Analysis of Factors Affecting Decision

The third task inquires into the multiple factors that affect decision, without giving overwhelming importance to only one type of factor, and relies on comprehensive empirical theories to explain them, assuming the "maximization postulate," (i.e., that all human responses are, within limits, a function of net value expectations).[384] This requires, "[a]naly[zing] the background of the decision makers, be they judges, legislators, kings, or actors in the international arena – determining the 'predispositional factors' conditioning the decisions potentially just as much as the 'environmental' factors such as the Zeitgeist, the mood of the times, etc."[385] According to *Free Society*, Natural Law is not known for making any demand for empirical inquiry about the factors affecting—or even the consequences of—decision.[386] In their primary concern over logical derivation, natural lawyers assume that their concepts and premises make reference to unseen forces or realities of various degrees of inexorability that control or influence human choice, and that others are able to

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380 *Id.* at 270.
381 *Id.*
382 *Id.*
383 *Id.*
384 *Id.* at 37.
385 Wiessner, *supra* note 3, at 49.
386 Lasswell & McDougal, *supra* note 2, at 281.

understand them.[387] Some even pride themselves on observing that the natural sciences are unable to disprove such realities.[388] Fuller, for example, is said make various references to laws about the natural world, human conduct, and the social process, to confuse the "is" and the "ought," and to posit an "inner morality" of the law without articulating a set of procedures for systematically exploring its social factors and consequences.[389]

Projection of Future Trends

Projection makes expectations about the future conscious, explicit, comprehensive, and realistic.[390] Because the scholar and the decision-maker want to test the net result of all conceivable alternatives, they must make developmental constructs, embodying alternative anticipations of the future, in light of all available information.[391] Such constructs represent scenarios "[o]scillat[ing] between the most optimistic and the most pessimistic predictions of future decision outcomes. This task, completing the project of analysis, tries to predict what will happen."[392] According to *Free Society*, because Natural Law conceives of law as a body of timeless or absolute rules, no provision is made for anticipating the future.[393] Although natural lawyers expect positive law to conform to the dictates of natural justice in time, the paradigmatic procedure for anticipating such a future development seems to consist of the derivational ascertainment of the perceived requirements of Natural Law and their subsequent extrapolation into the future.[394]

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387 *Id*.
388 *Id*.
389 *Id*.
390 *Id*. at 37-8.
391 Lasswell & McDougal, *supra* note 2, at 38.
392 Wiessner, *supra* note 3, at 50.
393 Lasswell & McDougal, *supra* note 2, at 302.
394 *Id*.

Invention and Evaluation of Alternatives

The last intellectual task of jurisprudence, according to New Haven, is the deliberate invention and assessment of new alternatives in policy, to be made in terms of gains and losses with respect to all clarified goals and disciplined by the knowledge acquired of trends, conditioning factors, and future probabilities.[395] All other tasks are synthesized in a search for integrative solutions characterized by maximum gains and minimum losses.[396] According to *Free Society*, the characteristic paradigm of Natural Law offers no explicit model of how decisions should be made.[397] Instead of emphasizing invention and evaluation equally, natural lawyers have only focused on the evaluation of the "inescapable" choices of effective power, by means of allegedly objective criteria they assume or postulate.[398] Such an evaluation is conducted on the basis of logical derivations applying high-level prescriptions to particular instances of choice.[399] Often natural lawyers deny or diminish potential innovation in choice, relying instead on deterministic assumptions that the dictates of nature or God must ultimately prevail, whatever may be the temporary choices of established decision-makers.[400] In this regard, although some Natural Law jurists have incorporated procedures and techniques from the empirical sciences, most insist that the goal values served come from non-observable sources outside the social process, or from an ill-defined "higher law," hindering our rational search for an *earthly* common interest.[401]

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395 *Id.* at 38.
396 *Id.*
397 *Id.* at 315.
398 Lasswell & McDougal, *supra* note 2, at 315.
399 *Id.*
400 *Id.*
401 *Id.*

The Overlap Between New Haven and Natural Law:
The Necessary Relation Between Law and Morality
as Predicated on Human Nature

Lasswell's and McDougal's understanding of Natural Law would have benefited from an acquaintance with several contemporary members of the latter School, foremost among them John Finnis.[402] Likewise, and as exemplified by the foregoing, Natural Law theorists can benefit from engaging with Policy-Oriented Jurisprudence. Despite their profound disagreements, and as things stand,[403] several areas of overlapping agreement are readily apparent

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[402] *See, e.g.,* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 90-1 (1980) (listing seven basic human values—life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion—and recognizing "countless objectives and forms of good," but suggesting "that these other objectives and forms of good will be found, on analysis, to be ways or combinations of ways of pursuing (not always sensibly) and realizing (not always successfully) one of the seven basic forms of good, or some combination of them. Moreover, there are countless aspects of human self-determination and self-realization besides the seven basic aspects which I have listed. But these other aspects, such as courage, generosity, moderation, gentleness, and so on, are not themselves basic values; rather, they are ways (not means, but modes) of pursuing the basic values, and fit (or are deemed by some individual, or group, or culture, to fit) a man for their pursuit"). To analyze the considerable normative and empirical overlap between New Haven and Finnis' work is beyond the scope of this paper. For an overview of the literature on Finnis' conception of various incommensurable basic human goods and human nature, *see* John Finnis & Germain Grisez, *The Basic Principles of Natural Law: A Reply to Ralph McInerny*, 26 AM. J. JURIS. 21 (1981); Gary Chartier, *Incommensurable Basic Goods*, 40 AUSTL. J. LEG. PHIL. 1 (2015); Bruce Renton, *Finnis on Natural Law*, 11 KINGSTON L. REV. 30 (1981); Alex E. Wallin, *John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods*, 35 CAMPBELL L. REV. 59 (2012); Steven D. Smith, *Persons Pursuing Goods*, 13 LEG 285 (2007); and Adam J. MacLeod, *The (Contingent) Value of Autonomy and the Reflexivity of (Some) Basic Goods*, 5 J. JURIS 11 (2010).

[403] Some disagreements between Policy-Oriented Jurisprudence and Natural Law are evident in their mutual criticism. Others are due to the fundamentally different theoretical backgrounds of each tradition. A comprehensive assessment of the philosophical foundations of Policy-Oriented Jurisprudence, its influences, and those of Natural Law, is beyond the scope of this paper. However, for an overview of the literature on the difference between Natural Law and Realism, Pragmatism, Utilitarianism, and Liberalism more generally (all core influences of New Haven),

between the two in their conceptions of law and morality. Let's take stock.

First, both traditions are—as theories *about* law—committed to *bridging the gap between morality and the law*, to the extent that doing so *maximizes* the opportunities of all to *flourish* as human beings.

Second, both ground their criteria to bridge such a gap in conceptions of *human nature*, *basic goods, and the common interest*.

Third, both require that the choice of values entailed in the legal process guiding such a bridging of the gap between morality and the law be *rationally guided*.

Fourth, both are equally and unflinchingly committed to an overarching goal of human dignity, while conscious of the *need to rationally compromise and ascertain the specifications* of such a goal.

Fifth, both affirm that law and morality are interrelated but not identical, and that *law, although political, is not reducible to politics*.

Sixth, and with few exceptions, representatives of both traditions have been historically committed to the *values of democratic and constitutional government*, as well as to *procedural and substantive conceptions of the rule of law*.

In light of the otherwise profound differences between New Haven and Natural Law, these areas of agreement stand out and suggest not only their reasonableness and likely truth, but a shared ethos. Such a consensus tells us certain things about the relationship between morality and the law, foremost among them *that* they are

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see Priel, *supra* note 5; Malcom Sharp, *Realism and Natural Law*, 24 U. CH. L. REV. 648 (1957); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L. J. 493 (1942); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 SO. CAL. L. REV. 1653 (1990); Michael Williams, *Naturalism, Realism and Pragmatism*, 37 PHILOSOPHIC EXCHANGE 2 (2007); Walter B. Kennedy, *Pragmatism as a Philosophy of Law*, 9 MARQ. L. REV. 63 (1925); Ben W. Palmer, *Natural Law and Pragmatism*, 23 NOTRE DAME L. REV. 313 (1948); Edward S. Adams and Torben Spaak, *Fuzzifying the Natural Law—Legal Positivist Debate*, 43 BUFF. L. REV. 85 (1995); J. B. Crozier, *Legal Realism and a Science of Law*, 29 AM. J. JURIS. 151 (1984); Henry Mather, *Natural Law and Liberalism*, 52 S. C. L. REV. 331 (2001); CHRISTOPHER WOLFE, NATURAL LAW LIBERALISM (2006).

necessarily connected, and that, regardless of *how* one conceives of that connection, it is one of the *facts* about law that, at some point, it ceases to be *law* in any meaningful sense, once it has gone *sufficiently astray* from basic human goods and values. New Haven and Natural Law may draw that line differently, but draw it they both do.

Concluding Remarks

I have endeavored to provide a brief overview of Lasswell's and McDougal's relationship to Natural Law, stressing both salient agreements and disagreements. In doing so, I have mostly offered a *descriptive* account of that relationship, detailing the most important of their mutual criticisms. I have refrained for the most part from *evaluating* Lasswell's and McDougal's observations about Natural Law, since that would exceed the scope of my aim herein. Even at a descriptive level, however, rubbing Natural Law's and New Haven's most opposite insights kindles a fire that illuminates the debate over the relationship between morality and the law.

If it is the case that Natural Law, when devoid of metaphysical or theological garb, ultimately stands for the "conscious and sustained quest for and accounting of the best reason a [decision-maker] could find"[404] in promoting human flourishing,[405] then Natural Law and

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[404] Priel, *supra* note 5, at 8.

[405] I must observe that, while both schools define human flourishing in different terms, there is the possibility of fruitful dialogue between them. It is true that one obstacle to this dialogue has partially been New Haven's seemingly difficult meta-language. *See* Reisman, *supra* note 4, at 25 ("[T]here has been great resistance and confusion about some of the metalanguage McDougal created or adopted from other social sciences"); Moore, *supra* note 14, at 665 ("This use of a precise meta-language for analysis is both one of the greatest strengths of the system and one of the greatest causes of popular misunderstanding of the system"). It is no less true, however, that the Natural Law tradition has itself also displayed an inability to articulate its insights intelligibly in the contemporary world, as recognized by Natural Law writers themselves:

> The political sphere is [a] forum to bear witness to the failures of one theory, and to advocate the superiority of a rival version of justice. Natural law, the theoretical 'loser' since the time of this nation's founding, is another justificatory theory for constitutional

New Haven are not just accidental allies in the long arc of legal history, but sojourners in the very direction into which it bends. They equally demand of law and rulers with the age-old prophetic voice: "Justice, Justice shalt thou pursue, that thou mayest live."[406]

> democracy. Natural law can explain why it is good that individuals and groups exist, and it can provide the foundation for rights to be protected beyond the bargaining of liberal contractual minimalism. The challenge to religious groups that seek to argue for [Natural Law], is to articulate their understanding of the good, and the rights that should protect the good, in language their opponents can understand as political conceptions of justice.

Stephen P. Kennedy, *Will Natural Law Survive Man's Failure to Reason*, 10 TRINITY L. REV. 211, 222 (2000). This article is partly a plea to writers in both schools for *clearer*, *deeper*, *good faith-based* debate.

[406] DEUTERONOMY 16:20.