

## BOOK REVIEWS

THE CONFIGURATIONS OF GROSS INCOME. BY JOSEPH T. SNEED. Columbus: Ohio State University Press, 1967. Pp. 340. \$7.00.

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Advising people and firms about their income tax problems is a big business. Any doubt about this proposition can readily be dispelled by surveying the huge volume of traditional, black-letter-law tax literature addressed to the client-oriented practitioner. The speed and thoroughness with which the publishing industry produces something for every taste and need in tax practice are tributes to the efficacy of a market economy. But the opportunity for profit is limited in the much smaller market for literature on the theoretical and historical aspects of taxation, and there are some significant gaps in this body of literature.

The subject of normative theory is well served, most notably by Henry Simons' masterpiece, *Personal Income Taxation* (1938). There are a substantial number of articles and books on specific policy issues within the tax system, many adopting Simons' normative criteria either explicitly or implicitly. But Simons wrote mostly about his view of what an ideal income tax system would look like, and other economists have surveyed the existing income tax system only on a general level, with a view to broad appraisals and recommendations for reform.<sup>1</sup> What has been missing is a bridge between the theory developed by Simons and others and that huge volume of black-letter literature which describes the system as it is, in all its dismaying complexity.

Most lawyers (but unfortunately few economists) are aware that a careful study of the intricacies of the existing system produces useful, often surprising insights into normative theory and, more broadly, into the realm of political economy. As a lawyer, Professor Sneed saw the longstanding gap between economic theory and pure legal analysis, and has tried, on a grand scale and with much success, to fill it. He has produced a book, the first of the series that will be required to accomplish his objectives, in which he combines the skills and insights of an economist like Simons with the legal craftsmanship and lawyerlike respect for detail and practicality exemplified by Roswell Magill in his skillful legal analysis, *Taxable Income*.<sup>2</sup>

Those who have read the articles in which Professor Sneed de-

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<sup>1</sup> E.g., R. GOODE, *THE INDIVIDUAL INCOME TAX* (1964); J. PECHMAN, *FEDERAL TAX POLICY* (1966), reviewed, Wolfman, 76 *YALE L.J.* 1036 (1967); D. SMITH, *FEDERAL TAX REFORM* (1961).

<sup>2</sup> R. MAGILL, *TAXABLE INCOME* (rev. ed. 1945).

veloped the theoretical underpinnings for his present work<sup>3</sup> could hardly fail to realize that he has accepted at the broadest level the challenge that any thoughtful tax man must be aware of—the challenge of trying to evaluate the entire income tax system in terms of well defined and reasonably fundamental criteria of social, political, economic, and psychological aspirations and constraints, while at the same time revealing the historical antecedents, the earlier political compromises, the mistakes of insight or judgment, that must be understood in order to explain why the system is as it is, with all its deviations from the ideal. While most lawyers, particularly the practitioners, are concerned only with the system's plumbing, Professor Sneed is concerned with its architecture. Like a good architect he understands the plumber's problems, but his concerns are much broader. Still, the book is conventional in a sense. Professor Sneed is an architect, not a city planner. He describes the system for collecting revenue, and appraises it in terms of equity, while ignoring the distribution of benefits. He describes the specific historical antecedents and theoretical foundations of the present law, but bypasses the broader historical and social context of which it is a part. These observations are intended only as description, not as criticism. The task undertaken is one that certainly deserves the enormous depth of understanding and the substantial energy that Professor Sneed has devoted to it.

Professor Sneed's task was extraordinarily difficult in terms of organization because his goal was to combine a discussion of the present law and its sources with a normative evaluation and with the development of some of his own, original doctrinal or taxonomical concepts. The heterogeneity of the intended audience makes the task even more difficult. Professor Sneed addresses his study principally to law students, but he purports in his *Foreword* "to make this volume also useful to practitioners." It is certainly to be hoped that in addition the book will be studied carefully by economists, political scientists, and other law professors. Inevitably, the effort to reach people of diverse backgrounds and interests results in a product not perfectly tailored to any particular group. For students, there is too detailed attention to some problems that to me seem either relatively trivial, such as the proper treatment of a transfer that is part gift and part sale,<sup>4</sup> or lacking in current vitality, such as the constitutional problems in taxing interest on state and local bonds.<sup>5</sup> Some material seems to have been included in an effort to be comprehensive for the benefit of practitioners,<sup>6</sup> or

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<sup>3</sup> Most notably, Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567 (1965); Sneed, *The Rule of Good Law and Federal Taxation*, 2 B. C. IND. & COM. L. REV. 203 (1961).

<sup>4</sup> J. SNEED, *THE CONFIGURATIONS OF GROSS INCOME* 174-76 (1967) [hereinafter cited as SNEED].

<sup>5</sup> SNEED 293-99.

<sup>6</sup> Any regard for the needs of practitioners seems unfortunate. I cannot believe that a significant number will use this book as a tool in their practice. Perhaps they should, but they won't. As a minor note, the utility of the book to practitioners, and to students as well, is substantially diminished by the lack of a table of cases.

perhaps out of Professor Sneed's simple urge, having gone as far as he did, to cover everything. For readers experienced in tax matters, the book will no doubt seem to contain too much basic material that either is well known or can be learned more readily elsewhere. But the problem of inessential material is more a minor annoyance than a serious defect, particularly since the reader can skim the parts that are not of interest to him, with the knowledge that there will be enough left to give him his money's worth and more.

The present book, as the first of a series, is confined somewhat arbitrarily to the question what increments, gains, or receipts are included in or excluded from taxable income.<sup>7</sup> As a prelude Professor Sneed sets forth very briefly the criteria—for example, Adequacy, Practicality, Equity<sup>8</sup>—by which particular provisions are later to be evaluated.<sup>9</sup> The explicit array of criteria proves to be an extremely helpful device, particularly because like any checklist, it reminds one of factors that might militate against conclusions towards which one is predisposed. Thus, for example, Professor Sneed concludes along with most respectable tax theorists that the present exemption of interest on state and local bonds is objectionable on many counts, but he does not ignore the fact that the exemption promotes federalism. Having recognized the existence of countervailing considerations, he can put the problem in a proper perspective:

The opposition to the exclusion usually counters by pointing out that because the revenue loss suffered by the Federal Government exceeds the value of the benefits received by state and local governments, the "subsidy" to these instrumentalities is inefficient and wasteful. This "waste," it is pointed out, goes into the pockets of the wealthy and contributes little to the welfare of state and local government. A federalism which demands for its sustenance such a disregard of Reduced Economic Inequality is, it is suggested, not worth preserving. Particularly is this true when direct aid by the Federal Government is too common to merit either concern or notice. That this rebuttal amounts to asserting that the end of Reduced Economic Inequality makes desirable some impairment of federalism is seldom explicitly recognized.

Thus, the lines are drawn. A tangible economic benefit to state and local government and a political belief are arrayed against Practicality, Equity, Free Market Compatibility, and

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<sup>7</sup> The designer of the dustjacket apparently was unaware of the content of the book. No doubt confused by the title, he seems to have assumed that the book deals with patterns of changes in gross national product or some such statistical phenomenon.

<sup>8</sup> The capitalization is a feature of Professor Sneed's style. In this review I have capitalized when I believed I was using a term in the sense in which he intended it.

<sup>9</sup> Unfortunately, the reader is advised at page 3 that for a complete explanation of the criteria he must turn to an earlier article by the author (Sneed, *The Criteria of Federal Income Tax Policy*, 17 *STAN. L. REV.* 567 (1965)). This article is of sufficient importance to the discussion in the book that it should have been incorporated in full, particularly since students are intended to be the principal audience.

Reduced Economic Inequality. The power of Political Order as a macrocriterion is nowhere better demonstrated.<sup>10</sup>

As this quotation suggests, Professor Sneed does not belabor his readers with lengthy discussions of why a particular provision of the present law is compatible or incompatible with a given criterion. Usually the matter is reasonably evident and he properly treats it as such. At times, however, one wishes that he had been more willing to run the risk of seeming to condescend. For example, after discussing the problem of when gain should be recognized for tax purposes, he states, "It should be clear that Equity requires that taxpayers be put on an inventory basis with respect to all their assets."<sup>11</sup> While he elaborates slightly on this assertion by quoting from Simons in a footnote,<sup>12</sup> Professor Sneed does not, in my view, discuss the issue adequately. It is his implicit assumption that nonrecognition of the gain on assets that have not been sold or exchanged is purely a response to considerations of Practicality. But if the concept of equity (in the broad sense in which it is generally used) is thought to include some general notion of fairness, then it seems to me that in some circumstances Practicality (from the taxpayer's, as opposed to the government's, perspective) could easily be regarded as an element of equity. More concretely, it does not seem to me self-evident that equity (at least as I use that concept) dictates identical treatment of the taxpayer who has converted an asset into cash and the taxpayer who continues to hold an illiquid asset. True, Professor Sneed can define Equity any way he wants, but to define it very narrowly, as he seems to do, raises an extraordinarily subtle and difficult problem of tax theory, and further discussion would have been interesting and helpful.

The problem of equity in the recognition of gain runs throughout the book. The difficulty is that if Equity is narrowly defined, its proper function is not clear. At the very outset Professor Sneed asserts, "It is obvious that, since the criterion of Equity is founded on a definition of personal income, the immediate task of establishing the frontier of gross income should be guided by the dictates of that criterion."<sup>13</sup> The meaning of this sentence is not entirely clear to me,<sup>14</sup> but it seems to represent a failure by Professor Sneed to accept the full thrust of his own thesis. His major contribution is to emphasize that a good tax system must reflect many competing goals and constraints. To me this suggests that the Simons model, and particularly the Simons definition of income, is oversimplified and less useful than a more sophisticated model would be. It is time to stop giving so much obeisance to the

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<sup>10</sup> SNEED 305-06 (footnote omitted).

<sup>11</sup> SNEED 71 (footnote omitted).

<sup>12</sup> SNEED 71 n.44.

<sup>13</sup> SNEED 6.

<sup>14</sup> I am particularly puzzled by the intended meaning of "immediate task" and "frontier."

Simons analysis, and it seems unfortunate that Professor Sneed stops just short of saying so.<sup>15</sup>

The same kind of problem arises in the discussion of what Professor Sneed calls "Gains from Status,"<sup>16</sup> referring to certain kinds of psychic gains, among other things. Here again he takes the position that it is Practicality that precludes taxation of such gains. It could as easily be asserted that the concept of income for tax purposes can have meaning only in relation to the function that the term is to serve; that as used for taxation it must constitute not a measure of well-being but a measure of capacity to pay taxes; and that therefore it would be absurd to claim that certain psychic gains should be regarded as income. Of course such an approach substantially diminishes the status of the concept of income as a device for achieving equity in the most fundamental sense, but it also reduces our uneasiness about some of the lines that must be drawn. I concede that Professor Sneed deals very effectively with most of the concrete problems of gains from status. He properly points out that we cannot wholly ignore them,<sup>17</sup> and makes the very astute observation that "as the community grows richer and the employer, rather than the market place, increasingly comes to be regarded as the source of consumption items in kind, the scope of [nontaxable] 'working conditions' increases while that of [taxable] compensation decreases."<sup>18</sup> But it seems to me that he misses the point when he suggests that the nontaxation of certain damage awards (*e.g.*, from an action for slander) can be defended on the ground that the psychic gain that it replaces (one's good reputation) would not be taxable.<sup>19</sup> The same could be said about conversion of one's leisure time into compensated services. The point is that income taxation should be concerned with capacity to contribute to societal costs and not with measuring well-being.

While Professor Sneed's application of his normative criteria is an extremely valuable contribution, it does not seem as distinctly creative and is not likely to be as intriguing to tax experts as some of the ana-

<sup>15</sup> He does say, "The preceding chapters have made plain that economic gain and taxable gain frequently are not coterminous." SNEED 63. But he fails to state explicitly that economic gain cannot and should not be regarded as the only proper criterion for taxability, and that as a consequence it is extremely difficult to define the role that the concept of economic gain should play in the development of tax policy.

The position I take on this issue places me on the side of Professor Bittker in the debate that he recently generated over the comprehensive tax base. See Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967); Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44 (1967); Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63 (1967); Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR*, 81 HARV. L. REV. 1016 (1968); Bittker, *Comprehensive Income Taxation: A Response*, 81 HARV. L. REV. 1032 (1968). For a somewhat more elaborate expression of my own views on this issue, see Klein, *Federal Income Tax Reform, A Reaction to Professor Blum's Twenty Questions*, 41 TAXES 175 (1964).

<sup>16</sup> SNEED 99-113.

<sup>17</sup> SNEED 99-100.

<sup>18</sup> SNEED 101.

<sup>19</sup> SNEED 109.

lytical concepts he uses to bring cases, rulings, and statutory provisions together and to place them in proper relation to one another and to the common problems they reflect. For example, he treats annuities, loan payments that might represent interest or principal, and recoveries for the taking of a portion of property (*e.g.*, an easement) together under the heading "Problems of Allocation of Receipts between Return of Capital and Gain."<sup>20</sup> Of course, the concept could include much more—for example, the depreciation deduction.

Indeed, the entire book suffers from the arbitrary decision to limit discussion to what has traditionally been regarded as the scope of the concept of gross income. But in light of the magnitude of Professor Sneed's undertaking it is easy to sympathize with such self-imposed limitations. What is important is that one finds a new way of looking at, and therefore of understanding, a class of tax problems. Another example of a useful, basic organizational device appears in this sentence: "There is, however, a common thread woven in the texture of each topic discussed, *viz.*, *the effect on the existence and amount of gain in the taxable period in which the receipt occurs of various marketing difficulties, contingencies, restrictions, etc., which pertain to the receipt.*"<sup>21</sup> A final example of Professor Sneed's adeptness in devising useful analytic tools is his discussion of income-splitting and some other problems under the topic "Problems of Receipts from within the Family."<sup>22</sup> This discussion certainly improves substantially on traditional treatments, which dealt with the same problems under the rubric of "assignment of income" or, even worse, lumped income-splitting problems together with problems of distinguishing between income and capital gain, and applied the utterly sterile fruit-and-tree notion to both. Again, one may be somewhat disconcerted by Professor Sneed's self-imposed limitations—in this case particularly by his failure to discuss trusts.<sup>23</sup> But at least the general approach is one that advances understanding.

Not surprisingly, there are points at which the effort to fit the law into his own framework seems to become somewhat Procrustean. For example, in discussing return of capital, he states that when percentage depletion results in deductions greater than the amount of total investment, "the taxpayer is regarded as having made an unassisted investment."<sup>24</sup> To try to rationalize percentage depletion by suggesting that in effect Congress has granted extra basis seems to me unrealistic, unnecessary, and misleading to students who must at some point learn that certain tax provisions can be understood only in terms of historical accident and political power. But this kind of lapse (if, indeed, it is

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<sup>20</sup> SNEED 29-37.

<sup>21</sup> SNEED 41.

<sup>22</sup> SNEED 171. It seems surprising that he failed to discuss in detail the relationship between this kind of issue and the broader question of the proper unit for taxation.

<sup>23</sup> Professor Sneed was well aware of the omission. See SNEED 172.

<sup>24</sup> SNEED 22.

one) is quite rare. The more common failure is in the direction of exclusion and that can easily be forgiven, or even justified.

Lest the reader of this review be misled, I should reiterate that the conceptual framework and policy analysis are woven into (sometimes, unfortunately, added onto) a thorough discussion of the law and its development, with a constant effort to identify the source or basic nature of the problem that particular cases, rulings, or statutes are attempting to meet. It is this constant attention to the total fabric of the law, its sources and its objectives, that makes the book so valuable for students. Professor Sneed has conveyed the kinds of ideas that every good law professor ought presumably to try to get across, one way or another, to his students.

This last observation brings me to a serious pedagogical problem that this book highlights. Certainly some of what law professors now spend time developing in class should be written down by the professor (or someone else) and read by students on their own. At the same time, we may not be mistaken in our belief (or perhaps mere habit of thought) that some of our ideas, even the ones we have worked out fairly thoroughly and are pretty sure of, should not be laid out—at least not in advance of classroom discussion. The obvious thought behind this attitude is that students should work out certain basic problems on their own, particularly the broader problems of synthesis and reconciliation. Many of the fundamental ideas developed in Professor Sneed's book are ideas that tax casebooks, at least in the hands of a good teacher, are designed to elicit. Most of us who teach taxation in law schools will probably have ideas that vary enough from Professor Sneed's that in spite of the availability of his book, we will be able to carry on as before, though perhaps disgruntled that he has deprived us of some of our best "original" material. But implicit in the concept of this book as a teaching tool seems to be the theory that a course like taxation should be taught with more text and problems, and less case analysis and free-ranging discussion. Potentially, of course, a certain amount of background material can make classroom discussion more sophisticated and rewarding. But surely there is a limit. We must take great care, I think, that in reacting against possibly excessive reliance on the case method we do not drift too far away from a continuing intellectual exchange, in the direction of a high-class drill.

It seems to me that the publication of this book tends to force consideration of educational issues that we recognize but tend to ignore. We could all learn a good deal about legal education if Professor Sneed would set down his thoughts on the process with regard to professorial writing.

I can conclude tersely. This is a book that most teachers of tax law will wish they had written. Each would no doubt have written it somewhat differently, but all are likely to be satisfied that a gap in the literature has now been filled.

THE LIMITS OF THE CRIMINAL SANCTION. BY HERBERT L. PACKER. Stanford, California: Stanford University Press, 1968. Pp. xi, 385. \$8.95.

*Al Katz* †

*"Every society has the criminals it deserves."*

*Albert Camus* \*

There is only one aspect of this book which is beyond question, and that is its profound value as a contribution to the difficult and often volatile problem of law and social policy. Professor Packer modestly prefers to call his book an essay rather than a treatise, but whatever the label it is undoubtedly the most important extended discussion of these problems in almost thirty years. The true measure of his effort lies not in the answers offered, but in the extent to which our understanding is advanced and the inquiry moved forward. The critical comments which follow will, I hope, demonstrate the seriousness and intelligence of the author's treatment of the criminal sanction.

In his review of its report, Professor Packer attacked the President's Commission on Law Enforcement for failing to ask the crucial question: What is the criminal sanction for? <sup>1</sup> The book under review is specifically addressed to this question, but it is not at all clear to me that Professor Packer has himself asked the crucial question. For as an examination of his argument will show, the crucial question is not *what* the criminal sanction is for, but *whom* the criminal sanction is for. The difference between these questions will significantly affect the outcome of analysis. If the question is what the criminal sanction is for, one is likely to conclude—as does Professor Packer—that the theory of general deterrence is still the major justification for the criminal sanction. If the question is whom the criminal

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\* As for the law of retaliation, it must be admitted that even in its primitive form it is legitimate only between two individuals of whom one is absolutely innocent and the other absolutely guilty. Certainly the victim is innocent. But can society, which is supposed to represent the victim, claim a comparable innocence? Is it not responsible, at least in part, for the crime which it represses with such severity? This theme has been frequently developed elsewhere, and I need not continue a line of argument which the most varied minds have elaborated since the eighteenth century. Its principle features can be summed up, in any case, by observing that every society has the criminals it deserves.

Camus, *Reflections on the Guillotine* (R. Howard tr.), in 2 THE WORLD OF LAW 512, 533 (E. London ed. 1960).

<sup>1</sup> Packer, *Copping Out*, NEW YORK REVIEW OF BOOKS, October 12, 1968, at 17.



sanction is for, one is likely to conclude—as I do—that the existing structure of the criminal law is useless, and that only a structure consistent with a rehabilitative model makes any sense.

Professor Packer clearly explains how theories of punishment determine the nature of the process required to impose the sanction, and how both the applicable theory of punishment and the specific process determine the purposes for which the criminal sanction may be used. He concludes that unless the criminal sanction is confined to deviant conduct which is generally regarded as immoral (that is, conduct not defended as either good or innocuous by a significant section of the population)<sup>2</sup> the judicial character of the criminal process will be severely strained, and enforcement will tend to be sporadic and discriminatory rather than intense and uniform. In the final analysis the primary goal of deterrence is defeated by over-criminalization.

Professor Packer does not accept the serious challenges to deterrent theory to be found in much recent literature. It has been argued, for example, that the notion of choice (*mens rea*) in the criminal law is fictitious.<sup>3</sup> Human behavior is largely a product of social and psychological constraints which presently are not relevant to the inquiry that determines guilt or innocence. Consequently, when the law speaks of intention it is not describing a historical condition in the mind of the actor. Rather, the doctrine of intent allows an outside observer—judge or jury—to impute to the defendant the observer's own set of choice perceptions. *Mens rea* reflects the perceptions of the trier of fact, not those of the defendant. Therefore, since *mens rea* does not describe the defendant's process of choice, it is specious to impose the criminal sanction on the ground that the defendant has made the wrong choice. The upshot of this line of argument is the suggestion that criminal conduct be regarded as a datum demonstrating a need for treatment rather than as an excuse for punishment justified by a finding of moral fault.<sup>4</sup>

A similar but more sophisticated approach suggests that crime is a functional alternative to mental illness, social activism or strict conformity.<sup>5</sup> As a mode of adapting to psychosocial stress, crime is dysfunctional to the extent its long-term effect is to increase rather than alleviate stress. Furthermore, for most offenders a criminal system that relies on punishment can only reinforce the adaptive mode implicit in criminality. The stress theory also maintains that the criminal law

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<sup>2</sup> H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 261-64 (1968) [hereinafter cited as PACKER].

<sup>3</sup> *E.g.*, J. MARSHALL, *INTENTION—IN LAW AND SOCIETY* (1968). This book is not a work of original research but a bringing together of contemporary psychological and sociological material bearing on the question of "choice."

<sup>4</sup> *Id.* at 188.

<sup>5</sup> *E.g.*, S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* (1968).

ought to be concerned primarily with the treatment of persons who demonstrate a potential for dangerous behavior and forego the exorcism of punishment.

Professor Packer's response to the treatment theorists is that they overlook the role of the criminal law in the socialization process. He argues that the values reflected in the criminal law depend for their socialization "on the vividness with which coercive threats are made."<sup>6</sup> "The existence of a 'threat' helps to create patterns of conforming behavior and thereby to reduce the number of occasions on which the choice of a criminal act presents itself. . . . [W]e automatically and without conscious cognition follow a pattern of learned behavior that excludes the criminal alternative without our even thinking about it."<sup>7</sup> Apparently Professor Packer does not realize that with these statements he not only cuts the ground from under deterrent theory but concedes to the treatment theorists their claim that *mens rea* is phony. He seems to say that deterrent theory is valid because punishment aids socialization to majoritarian norms. But it is precisely because punishment as an aid to the socialization of such norms has failed that punishment in the particular case is said to be necessary. Furthermore, individuals who have not been socialized to the "norms made vivid" by the criminal law also "automatically and without conscious cognition follow a pattern of learned behavior that [*does not*] exclude . . . the criminal alternative without . . . even thinking about it."

Perhaps Professor Packer missed the significance of his remarks about socialization because he was asking *what* the criminal sanction is for rather than *whom* it is for. The latter question might have led him to wonder whether the infliction of punishment on adults is more than tenuously related to the socialization of majoritarian values, and whether there is any relation between the socialization of respect for the autonomy of others and the actual infliction of criminal punishment for theft or assault. As Professor Packer has it, deterrent theory means that the process of socializing basic majoritarian values depends on its own failure—it is a predatory dialectic. On the one hand "the symbolic richness of the criminal process is a powerful deterrent";<sup>8</sup> on the other, "it is clear that the deterrent role of the criminal law is effective mainly with those who are subject to the dominant socializing influences of the day."<sup>9</sup> The general principle seems to be that the criminal sanction may be imposed on those who for some reason or another were not "subject to the dominant socializing influences of the day." Is punishment of these people morally defensible?

Professor Packer contends that the punishment implied by deterrent theory is morally defensible because it is necessary. That is, no

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<sup>6</sup> PACKER 42.

<sup>7</sup> PACKER 43.

<sup>8</sup> PACKER 44.

<sup>9</sup> PACKER 45.

other theory is capable of justifying general a priori legislative proscriptions.<sup>10</sup> The criminal law must, therefore, treat individuals *as if* they were capable of exercising rational choice.

I do not think this is so. Legislative prescription of conduct can be justified on pragmatic and moral grounds independent of punishment theory. Official interference with individual autonomy must be limited to occasions of specified conduct in order to eliminate official arbitrariness and to provide some assurance that socially harmful or dangerous behavior is involved. Thus the notion of culpability—so long as it is not taken to imply moral turpitude—can be retained independent of deterrent theory. People who engage in dangerous conduct under idiosyncratic conditions of extreme existential stress are unlikely to be dangerous under normal conditions; there is no reason to suppose that incarceration, rehabilitation or treatment is needed in such cases.

It is also not true that indeterminate sentences for all offenses is the necessary consequence of abandonment of the deterrent theory. This is a favorite claim of deterrent theorists who, like Professor Packer, claim for themselves the right to an "integrated theory" of criminal law, but insist that all contrary theories be strictly logical.<sup>11</sup> The indeterminate sentence is a necessary consequence of a rehabilitative model only if one assumes that treatment or rehabilitation is for the benefit of the deviant. But this assumption need not be made. Rehabilitation is a social enterprise, the primary goal of which is social protection through the elimination of recidivism. As a social enterprise, predominating moral norms and considerations of practical necessity apply. This means that indeterminate sentences for all deviants without regard for the seriousness of their past conduct or their estimated future behavior is impermissible. Furthermore, the limited availability of human and other resources provides a practical reason for drawing distinctions among offenders and offenses. Treatment theory does not, therefore, mean the abandonment of considerations relevant to an integrated theory of criminal law. Finally, pruning the criminal code of misuses of the criminal sanction would eliminate the prospect of treatment theory entailing indeterminate sentences for trivial offenses. Overcriminalization burdens the ad-

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<sup>10</sup> PACKER 68, 96.

<sup>11</sup> It follows from the offender-oriented aspect of the rehabilitative ideal that the intensity and duration of punishment are to be measured by what is thought to be required in order to change the offender's personality. . . . If a writer of bad checks can be cured of his underlying disorder only by five years of intensive psychotherapy, then that is what he is to receive. . . . Of course, if he does not yield to treatment and is thought to present a danger, he will not be released.

PACKER 54-55. See also Kadish, *The Decline of Innocence in the Criminal Law*, 26 CAMBRIDGE L.J. 273, 289 (1968): "Moreover, the natural and logical implications of proposals like those of Lady Wootton would multiply further the evils I have tried to describe. . . . Why should there be any limit on the duration of the detention of persons brought within the system?"

ministration of the criminal law by substantially increasing the number of people it must handle. The consequence of this burden, as Professor Packer carefully explains, is that the criminal process begins to look more like an "assembly line" than an "obstacle course."<sup>12</sup> The objection to this tendency is not one of logic but one of value, and it is an objection treatment theorists are entitled to enter. Nothing could be more inconsistent with a concern for preventing future deviant behavior than an assembly-line process.

Unfortunately, the factual foundations of the rehabilitative model are weak. The science of predicting future behavior is primitive at best, and the general prognosis for rehabilitating criminal deviants is poor. While there is little or no evidence to show that prison terms imposed under existing sentencing structures serve to intimidate anyone,<sup>13</sup> in many instances the failure of socialization to the norms reflected in criminal codes is so profound that rehabilitative alternatives to prison cannot claim obvious superiority. Nevertheless, overcriminalization consumes public resources better allocated to rehabilitation research and experimentation. If we can learn how to resocialize dangerous offenders we may learn more about our original social sin.<sup>14</sup> It may be, for example, that a society that requires a good measure of properly channeled aggression for its survival necessarily generates a reciprocal measure of deviant aggression. Criminal theorists and social scientists then meet on the most serious of all political questions.

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<sup>12</sup> PACKER 163.

<sup>13</sup> Professor Packer suggests that short-term sentences so questionably serve the goals of punishment that they become evidence of our real lack of concern with the substantive offenses for which they are imposed. PACKER 275-76. However, it may well be that short-term sentences are more efficacious than long-term sentences. The short term inflicts a deprivation and then removes it before the individual unshakably adapts to his role as criminal outcast. Cf. L. ROBINS, *DEVIAN'T CHILDREN GROWN UP* 210-12, 230-32, 303 (1966).

<sup>14</sup> Professor Packer suggests that a difficulty with the rehabilitative ideal "is that it makes the criminal law the vehicle for tasks that are far beyond its competence. Surely the point does not require laboring that a general amelioration of the conditions of social living is not a task that can be very well advanced in the context of institutions and processes that we devote to apprehending, trying, and dealing with persons who commit offenses." PACKER 55. Certainly this is true, but the question presented is the morality of institutional punishment. If the criminal law is incapable of generally ameliorating the conditions of social living, and if crime is inextricably tied to such conditions, can the criminal law be more than a dumb-show?

ENFORCEMENT OF JUDGMENTS FOR THE PAYMENT OF MONEY. BY A. LEO LEVIN, PHILIP SHUCHMAN, AND ROBERT A. GORMAN. Goodrich-Amram Pennsylvania Procedural Rules Service with Forms. The Lawyers Co-operative Publishing Company (Rochester, N. Y.) and Matthew Bender & Company, Inc. (Albany, N. Y.), 1967. Pp. 430.

*Samuel J. Roberts* †

On November 1, 1960, the Civil Procedural Rules Committee bestowed a sweeping revision of Pennsylvania execution procedure on the bench and bar. The revision was the long-awaited response to a long-felt need for modernization. The old rules had all the intricate detail and rich historical color of a medieval tapestry; but they were susceptible of easy misinterpretation by the modernist who examined them too closely, or not closely enough. Moreover, the tremendous changes brought about in commercial law by the Uniform Commercial Code and consumer legislation demanded simple, flexible execution procedures and defenses that were impossible under the old rules.

Under the new rules, the confusing vocabulary and multiple writs of prior practice are gone. The writs of fieri facias, scire facias, liberari facias, venditioni exponas, inquisition, condemnation, alias and pluries have been abolished. In their place stands one streamlined writ of execution available for both levy and attachment of real and personal property. But sweeping revision may be a mixed blessing if bench and bar are not guided in the transition from past to present practice. The Civil Procedural Rules Committee had prefaced its recommendations with an explanatory note outlining the basic changes, but only the present commentaries, too long delayed, have added the extensive explanations and exhaustive annotations required for complete understanding and effective use.

Professors Levin, Shuchman, and Gorman have more than equalled the clarity of organization, felicity of language, cogency of argument, and aptness of illustration of their predecessor, Philip Werner Amram, who authored the commentaries on the prior rules. The late Judge Flood of the Pennsylvania Superior Court, who was Vice-Chairman of the Civil Procedural Rules Committee and a teacher of practice and procedure at the University of Pennsylvania Law School, once characterized the prior rules and their annotations as the greatest existing teaching aids for Pennsylvania practice and procedure. It is certain that the new execution rules and the present commentaries will serve the same high function, as well as be indispensable to the prac-

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† Justice, Supreme Court of Pennsylvania.

ting attorney or judge. The authors are to be commended for their significant contribution to this branch of the law.

The rules themselves have stood well the test of time. Their acceptability and utility is further enhanced by this commentary. There have been very few cases in which the courts have not found in the rules the answers to questions presented about execution procedure. The Pennsylvania Supreme Court has been called upon to lend assistance on only one or two occasions. Undoubtedly, the high quality and thoroughness of the Levin-Shuchman-Gorman commentary will adequately fill any needs for interpretation that may arise. In time, *Enforcement of Judgments for the Payment of Money* will come to be regarded by the legal profession as carrying as much authority as a unanimous decision by the court of last resort.

THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER. BY MYRES S. McDOUGAL, HAROLD D. LASSWELL, AND JAMES C. MILLER. New Haven and London: Yale University Press, 1967. Pp. xxi, 410. \$9.75.

Burns H. Weston †

For one who proclaims loyalty to the so-called New Haven Approach to law<sup>1</sup>—the “configurative” and “policy-oriented” jurisprudence of Harold D. Lasswell and Myres S. McDougal—it is perhaps self-serving to say that their *Interpretation of Agreements and World Public Order*,<sup>2</sup> written in collaboration with law-trained psychologist James C. Miller, constitutes a monumental achievement in the annals of legal scholarship. But, truly, the book (here so feeble a word) is a monumental achievement. No one serious about understanding legal instruments of virtually any kind—wills, contracts, opinions, resolutions, statutes, codes, charters or constitutions, as well as treaties—can justifiably abjure its challenge. It superbly demonstrates how the New Haven Approach, in dealing with the

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<sup>1</sup>The expression “the New Haven Approach” while perhaps not completely precise (because, standing alone, it can be misunderstood to refer to the Yale Law School as a whole), is employed here for reasons of convenience. It belongs to Professor Richard A. Falk and was coined by him to refer to “a group of scholars that have self-consciously elected to guide their studies by an application of the framework of inquiry as it has been outlined in the principal methodological efforts of Professors McDougal and Lasswell [of the Yale Law School].” Falk, *On Treaty Interpretation and the New Haven Approach: Achievements and Prospects*, 8 VA. J. INT’L. L. 323, 330 n.11 (1968). Professor Gidon Gottlieb has referred to the same phenomenon, still less precisely (because the Lasswell-McDougal jurisprudence is not restricted to the international law field), as “the Yale School of International Law.” Gottlieb, *The Conceptual World of the Yale School of International Law*, 21 WORLD POLITICS 108 (1968). Both of these writings constitute extensive reviews of M. McDOUGAL, H. LASSWELL, & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967), the work here reviewed. Other major published studies inspired by the New Haven Approach (or the Yale School of International Law) include: R. ARENS & H. LASSWELL, *IN DEFENSE OF PUBLIC ORDER* (1961); L. CHEN & H. LASSWELL, *FORMOSA, CHINA, AND THE UNITED NATIONS* (1967); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES: A FRAMEWORK FOR POLICY-ORIENTED INQUIRIES* (1965); H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950); M. McDOUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960); M. McDOUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962); M. McDOUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); M. McDOUGAL, H. LASSWELL & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); B. MURTY, *THE IDEOLOGICAL INSTRUMENT OF COERCION AND WORLD PUBLIC ORDER* (1967). See also M. McDOUGAL & D. HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948). For an introduction to another major work in progress, see McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (1967). For an indication of this reviewer’s acceptance of the New Haven Approach, see Weston, *International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry*, 54 VA. L. REV. 1069, 1265 (1968).

<sup>2</sup> (1967) [hereinafter cited as INTERPRETATION].

particular (*i.e.*, the interpretation of international agreements), can clarify the general.

Approaching interpretation as a problem in communication,<sup>3</sup> the authors conclusively relegate to much deserved exile the still too many "textualists" (practitioners and scholars alike) whose "arbitrary formalism" would "arrogate to one particular set of signs—the text of a document—the role of serving as the exclusive index of the parties' shared expectations."<sup>4</sup> Over and over again the authors emphasize the clearly democratic imperative of consulting *all* the "signs" (*e.g.*, words and deeds) of the extended and more-or-less reciprocal agreement-making process that may have relevance for ascertaining "genuine shared expectations." Still more important, and proceeding from an admitted "sanguine" belief "that the past is a storehouse of experience that may enable contemporary observers to devise improved principles to assist the decision-maker in his task,"<sup>5</sup> the authors fashion a comprehensive and systematic methodology for engaging in the interpretative enterprise. In so doing, they reject outright the popular but contradictory views of those "eminent figures" who insist either "that . . . interpretation is as automatic as the working of a well-designed and operated slot machine" or "that all interpretation is a genteel hoax."<sup>6</sup> In the end, mindful of the authors' counsel that "with every interpretative problem one is well advised to adopt a critical and realistic rather than a perfectionist expectation in regard to results,"<sup>7</sup> one wants "to assent [with Professor Falk] in the spirit of 'well, of course, this is the only sensible way to interpret an international agreement.'"<sup>8</sup> In any case, one wants to agree with Professor Gottlieb that "[t]he *Interpretation of Agreements* adds another volume to the short shelf of those works on international agreements which are essential for every international law scholar and practitioner."<sup>9</sup> A brief synopsis should make this readily apparent.

The first two chapters set forth the authors' basic conceptual framework and policy recommendations. They are essential reading for what follows. Of course, to persons familiar with the New Haven Approach,<sup>10</sup> especially those who have kept pace with all the fecund

<sup>3</sup> "In the theory and practice of interpretation the principal intellectual obstacle would appear to be the failure of decision-makers and publicists to conceive of the agreement-making process—to say nothing of the processes of claim and decision—as a process of *communication*, and to view this process in its widest extent through the powerful lenses of modern communication studies." INTERPRETATION at 371-72.

<sup>4</sup> INTERPRETATION at xvii.

<sup>5</sup> INTERPRETATION at xxi.

<sup>6</sup> INTERPRETATION at 371. See also *id.* at 6-10.

<sup>7</sup> INTERPRETATION at xvii.

<sup>8</sup> Falk, *supra* note 1, at 332.

<sup>9</sup> Gottlieb, *supra* note 1, at 109. "It joins on that shelf the *Harvard Research in International Law, Law of Treaties*; Lord McNair's *The Law of Treaties*, the six reports and draft articles on the law of treaties of the International Law Commission, and De Visscher's *Interpretation Judiciaire en Droit International Public*." *Id.* at 109-10 (footnotes omitted).

<sup>10</sup> See note 1 *supra*.



contributions of Professors Lasswell and McDougal,<sup>11</sup> the conception and recommendations will come as no surprise. With "a consistency of approach and a unity of purpose that assure them a towering place in the vast field of international law,"<sup>12</sup> the authors delimit the overriding "problem," "policy goals" and "strategies" of interpretation *in context*. Indeed, it is largely their emphatically contextual approach to interpretation, including their willingness—nay eagerness—to consult both the findings and techniques of the behavioral sciences, that so markedly distinguishes them and their product from others who have sought to make sense out of this confused and confusing realm. By detailing systematically, though at a high level of abstraction, a tripartite process of "agreement," "claim" and "decision" within which purported covenants are reached, disputed and authoritatively regulated, the authors persuasively demonstrate the enormous range of policy-relevant factual variables (heretofore largely disregarded) that are indispensable to realistic interpretation and application. Along the way, they effectively burst the "plain and natural meaning" bubble and lay waste to the counsels of interpretative despair, those polar views that have too long impeded rational inquiry (and, I would add, sensible law school teaching) in this field.

The "problem," Professors McDougal, Lasswell and Miller observe, is to bring to the focus of responsible attention more convincingly than has been done in the past the "urgent need" to facilitate strategies of persuasion (rather than coercion)—to improve upon *and* devise "appropriate general community procedures and principles to facilitate the making and application of agreements"<sup>13</sup>—for securing at least minimum and hopefully optimum order. This "urgent need," made distressingly obvious by eons of wasteful human conflict, is, they note, the more pressing "in the emerging new space-atomic era, with both its threats of potentially comprehensive destruction and its promises of a productivity in all values hitherto beyond fantasy."<sup>14</sup> Throughout, one feels the authors' distinct and justifiable displeasure with the most of us who, with a myopia characteristic of persons nurtured by a tradition of distorting dogmatisms, neglect to keep sufficiently in mind the central importance of agreements (and, so, the interpretative enterprise) "for establishing a stability in peoples' expectations which lessens predispositions for arbitrary resort to violence" and for organizing "the effective employment of resources in the maximum production and distribution of valued social outcomes."<sup>15</sup>

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<sup>11</sup> For a direct progenitor of INTERPRETATION, see McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOLUTION 337, 351-53 (1960). See also Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 INQUIRY 87 (1958).

<sup>12</sup> Gottlieb, *supra* note 1, at 109.

<sup>13</sup> INTERPRETATION at 5.

<sup>14</sup> *Id.*

<sup>15</sup> INTERPRETATION at 3 (footnotes omitted).

The overriding "goals" of interpretation which the authors recommend and from which they deduce particular policies to fit exact issues are designed, consistent with the New Haven Approach generally, "to give effect to the goals of a public order of human dignity."<sup>16</sup> They number four: *first*, and most pervasive, that decision-makers "undertake a disciplined, responsible effort to ascertain [read "approximate"] the genuine shared expectations of the particular parties to an agreement";<sup>17</sup> *second*, that decision-makers "supplement or augment the relatively more explicit expressions of the parties by making reference to the basic constitutive policies of the larger community which embraces both parties and decision-maker" when the "search for genuine shared expectations" falters or fails because of "gaps, contradictions, or ambiguities";<sup>18</sup> *third*, that decision-makers "refuse to give effect to the expectations of the parties" in those cases "when grave contradictions are found between the explicit expectations of the parties . . . and the requirements of fundamental community policy";<sup>19</sup> and *fourth*, that decision-makers defer to "carefully worked out arrangements" (*e.g.*, well-drafted texts) because "clarity of expectation may [thereby] be encouraged."<sup>20</sup> It is of course the authors' "primary or initial" goal that is most revolutionary, requiring as it does *near total* rejection of the "textualist" and what might be called "neo-textualist" schools. To be sure, the authors tacitly, if they do not expressly, accept the text as an *important* index of party expectations. This is evidenced by their fourth overriding preference for deferring to "carefully worked out arrangements" and their subsequent deduced willingness to "assign priority" to "the parties' explicit statement," and *other* "outcome" features of the agreement process—*e.g.*, "ceremonies, attachment of signatures or seals, delivery of an object"—"[w]hen sources of equal credibility give contradictory results concerning . . . expectations."<sup>21</sup> But because "[t]he communications which constitute an international agreement like all other communications, are functions of a larger context"<sup>22</sup> and so "may be affected by any and all of the variables in the process of agreement and its context,"<sup>23</sup> the authors correctly refuse to make the text the *exclusive* (or even near-exclusive) indicator of such expectations. Accordingly, they

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<sup>16</sup> INTERPRETATION at 40. A "public order of human dignity" is elsewhere defined by Professor McDougal to mean a "public order in which values are shaped and shared more by persuasion than coercion, and which seeks to promote the greatest production and widest possible sharing, without discriminations irrelevant to merit, of all values among all human beings." MCDUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 987 (1960).

<sup>17</sup> *Id.*

<sup>18</sup> INTERPRETATION at 41.

<sup>19</sup> *Id.*

<sup>20</sup> INTERPRETATION at 42. One wishes that the authors would have said more about the salutary possibilities of deliberate obfuscation.

<sup>21</sup> INTERPRETATION at 58.

<sup>22</sup> INTERPRETATION at 11.

<sup>23</sup> INTERPRETATION at 12.

deliberately repudiate (not without considerable scorn) the views, for example, of Sir Eric Beckett ("the task of the court is to interpret the treaty [the text?] and not to ascertain the intention of the parties"<sup>24</sup>) or of the somewhat more progressive International Law Commission ("the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties."<sup>25</sup>). For Professors McDougal, Lasswell and Miller, then, it is the intentions of the parties—their "genuine shared expectations," expressed in *all* their words and deeds both before and after explicit commitment—not the text alone, that should preeminently concern decision-makers;<sup>26</sup> and, to this end, nothing that throws light thereon, including, obviously, the text itself, should be precluded from investigation. This is, regrettably, a relatively revolutionary posture, but not simply because for the first time real substance is given in the interpretation context to the widely proclaimed goals of a public order whose aim is to defend the dignity of man—*i.e.*, "to respect *his* choices and not, save for overriding common interest, to impose the choices of others upon him."<sup>27</sup> The call for a "disciplined search" for "genuine shared expectations," together with the complementary appeals for "supplementing" and "policing" communications in accordance with overriding community goals (which, while subordinating "genuine shared expectations," do not derogate from, but rather advance the basic norms of democratic public order), represent, as my colleague-in-spirit John Norton Moore has pointed out, "a simple but profound insight into legal process."<sup>28</sup> Paraphrasing Professor Moore, "the use of such a tripartite goal structure impels attention to the function, or lack thereof, of [all] rules and can materially assist in appraisal of the efficacy of [any] process [to which the various rules are specialized]."<sup>29</sup>

<sup>24</sup> INTERPRETATION at 91, quoting a statement by Sir Eric Beckett to the Institute of International Law during its 1950 session, 43 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 438-39 (1950).

<sup>25</sup> INTERPRETATION at 88, quoting 19 U. N. GAOR Supp. 9, at 27, U.N. Doc. A/5809 (1964).

<sup>26</sup> In a recent less than enthusiastic review of INTERPRETATION, notwithstanding "considerable agreement with the authors concerning the goal of interpretation," Professor Briggs rues that Professors McDougal, Lasswell and Miller have adopted "a decrepit and often-challenged view that it is the intention of the parties . . . which is subject to *interpretation* rather than the text of the treaty in which they have objectively expressed their shared intentions, subjectivities, and agreement." Briggs, Book Review, 53 CORNELL L. REV. 543, 545-46 (1968) (emphasis added). Given the basal importance of this alleged decrepit view to the McDougal-Lasswell-Miller thesis, it is not a little paradoxical that Professor Briggs should still find "considerable agreement" with the authors' "goal of interpretation." However, the paradox is doubtless explained by Professor Briggs' misunderstanding that Professors McDougal, Lasswell and Miller advocate not the *interpretation* but the *investigation* of party intentions or expectations (in the text and elsewhere). I trust Professor Briggs will pardon me this "plain and natural" interpretation of his language.

<sup>27</sup> INTERPRETATION at 41.

<sup>28</sup> MOORE, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 684 (1968).

<sup>29</sup> *Id.* at 685. But cf. note 61 *infra* and accompanying text.

This "simple but profound insight" is given graphic expression in the "strategies of interpretation" which Professors McDougal, Lasswell and Miller recommend. Having carefully marshalled their policy preferences, and with systematic reference to the key features of the processes of agreement and decision which they earlier clarify, the authors propose comprehensive tools of interpretation by articulating sophisticated "principles of content and procedure." These principles, or decisional directives, subsumed under a superarching "Principle of Contextuality," are designed to facilitate the fullest possible realization of the authors' policy goals. Couched in modern communication theory and other up-to-date behavioral science findings,<sup>30</sup> the principles significantly broaden the parameters and perimeters of relevant inquiry that traditional doctrine has ordinarily deemed legitimate and/or possible. In this respect, they represent another revolutionary departure from past practice and thinking. While receptive to more-or-less traditional predilections for examining the "*travaux préparatoires*" (e.g., "legislative history") or the text or the "subsequent conduct" and for canonizing the interpretative task, the authors go far beyond. By proposing a host of "content" principles<sup>31</sup> keyed to each of the many phases of the interdependent processes of agreement and decision—but *without* any ordered hierarchy, because "[t]he significance of any particular factor may in different contexts vary greatly in relation to other factors"<sup>32</sup>—they compel investigation of *all* relevant "pre-outcome" (e.g., "negotiation"), "outcome" (e.g., "text") and "post-outcome" (e.g., "subsequent conduct") indices of party intention and community preference.<sup>33</sup> By recommending a series of "principles of procedure"<sup>34</sup> designed to assist such investigation—again *without* any hierarchical ordering, because "[i]t is obviously no more possible to order in a hierarchy of importance the principles that point to the factors which may affect the mediation of subjectivities than it is to order the factors themselves"<sup>35</sup>—they reduce *drastically* (mindful of human psychology, the authors are careful not to say completely)

<sup>30</sup> Gottlieb, *supra* note 1, at 112, criticizes the sections of INTERPRETATION that are devoted to communication theory as being "unsatisfactory, referring loosely to a poorly identified body of scholarship."

<sup>31</sup> "Principles of content are addressed to the choice of subject matter that is relevant to the alternatives of policy open to a decision-maker." INTERPRETATION at 46.

<sup>32</sup> INTERPRETATION at 116.

<sup>33</sup> I refer to such additional directives as, for example: "The Principle of Including All Strategic Acts," which urges "consideration [of] all signs and deeds throughout the negotiations . . . as well as during the course of performance" because "the entire sequence of acts and deeds may be relevant to shared subjectivities . . ." (INTERPRETATION at 56); or "The Principle of Explicit Rationality," which asks decision-makers to "make as explicit as possible the principles of interpretation and application which influence their decision" because of the obvious "guidance" this can have for "future agreement-makers and interpreters." *Id.* at 64.

<sup>34</sup> "The principles of procedure, though intimately intertwined with content, deal with the agenda used by the problem-solver in bringing relevant subject matter to the center of his attention." INTERPRETATION at 46.

<sup>35</sup> INTERPRETATION at 116-17.

the potential for arbitrary discretion. The McDougal-Lasswell-Miller "principles of content and procedure" are no mere canons of interpretation as traditionally conceived (witness alone the refusal to rank the factors of inquiry as well as the means for evaluating them). The authors seek simply to inject common-sense clarity, or *guidance*, into a welter of technical confusion about what is important for the interpreter to look at and about how he can most efficiently and effectively go about serving both individual and community goals. They do so by refusing to accept language as alone sufficient to resolve the interpretative inquiry, and by recognizing, in balanced fashion, that the problem will be resolved neither by excessive adherence to, nor wholesale rejection of, traditional canons.<sup>36</sup> "The appropriate [general] function of principles of interpretation," they write, "is that of calling the attention of the decision-maker, in an orderly and economic way, to the various features of the process of commitment and its context which must be taken into account in determining the parties' genuine shared expectations and identifying relevant general community policies."<sup>37</sup> Doubtless some will say that this is all very obvious and that it is hardly necessary to go to such lengths to prove the point. But surely this would be profoundly to the credit of the authors' rigorous and rigorously sustained analysis. We too often forget that some ideas are obvious only after someone has taken the great pains that are necessary to make them so.

Contrasted with the first two chapters, the remaining four—detailing past trends in interpretation and summarizing the authors' appraisals and recommendations—contain what will probably be widely regarded as the heart and soul of this perceptive volume, if not because of their greater length overall then because of their less abstract character. However, I could not wholly concur in this judgment. Though these chapters are clearly indispensable in their own right (if only because they continue the essential tasks of rational inquiry<sup>38</sup>),

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<sup>36</sup> The view we recommend thus rejects the excessive emphases of recent years both upon hierarchy as in Beckett and Fitzmaurice, and upon freedom of decision as in Hyde, Stone, and others. The choice between an ordered hierarchy of rules and the rejection of all rules is one which unnecessarily restricts available alternatives. The disciplined, systematic use of such rules, not in precise application as justifications for apparent "objective" decisions, as has been suggested, but rather as specific directives to contextual factors and as procedures for guiding an examination of such factors, is, we suggest, the only reliable means of best approximating, in all cases, the participants' genuine expectations of commitment.

INTERPRETATION at 117.

<sup>37</sup> INTERPRETATION at 111.

<sup>38</sup> The tasks of intellectual inquiry essential for decision include, according to the New Haven Approach, clarification of community goals, description of past trends in decision, analysis of conditions affecting decision, projection of future trends in decision, and invention and evaluation of policy alternatives. For greater detail, see McDougal, *supra* note 11, at 343-45. For a particularly informative presentation of contemporary decision theory (replete with helpful references), see Mayo and Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318 (1964).

they represent more the frosting on the cake than the cake itself. Without the conceptual leaven of the first two chapters, the remainder would taste *relatively* flat. But of course—the reader will perhaps allow me to abuse the metaphor further—no cake tastes very good without frosting. With richness in factual detail and insight, faithfully following the conceptual model previously outlined, Professors McDougal, Lasswell and Miller exhaustively explore all the hoary practices and canons of interpretation that have been customarily employed—*e.g.*, *ut res magis valeat quam pereat* (the so-called rule of effectiveness) and *ejusdem generis* (specific statements are to be preferred to general ones)—skillfully assessing the relevance of each in terms of the goals of individual dignity and overriding community interest. Readers will find extremely valuable the scholarly treatment of existing international (and, to some extent, domestic) case law and the writings of publicists, especially the timely evaluation of the 1966 Draft Articles on Treaty Interpretation of the International Law Commission, which the authors rightly criticize for its retrogressive emphasis on textuality. Aware that their principal proposals are likely to meet considerable resistance in the near future, the authors base their hopes for reform mainly in the automated dissemination of communication data and in the education of future decision-makers. In the end, one is led to conclude that Professors McDougal, Lasswell and Miller regard others' forays into interpretative analysis largely as love's labors [sic] lost. As Shakespeare would have said of these other forays: "They have been at a great feast of languages and stol'n the scraps."<sup>39</sup>

*The Interpretation of Agreements and World Public Order* is, then, a major creative achievement, so much so that nearly any criticism one might offer borders on the picayune. But the work does have some minor shortcomings that nonetheless deserve mention—and of course it would be completely out of character for one tutored in the New Haven Approach to leave them unsaid. I should add, however, that they are tendered mainly in the spirit of missionary zeal and that they differ markedly from some of the more common attacks on the New Haven Approach. They are conveniently divided into complaints about content and procedure (if I may be permitted to use that dichotomy).

First, two grievances about content. Most of the book, as noted, deals with specific past trends in interpretative decision and commentary. This treatment, however, is analytically more restricted than the book's title, introduction, or even first two chapters generally lead

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<sup>39</sup> W. SHAKESPEARE, *LOVE'S LABOUR'S LOST*, act V, scene 1, line 39. McDougal, Lasswell and Miller write, "The melancholy truth is . . . that the past and present stream of interpretation is inadequate. Patent discrepancies exist between what is too often done in fact, and defensible conceptions of what is, or ought to be, accepted practice." *INTERPRETATION* at 360.

one to expect. The bulk of the book does *not* explore, as one might suppose, the interpretative experience of *all* arenas of decision nor, for that matter, the interpretation of *all* agreements.<sup>40</sup> Rather, it is limited primarily to consideration of the interpretative practices of *international third-party arbiters*, most notably the World Court. To be sure, this mild raising of false expectations is not of itself cause for much complaint. The alert reader will surely be sensitive to the discrepancy. And the discrepancy itself does raise some important questions about institutional operations and goals.

From an operational standpoint, thus, to what extent can we fairly presume, as the authors seem to do, that recommended interpretative principles inspired largely by the experience of relatively well-organized fora are equally appropriate for more-or-less unorganized arenas of decision? Highly institutionalized fora—*e.g.*, the International Court of Justice or the Supreme Court of the United States, as well as temporary or ad hoc tribunals (international and domestic)—usually possess the time and other resources seemingly necessary for undertaking in full the disciplined enterprise called for by the authors. But surely less rigorously structured arenas of interpretation, especially those attuned to the demands *and* virtues of instant decision—*e.g.*, foreign offices and, on occasion, international organizational agencies—often do not. In short, there exists a problem of feasibility and practicality for interpreters compelled to make instant decisions. For the neophyte and doubting Thomas at least, this calls implicitly into question the authors' emphatic (but, I maintain, convincing) refusal to accept a hierarchical ordering of interpretative principles.

I am not suggesting that the McDougal-Lasswell-Miller study, however restricted in scope, does not bear enormously valuable implications for all types of decisional arenas. Obviously it does. As Professor Moore has colorfully written, "[n]o one . . . would downgrade the computer because it is not a useful device for the task of making the weekly grocery list."<sup>41</sup> Nor am I saying that the authors are insensitive to the problem I have raised. To the contrary, their

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<sup>40</sup> As is by now obvious, the book does not treat of the interpretation of *all* agreements (except in an elevated theoretical sense), but only of *international* agreements. At the outset, however, one is led temporarily to wonder whether even *all* international agreements come within the authors' purview. They write: "By agreement we refer to outcomes of commitment, both explicit and implicit in social progress, which are achieved by strategies consisting more of persuasion than coercion." INTERPRETATION at 13-14 (footnotes omitted). Given the authors' persuasion-coercion continuum, it is of course possible to talk about coercive agreements. On the other hand, at what point is an "agreement" marked by coercion no longer an "agreement"? Consider, for example, how we might compare the outcomes reached between Czechoslovakia and the Soviet Union at Prague on October 16, 1968 (relative to the stationing of Soviet troops in Czechoslovakia) with the German view of the Treaty of Versailles following World War I? This kind of question is of course intended to be answered by the authors' "principles of content" as those principles pertain to the Process of Agreement. But, then, doesn't this make the persuasion-coercion continuum irrelevant and thus unnecessarily confusing?

<sup>41</sup> Moore, *supra* note 28, at 680.

careful delineation of the diverse characteristics of the process of decision within which the interpretative act is performed<sup>42</sup> and their advocacy—as a “principle of procedure”—of “The Operation of Adjusting Effort to Importance”<sup>43</sup> (described as adjusting “the time and facilities devoted to the act of interpretation according to the importance of the values at stake in the controversy and to community policies”<sup>44</sup>) simply belie such an assertion. Nevertheless, precisely because the authors acknowledge that “[t]he most important appliers and interpreters of international agreements . . . are still perhaps nation-state officials”<sup>45</sup> (for whom, as noted, time and other interpretative resources are often scarce), the focus upon international third-party interpretations tends to obscure the authors’ sensitivity to, and to divert our attention from, the very real functional problem of economy here raised. “The Operation of Adjusting Effort to Importance”—the authors’ persuasive answer to those who would insist that a hierarchial ordering is required—simply tends to get lost in the shuffle, thereby fostering a lack of confidence in the universal applicability (or relevance) of the authors’ recommendations.

Of course we cannot blame the authors for dwelling upon international tribunal interpretations, given the obvious difficulty of securing written (if any) interpretations from other than judicial-like fora. But we can insist upon a greater and more detailed recognition of the operational difficulties that are ordinarily encountered in unorganized arenas of decision. This could have been done, in part, by repeated qualification or by re-emphasis in the concluding chapter. Most helpfully, it could have been done by detailing more elaborately precisely how we are to draw the inferences suggested by “The Operation of Adjusting Effort to Importance.” It is not enough to say that “[a] rational perspective calls for estimates to be made of the gains and losses to be expected by proceeding further or turning from the current inquiry,”<sup>46</sup> or that “the decision-maker has the responsibility of giving careful consideration to the magnitude of the values at stake from the standpoint of community policy.”<sup>47</sup> The hierarchy advocates will finally be vanquished only when the methods of making gain-loss estimates and value-policy considerations are precisely detailed. One answer, of course, is to adopt the New Haven Approach by assessing these matters in terms of the multi-phase processes of agreement, claim and decision. But then, one may ask, how is *this* to be economically done in the instant decision context? The short

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<sup>42</sup> See INTERPRETATION at 27-29.

<sup>43</sup> See INTERPRETATION at 65-66, 302-07.

<sup>44</sup> INTERPRETATION at 65.

<sup>45</sup> INTERPRETATION at 28.

<sup>46</sup> INTERPRETATION at 66.

<sup>47</sup> *Id.*



answer: do as much as you can the best you can,<sup>48</sup> "adjusting efforts to importance."

The other problem born of the discrepancy mentioned concerns the goal of approximating "genuine shared expectations" within the framework of higher constitutive priorities. As a general proposition, this is surely *the* overriding principle around which to organize the interpretative enterprise for relatively well-structured international third-party arbiters. Such interpreters manifest, in varying degree, of course, a kind of emotional detachment from the particular demands that claimants project when invoking community processes of authority. But is this organizing principle (or goal) equally meaningful for more unstructured arenas in which the *dédoublément fonctionnelle* phenomenon is at work (*i.e.*, where claimant and interpreter are one) and in which emotional detachment is therefore rendered more difficult, if not sometimes impossible?

Again, it is important that neither I nor the authors be misunderstood. I am not suggesting, as Professor Falk seems to do in his recent and constructive review of the McDougal-Lasswell-Miller study,<sup>49</sup> that "genuine shared expectations" and fundamental community policies can rarely be realized in more-or-less horizontal (or partisan) decisional contexts. As the authors point out, "[w]hat restraint there is upon arbitrary decision, and it is not insignificant, is afforded by the same sanction which supports all international law: common interest, policed by need for reciprocity and fear of retaliation."<sup>50</sup> To this can be added, in further partial answer to Professor Falk, here and elsewhere,<sup>51</sup> that the observable tendency of

<sup>48</sup> This is not intended as a flip response. The point is, as Professor Moore has remarked, that "[s]ensitivity to function is the only guide to profitable use." Moore, *supra* note 28, at 680. While the New Haven Approach does require rigorous and systematic analysis, no one—least of all Professors Lasswell and McDougal—would insist upon its use to the point of rendering decision itself a virtual impossibility. Obviously, one has to pick and choose. But always with an eye to policy and with full realization of one's observational standpoint. Regrettably, too many assume a slavish response to the demands of the New Haven Approach, and this, in turn, generates a kind of petrification which tends to inhibit its use altogether and, so, to minimize the potential for truly rational decision. On the other hand, as one who has utilized the New Haven Approach, I must confess a certain suspicion (born of my own share of intellectual fear and inertia) that the difficulty of its use is grossly exaggerated, and that time and other resources are often more readily available than we care to admit. Foreign offices and United Nations delegations, for example, are generally staffed with skilled (if not always numerous) negotiators who are expert in anticipating and marshalling precise arguments well in advance of actual debate and who are, moreover, well versed in the liberating delaying tactics that are commonplace in the interpretation-negotiation process. For related thoughts, see notes 61 & 70 *infra* and accompanying text.

<sup>49</sup> See Falk, *supra* note 1, at 344-52.

<sup>50</sup> INTERPRETATION at 28. I would submit, however, that the restraint is not as significant as this statement, standing alone, implies. My discussion that follows suggests that the authors agree.

<sup>51</sup> Professor Falk's praiseworthy concern for impartiality is, I think, a bit excessive when addressed to the McDougal-Lasswell-Miller study. It stems in the main from his provocative book, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964). For more of my reactions to Professor Falk's thesis, see Weston, Book Review, *L'Affaire Sabbatino: A Wistful Review*, 55 Ky. L.J.

national officials (judicial, executive and legislative)—or, for that matter, international officials (judicial, executive and parliamentary)—“to invoke norms [or interpretations] that correspond with the national preference”<sup>52</sup> is not necessarily destructive of world order but merely reflective of the vast process of claim and counterclaim by which that order is by and large established. Neither am I agreeing with Professor Falk (or with what Professor Falk seems to be saying) that the authors have failed to take sufficiently into account “this central feature of the interpreter’s orientation,”<sup>53</sup> or, in other words, the problem of bias. Throughout their study, in their delimitation of the processes of agreement, claim and decision, in their clarification of community goals, and in their recommendation of specific “principles of content and procedure,”<sup>54</sup> the authors make abundantly clear that restraint of partisanship ranks high among their priorities. Indeed, their entire study is a manifesto against bias. Because of this I see little or no reason why war-peace, human rights or other politically sensitive issues for which Professor Falk evinces unimpeachable concern could not satisfactorily be dealt with (to the extent that they implicate the interpretative process) were all decision-makers to adopt the McDougal-Lasswell-Miller approach.

What *does* concern me about the authors’ “primary or initial” organizing principle (or goal) of ascertaining “genuine shared expectations”—and perhaps this is what Professor Falk is really driving at—is the disproportionate emphasis they give to it. Insofar as more-or-less partisan interpreters are concerned (*e.g.*, foreign office, and sometimes international organizational, officials), the principle is by and large empirically unjustified and therefore irrelevant. Interpretation in a diplomatic (or horizontal) arena of decision is essentially a matter of negotiation or bargaining—a renewed, or post-outcome, process of agreement. In such setting, the claimant-interpreters seek less to ascertain original shared expectations (if, indeed, expectations were even “shared” in the first place) than they seek the “extension,” “normalization,” “redistribution” or “innovation” of the agreement, or even “side-effects” largely unrelated to the agreement.<sup>55</sup> In a world

844, 853-57 (1967), reviewing E. MOONEY, FOREIGN SEIZURES: SABBATINO AND THE ACT OF STATE DOCTRINE (1967).

<sup>52</sup> The phrase is drawn from R. FALK, *supra* note 51, at 75.

<sup>53</sup> Falk, *supra* note 1, at 345.

<sup>54</sup> *E.g.—Content*: “The Principle of Projecting Genuine Expectations,” embodying the traditional principles of “effectiveness” and “restrictive interpretation” (INTERPRETATION at 52-53); “The Principle of Adapting the Level of Generality or Particularity to the Other Features of the Context,” required because “[b]y examining the whole concatenation of factors arbitrariness may be avoided” (*id.* at 57-58); “The Principle of Adapting Impartiality,” required because if the overriding goal of human dignity is to be realized “every party is entitled to equality of consideration” (*id.* at 61); “The Principle of Explicit Rationality,” required because for “guidance and self-knowledge” it is necessary to explain what principles “influence” decision (*id.* at 64). *E.g.—Procedure*: “The Operation of Estimating the Effects of Decision,” required because decisions “affect general confidence in the integrity of the decision process” (*id.* at 76-77); “The Operation of Examining the Self for Predispositions Incompatible With the Goals of Human Dignity,” required for eliminating bias. *Id.* at 77.

in which, to requote the authors, the "most important appliers and interpreters of international agreements . . . are still perhaps nation-state officials,"<sup>56</sup> does not the central placement of the "genuine shared expectations" principle in the McDougal-Lasswell-Miller scheme again create a possibly justified lack of confidence in the authors' recommendations about what is important for the interpreter to look at and about how he can most efficiently and effectively go about serving both individual and community goals?<sup>57</sup>

Professors McDougal, Lasswell and Miller have not dealt sufficiently satisfactorily with this problem. Their thesis, though not their vision, has been distorted by their repeatedly heavy, albeit necessary, reliance on the international third-party interpretation context. Concededly, the authors do display the sensitivity to the problem that we are accustomed to expect from the dynamic procedures of the New Haven Approach. Indeed, when characterizing the "genuine shared expectations" principle (or goal) as their "primary or initial" goal, they indicate the solution: the "genuine shared expectations" principle may be subordinated (though perhaps not disregarded altogether).<sup>58</sup> Recognizing that "[t]he significant characteristics of decision-makers may vary in the same ways as . . . the parties to international agreements"<sup>59</sup> and that "the availability and accessibility of relevant indices of subjectivities will vary greatly from case to case, and in some instances may be meager or confusing in the inferences they suggest,"<sup>60</sup> then "even the most conscientious interpreter can have no recourse other than to eke out inferred subjectivities *by reference to basic, general community policies*"<sup>61</sup> (e.g., conflict resolution and the maintenance of minimum order). The difficulty is, however, that the authors do not say enough about (or do not sufficiently re-emphasize) the competing sovereignty-oriented pressures and perspectives which so dominate most of the international interpretation process. Consequently, they lull us into a somewhat crooked perception about the interpretative world in which we live. Had they said more—had they woven this theme (and especially some operational guidelines by which more-or-less partisan claimant-interpreters can pursue basic world order goals)<sup>62</sup> more pervasively and precisely into their overall conceptual

<sup>55</sup> These "objectives" of the agreement-making process are drawn from Fred C. Ikle's highly illuminating, but nonetheless insufficiently systematic study, *How NATIONS NEGOTIATE* ch. 3 (1964).

<sup>56</sup> INTERPRETATION at 23.

<sup>57</sup> For an indication that this may be so, see Gottlieb, *supra* note 1, at 128-29.

<sup>58</sup> Contrary to Professor Briggs, the authors do *not* "believe that the beginning and end of treaty interpretation is to discover 'the genuine shared expectations of the particular parties.'" Briggs, *supra* note 26, at 544.

<sup>59</sup> INTERPRETATION at 23.

<sup>60</sup> INTERPRETATION at 29.

<sup>61</sup> *Id.* (emphasis added).

<sup>62</sup> Professor Falk comments on this point as follows:

The McDougal-Lasswell-Miller reliance on the rhetoric of "genuine expectations" and community policies allows an attuned decision-maker to invoke the proper language without, in any sense, being influenced by it. In this

fabric—they would have added immeasurably to the persuasiveness of their program.

My second and last general complaint—the procedural note—I hesitate to make, partly because of the twitting it may occasion among some who navigate in the McDougal-Lasswell-Miller universe, but mainly because I am myself doubtless susceptible to the same criticism. It concerns the authors' language and/or style.

Now let it be understood, I am *not* balking at the authors' technical vocabulary, still less at their analytical typologies—sometimes disparagingly called “McDougalese.” To the contrary, I gladly commend it, however difficult it is for some to fathom, since I am aware of the extraordinarily liberating and insightful effect it has on a profession whose primary impact has too often been to obfuscate rather than to clarify. Those who, like other well-intending reviewers, and despite agreement with the book overall, would criticize the McDougal-Lasswell-Miller study (or any of the studies based on the New Haven Approach) because it constitutes “a linguistic morass in which the authors have chosen to bury their own powers of communication”<sup>63</sup> or because “the rubrics employed . . . achieve an elevated level of abstraction” which has led the authors “to reformulate in their own jargon a modern set of canons of interpretation” so that “[p]ossibly one hundred pages are squandered on . . . dogmatic scientism,”<sup>64</sup> simply reveal a mistaken but widespread tendency to

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sense, in the absence of specific operational demonstrations, the Yale authors have created a new framework of legal fictions rather than a rational framework for policy-oriented inquiry.

Falk, *supra* note 1, at 351 n.85. One difficulty with Professor Falk's argument is that he does not himself make very explicit what “operational demonstrations” he would accept. Of course, this is tough business. But it should not be overlooked that Professors McDougal, Lasswell and Miller go to extraordinary lengths to give specific application to their highest level goals when dealing with the particular problems that represent the real world of concrete competing claims. They do so, indeed, to a degree far surpassing similar efforts by the New Haven Approach elsewhere. Yet Professor Falk's criticism, born of a desire to prevent the chauvinistic manipulation of the law, remains valid to the extent (beyond which I think it would be unjustifiably extreme) that it concerns the McDougal-Lasswell-Miller treatment of more-or-less partisan interpretative arenas. On the other hand, there is not now, nor is there ever likely to be, as Professor Falk seems to have suggested several years ago, “a scientific alternative to human judgment.” See Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231-32 (1964). Neither scientific nor social rules or “operational demonstrations” automatically decide cases, and for any of us to think as much (I do not include Professor Falk) is to dance an arcane positivist pantomime. The essential point is that we consciously and continuously display sensitivity to function and policy, a theme clearly expressed in the McDougal-Lasswell-Miller content “Principle of Explicit Rationality” (see INTERPRETATION at 64, 265-66) and all the recommended “principles of procedure.” Still, given that there are always competing *policy* choices to be made even (perhaps especially) within the framework of a public order of human dignity to which all of us would subscribe, we must concede that there remains much room for intellectual endeavor in the matter of clarifying how controlling policies are to be chosen and how, once chosen, they are to be surely translated or applied to the particular decision. For related thoughts, see Gottlieb, *supra* note 1, at 123-28; note 48 *supra* and accompanying text. See also note 70 *infra* and accompanying text.

<sup>63</sup> Briggs, *supra* note 26, at 543.

<sup>64</sup> *Id.*

believe that traditional legal thinking, with all its normatively ambiguous and contradictory trappings, is adequate to the task of coping with social reality. As Professor Moore has written, much of this kind of criticism "stems from a *genuine* difficulty in understanding the specialized [and normatively neutral] terminology of [the New Haven] policy-oriented jurisprudence,"<sup>65</sup> a difficulty which neither I nor, I suspect, Professor Moore would care to minimize. But as Professor Moore goes on to say, it sometimes stems "from a natural suspicion [I would add fear], nurtured by a jargon-filled world, of that which is not understood."<sup>66</sup> In short, it is extremely important to understand, in a cosmological sense, what the New Haven Approach is trying to do. Professor Falk's apt eloquence needs almost nothing from me:

McDougal strives to achieve clear and precise expression. His sentences are *almost always*<sup>67</sup> impossible to improve upon. Their complexity stems from an insistence upon nuance and accuracy, not from an infatuation with German metaphysics, or some inborn quality of verbal ineptitude. McDougal, with the substantial help of Harold D. Lasswell, is engaged in the formidable task of developing and applying a jurisprudence that takes *systematic account* of all aspects of social reality relevant to the processes and structures of making *rational* decisions about legal policy alternatives. This is a complicated endeavor and requires an elaborate intellectual apparatus. It would not occur to anyone to complain about Einsteinian theories of physical reality on the ground that they were abstruse and not readily susceptible to lay understanding. Well, it is time that we appreciate that theories about social reality are also likely to be comparably complicated if they are to render service. Our expectations seem quite wrong. Why should a reader be entitled to grasp McDougal's ideas on international law without special effort and training? We confront an insidious form of anti-intellectualism whenever we meet the argument that legal analysis must be carried on in a fashion that requires its meaning to be evident to the uninitiated or hurried reader. All [or almost all]<sup>68</sup> that it is proper to demand is that legal analysis bring added knowledge and understanding to the adept.<sup>69</sup>

May I now quote Professors McDougal, Lasswell and Miller out of context? "If the light cannot be dazzling there is no reason for sulking

<sup>65</sup> Moore, *supra* note 28, at 674 (emphasis added).

<sup>66</sup> *Id.*

<sup>67</sup> Emphasis added.

<sup>68</sup> Insertion added.

<sup>69</sup> Falk, *International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal*, 59 AM. J. INT'L L. 66, 70-71 (1965).

in the dark.”<sup>70</sup> Of course, if the light cannot be dazzling, neither should we succumb to what Abraham Kaplan has called “the principle of the drunkard’s search: He looks for his house key, not where he dropped it, but under the street lamp, because ‘it’s lighter there.’”<sup>71</sup> There *are* limits to rationality. But if properly understood, the New Haven methodology (a highly specialized tool forged from throughout the behavioral sciences) will be recognized for what it is in fact: a policy-oriented check-list which, purporting neither to recreate the “real world” in all its detail nor to dispense with that final creative choice which every decision-maker must make,<sup>72</sup> seeks only tentatively and undogmatically to “guide scholarly activity in directions that are presently accepted as valuable.”<sup>73</sup> In a world in which, at home and abroad, the law is coming increasingly under fire for being regressive or irrelevant, the New Haven Approach has proven fantastically well-suited to making the law both progressive and relevant to the interpretative and other complex worlds of human behavior. Jargon is not by definition bad. It is simply that some jargon is more equal than others.

Perhaps contrary to Professor Falk, however, “added knowledge and understanding to the adept” is not “all that is proper to demand” of legal analysis. We can also hope that comprehension and insight will be facilitated, and this requires clarity of expression above all.<sup>74</sup> Regrettably, Professors McDougal, Lasswell and Miller do not wholly succeed in this regard—essentially in two ways. Though here limited principally to the authors’ Introduction and first two chapters, these two failings occur at the outset of most of the studies that have been inspired by the New Haven Approach—the more regrettable because our willingness to read to the end is ordinarily determined by how things are said at the beginning.

First is the problem of excessive theoretical abstraction. Throughout the beginning of the book, as I have indicated, the reader is given abundant conceptual insights, but with only modest effort by the authors to root their message in the *terra cognita* of factual demonstration. Consider, for example, the authors’ “preliminary identification” of the “Participants” in “the Distinctive Process of Agreement.” It reads, in part, as follows:

<sup>70</sup> INTERPRETATION at xviii.

<sup>71</sup> Kaplan, *Some Limitations on Rationality*, in NOMOS VII: RATIONAL DECISION 55, 60 (C. Freidrich ed. 1964).

<sup>72</sup> As to the final indeterminism or uncertainty that is inherent in legal process, see McDougal, *The Ethics of Applying Systems of Authority*, in THE ETHICS OF POWER 221 (H. Lasswell & H. Cleveland ed. 1962).

<sup>73</sup> H. LASSWELL, THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS 2 (1956).

<sup>74</sup> This is, I think the point of Professor Gottlieb’s rather hyperbolic observation that “in the large, solid part of the *Interpretation of Agreements* devoted to the analysis of juridical practices, it is evident that the authors themselves do not always feel the need to indulge in their neoscientific language and that its use may be a luxury of style more significant as a badge of allegiance than as a tool of communication or as a ‘value cleanser’ in legal discourse.” Gottlieb, *supra* note 1, at 131.

The participants in processes of persuasion, as in processes of coercion, are group and individual. The most important group participants, in terms of the value impacts of the agreements they make, remain of course the nation-state and lesser territorially organized communities. Of increasing importance, however, are international governmental organizations, private associations devoted to wealth and other values, political parties, and pressure groups.<sup>75</sup>

The authors go on to explain "individual" participation in terms of the individual's role as surrogate for the "group" and as "the ultimate actor in all group interactions."<sup>76</sup> Concededly, the authors do make clear what they mean by "group" and "individual" participants, and surely it is unnecessary to specify exactly how nation-states, international governmental organizations and, perhaps, private associations partake of the international agreement-making process. After all, the authors are entitled to assume some measure of competence, even on the part of the neophyte. But is it so apparent how political parties and pressure groups (or even "lesser territorially organized communities" especially for those of us who are accustomed to living in a federated community like the United States) participate in the international agreement-making process? My example is simplistic of course. But how much easier and less vexing the already difficult job of learning would be had the authors peppered their early discussion with concrete illustrations of at least the less-than-obvious!<sup>77</sup> Doubtless a good book, and especially a monumental one, is worth reading forward and backward and over and over again. But should we be compelled to do so extensively?

Second, and intimately related, the authors make only a minor effort to define their terminology. The alert reader will of course be aware when, by way of subsequent elaboration or repeated use, a technical term or phrase, at first left undefined, becomes understandable. This is particularly true of the authors' "meta-language" (*e.g.*, "participants," "objectives," "situations," etc., or "wealth," "power," "respect," etc.). But not all terms are defined (*e.g.*, "value") and not all become clear simply by repeated use. Thus, notwithstanding repeated use in the interim, the term "subjective events," a key term

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<sup>75</sup> INTERPRETATION at 14.

<sup>76</sup> INTERPRETATION at 14-15. Curiously, the authors say nothing about individual participation in a non-surrogate capacity, as would be the case, for example, of foreign public bondholders or of individual concessionaires or entrepreneurs.

<sup>77</sup> *E.g.*: "Forums arise whenever communicative acts become at least partially stabilized. Reflection will show that it is sometimes useful to identify such micro-forums as occur between two people—as for example, between Winston Churchill and Franklin D. Roosevelt during World War II. No one can doubt the significance of such relationship for the flow of international agreement or for the occurrence of problems of interpretation." INTERPRETATION at xiii. Imagine the foregoing without the authors' "for example."

first mentioned at page x (but unnoted in the Subject Index<sup>78</sup>), is later defined at page 38: "the intent to participate in a given activity in a certain way." Similarly, and again despite repeated use in the interim, the word "subjectivities," first mentioned at page xi, is later defined at page 10: "demands, identifications, and expectations" (themselves words of art left initially undefined). Quite apart from the obvious question why the authors so postpone their definitions, this sort of checkered procedure (and it is not infrequent) naturally raises questions, few of them answered by even a dictionary. Do "subjective events" and "subjectivities," sometimes used seemingly interchangeably, mean the same thing? Do "shared subjectivities" and "shared expectations," likewise interchangeably used, mean the same thing? And so forth. Perhaps, then, even for the initiated there are esoteric hurdles. Surely it would have behooved the authors to be more explicit at the outset. An obvious solution would have been an extensive glossary at the close of the text. Alternatively, the authors might have prepared an expanded Introduction (partly standardized and thus useful for other related studies) detailing not only their technical communication theory terminology and their "meta-language" but also, in broad outline, the whole cosmology of the New Haven Approach.<sup>79</sup>

The point is, of course, that the authors *do* want to be heard. They *do* want to influence. Stylistic tongue in cheek, can it be denied that their intelligence-serving and recommending functions would be still better served had they more effectively employed the whole concatenation of strategies that past trends have demonstrated better calculated to maximize the consequentiality of one's objectives?

So much, then, for my major complaints, though like all reputation-conscious reviewers I am loathe to admit that I have no more. But the fact is, I do not. In retrospect, indeed, I wonder if even these that I have mentioned are especially significant. This is, I hasten to add, an honest wonder, born of the knowledge that the book I have here considered constitutes a truly major creative achievement. Whatever it may lack in the particular, it overwhelms in the general. It is my fervent hope that those who, for whatever reason, have avoided analyzing and debating the New Haven Approach in the past will stop doing so now. *The Interpretation of Agreements and World Public Order*, the latest major policy-oriented study from New Haven, will make it more than well worth their indulgence. In sum, this is a book that deserves the closest possible scrutiny by the widest possible audience.

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<sup>78</sup> The authors' Subject Index, incidentally, seems of marginal utility, at least for the uninitiated, owing to its incomplete character (e.g., "focal agreement," first mentioned in the text at page 19, is first noted in the Subject Index at page 36) and its generally esoteric nature.

<sup>79</sup> See, for suggestive example, McDougal, *supra* note 11, or Moore, *supra* note 28.