argued that Madison's support of a bill of rights was dictated by the fact that he had to do so or lose his political hide in Virginia.

Levy shows that it was not until the Sedition Act of 1798 that an unqualified libertarian theory of freedom of expression finally evolved in the United States (p. 249). But it will give small comfort to admirers of the Jeffersonians to discover that when in power, their practice did not conform to their rhetoric. They too sought to prosecute their political enemies as the Federalists had done, while the Federalists became, naturally, the defenders of freedom. As John Adams said so aptly, the Constitution was "a game at leap frog."

Despite my reservations, some of which I have indicated and some of which are serious, I think the book is invaluable. It is a healthy corrective to much woozy thinking about a central problem; it re-examines a great deal of material objectively; and it calls attention to many a significant but forgotten or unknown tract, such as that of Tunis Wortman. No student of early American history, be his interest law or politics, can safely ignore the book.

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STUDIES IN WORLD PUBLIC ORDER. By Myres S. McDougal[1] and Associates. New Haven: Yale University Press. 1960. Pp. xx, 1058. $15.

One of the few men in this country to found a school of legal writing is Professor Myres McDougal of Yale, who describes his program as a "contextual, policy-oriented jurisprudence" (p. ix). Reflected in these twelve essays by Professor McDougal and his eight associates is the behaviorist approach to the social sciences. The essays exhibit a passion for explaining the processes of power and decision and an equal degree of impatience with rules, described as "normative-ambiguous" (p. 164), and with logical deduction, called "transempirical derivation and justification" (p. 994). Professor McDougal's world is alien to that of Blackstonian stare decisis or Langdell's case method; rather it is a world of policy in which the lawyer's role is to clarify interests or goals by discerning and evaluating alternative strategies. This fluid, dynamic school seems at first glance to have a particular affinity with international relations, and appropriately Professor McDougal and his colleagues devote most of their scholarly efforts to international law. Their radical attack on traditional conceptions of law is made doubly effective by the peculiarly vulnerable position which international law seems to have assumed in the mind of the public and bar. Their approach appears as a new beacon to those impatient with the process of international law and dissatisfied with much of its content. The present collection of representative essays codifies the new school, places its primary writings in one convenient source, and affords an excellent opportunity to study the policy-oriented school as a whole.

Certainly the first impression Professor McDougal gives is one of common sense and practicability. Reliance on reasonableness is the key-

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note of the essays. In any dispute, he asserts, international legality is to be determined by balancing the particular exclusive interest of the individual state against the general interests of the community of states. In describing the process of deciding claims to portions of the high seas, he writes that "for all types of controversies the one test that is invariably applied by decision-makers is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context, is *reasonable* as between the parties" (p. 778). The most famous essay of the collection, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security" (pp. 763–843), gives a concrete example of this balancing: When, in 1954, the United States used part of the high seas for hydrogen-bomb tests, the result was a minimal restraint on navigation and fishing compared with a highly legitimate use of the ocean resources for testing. The tests, Professor McDougal argues, were reasonable because at stake was the security of the free world alliance, while only minimal interests were sacrificed. Being reasonable, the tests were therefore legal.

This balancing of interests is to be done afresh in each case, taking into account many factors, with the decision to be arrived at by bargaining and compromise; the international lawyer must therefore be trained in the clarification of alternatives and the sorting out of masses of detail. In the international scene where enforceable judicial decisions are infrequent and conflicting claims are legion, this picture of the policy-oriented lawyer appears quite realistic. It is tempting to forsake the frustrating task of keeping up with conventions, awards, customs, the works of publicists, and other sources of international rules, and turn to the actual actions and aims of states. Professor McDougal does not entirely disregard international rules, but admits them only as one of many factors in policy decisions. Nor may a state in his program act amorally. Indeed it is the duty of the lawyer to encourage enlightened state policies and promote an ultimate international order that will be conducive to human dignity. For Professor McDougal holds paramount the "intensity" of a nation's "dedication to the goal values of human dignity," as opposed to "the suicidal invocation and extrapolation of irrelevant, absolutistic labels" (p. 842 n.322).

As an example of what Professor McDougal considers a leading decision applying the test of reasonableness, he cites the *Anglo-Norwegian Fisheries Case*.[2] The International Court in that case upheld Norway's claim to exclusive fishing rights over a large area beyond what was traditionally considered the proper limitation of territorial seas on the grounds of the "general toleration of the international community" and Great Britain's failure to protest the claims even though apprised of them for a long time.[3] The majority opinion places most of its emphasis on this technical factor of consent, although in passing it alludes cryptically to the "consideration" of "certain economic interests peculiar to a region . . . ." Professor McDougal seizes upon this mention of

[2] [1951] I.C.J. Rep. 116.
[3] *Id.* at 138.

"economic interests" and weights it in his own summary of the case on a par with consent and acquiescence, concluding that the Court "upheld Norway's system upon broad grounds of reasonableness . . ." (p. 785). While on the one hand it is most questionable that the majority opinion used the approach of reasonableness, it is clear on the other that Professor McDougal does consider the factor of "economic interests" in his own reasonableness equation. This is further demonstrated by his argument in a later essay that exclusive fishing rights may be reasonable because of "certain special factors" including "the degree to which the claimant's economy is dependent upon the exploitation of adjacent fisheries" (p. 898). Thus it is reasonable in Professor McDougal's broad conception to take into account the wealth of one state and the poverty of another.

The most fundamental objection to Professor McDougal's thesis is this equation of reasonableness with legality. The very breadth of his conception of reasonableness, the multiplicity of factors involved, and the uniqueness attached to strict consideration of context, erodes the predictability of law and instead infuses it with the psychological debility of ex post facto rationalization. The great danger here is that, were Professor McDougal's approach accepted, legal thinking would turn from the propounding of broad beneficial conventions and improvement of existing rules to the detailed rationalizing of the factors of specific cases. Without the stability of rigid rules international claims would spawn many clashes that otherwise would never arise. The absence of precise standards by which to judge the validity of a country's claims would foster continuous and conflicting demands. Lacking rigid prohibition, a state might well decide it could reasonably claim exclusive rights to hitherto high-seas fisheries because its army needed fish and it needed its army for security. Or it could confiscate alien property with impunity, claiming that it needs the property more than the foreign capitalists. Moreover, situations repeatedly develop which place a nation in an embarrassing position, and the only course of action which does not alienate large groups is the course explicitly prescribed by the rules of international law.

Another substantial danger is the threat of lessening respect for the law. When there is no clear rule to invoke, it is hard to convince the losing party in any adjudicatory context that the decision-makers are not merely rationalizing their result. Certainly almost anything may seem reasonable to the partisan. If there were no norm whatever, a rather equally balanced case would be nearly impossible to decide. In a situation where one nation was clearly in error, the only rule of law the judges could offer for their decision would be the ground of *ex aequo et bono*. But this ground has never been used by the International Court, probably because of a deep-seated conviction that the losing nation would resent its well-considered claim being defeated because unreasonable as a matter of law. On the other hand, it is very convincing to have rules of law to cite. It is historically true that people respect establishment and custom, and that the previous use and general applicability

of a rule makes it more easily accepted and obeyed. This helpful human pattern is too valuable a tool to discard out of mere impatience.

Another objection of a more practical nature is that the people who are involved in international decision-making do not all want the same service from international law. A weak nation may want broad international protection, while a strong nation bargains for the least interference possible. Each position is quite reasonable, and in the absence of at least a few inflexible rules the strong nation might be expected gradually to eat away the defenses of the weaker. Professor McDougal argues that a feeling of reciprocity will balance the position bargainers take, that a strong nation in this case would behave reasonably for fear of like treatment from a still stronger nation or a coalition of weak nations in the future. But fear of like treatment has not prevented nations from making outrageous claims in the past — witness those of Peru, Ecuador, and Costa Rica to a territorial sea of 200 miles, cited by Professor McDougal in a footnote (pp. 895–96 n.133). In addition state officials well might refrain from protesting unreasonable claims of other states for political motives or for a different sort of reciprocity — the chance later to make an equally unreasonable claim. In sum, although an international law of human dignity based upon reasonableness would be extremely desirable, unfortunately it has been truly said that the least common commodity is common sense. Professor McDougal's program, which seems to be an efficient, practical, and businesslike manner of airing all interests, is on analysis rather utopian.

Professor McDougal may justifiably criticize the flaws and inadequacies of the present law, but it is fortunate that in spite of differing goals, differing amounts of humanitarianism, and differing traditions, there is in the world a rather general respect for a large number of established rules and broad conventions. It is fortunate also that in practice judges are able to apply these rules with enough latitude to hand down generally reasonable decisions even though respecting as far as the words will allow the verbal rules. Scholars and international commissions are working within the framework of the present law to bring it up to date, and if they have to work slowly lest there be confusion, and invoke traditional (but well qualified) labels lest there be disrespect, then realistically that is the world they must deal with. There is no doubt that this collection of Professor McDougal's essays will be of great benefit, as the essays have been in their previous publications. His penetrating analysis constantly causes the reader to reconsider traditional premises and to take note of the social goals the rules of law should be serving. It is also clear that his essays and specific suggestions will be of great substantive aid to the continuing improvement of the rules of international law. It is unlikely, however, that Professor McDougal will convince the nations of the world to overthrow traditional rules in favor of flexibility and reasonableness. And perhaps, considering the chaos that might ensue, it is just as well.

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