

# MYRES S. MCDUGAL: ARCHITECT OF A JURISPRUDENCE FOR A FREE SOCIETY

“no more a person  
Now but a whole climate of opinion  
Under whom we conduct our differing lives.”  
—Auden

*W. Michael Reisman\**

A few names stand out for their contributions to our understanding of law and its relation to social processes: Aristotle, Thomas Aquinas, Montesquieu. Myres Smith McDougal, the founder of the New Haven School of Jurisprudence, is a member in full standing of that small club. Indeed, future generations will view his contribution as even more important than those of his illustrious predecessors, for, in addition to analysis and insight, McDougal brings a luminous vision of the objective of law that is to inform each particular decision: human dignity.

There will surely be many biographies of Myres McDougal, which will explore the transformation of a shy and, initially frail, youngster into the powerful figure who has played such an important role on the world stage. We can essay only a few brush strokes here. Myres Smith McDougal was born in 1906 in the farming community of Burton, Mississippi. His father was a country doctor and something of a local political boss. McDougal's childhood blended close, trusting family ties with prudent cautions against the machinations of

---

\* Hohfeld Professor of Jurisprudence, Yale Law School. These remarks were made at the Law Weekend Banquet on March 23, 1996 in Oxford, Mississippi. Part of them have been drawn from an earlier appraisal of Myres McDougal. See *W. Michael Reisman, Myres McDougal*, 18 INT'L ENCYCLOPEDIA SOC. SCI. 479 (1979).

strangers, and these early impressions seem to have become tenets of McDougal's thought, in his emphasis on the importance of stable relationships on which one can rely, the human agency in political organization, the continuous relevance of power, and the practical importance of learning. But the bucolic picture of the childhood of a Mississippi farm boy that McDougal himself has sometimes cultivated, was something of a myth. McDougal's earliest years moved between Northern Mississippi and Louisville, Kentucky, as his father completed his studies at the University of Kentucky, then one of the four major medical teaching centers in the United States. Thereafter, McDougal's father often took advanced courses in Chicago during summers and the family would accompany him. Young Myres spent one summer with an uncle who had settled in Alaska and, as a teenager, McDougal, traveled widely in the South and Southwest to county fairs, as a member of a competitive team judging cattle. In these contests, McDougal attributed his success more to an understanding of human beings than of cows.

Nor, myths aside, was it the happiest of childhoods. This was a South still traumatized by the Civil War, its economy still slumping and, much of its inner spirit captured in the houses its people inhabited. As they decayed, people did little to repair or extend them. As for young Myres, his childhood was disrupted by frequent moves by his father, as his father's medical practice expanded and he moved to ever larger towns.

McDougal's father wanted him to enter state politics and become a U.S. senator. After attending local schools, McDougal studied classics and then law at the University of Mississippi, earning a B.A., M.A., and LL.B. After a brief stint teaching Latin and Greek at the University of Mississippi, he devoted his academic career entirely to law. As a Rhodes Scholar, he studied law at St. John's College, Oxford, came under the influence of W.S. Holdworth, and received his B.C.L. in 1930. Though invited to teach at Oxford, he elected to return to the United States to take his doctorate in 1931 at the Yale Law School.

McDougal arrived at Yale in 1930, trained in a formal

Positivism that viewed law as a body of rules and principles and that employed a method of rudimentary, though often elegantly expressed, syntactics not advanced yet to even the crude and exaggerated empiricism of C.C. Langdell's case method. Yale was then the center of Legal Realism, a diversified jurisprudential movement, most of whose members sought to annihilate positivism, expose rules as camouflage, and reveal law as no more than decisions of human beings who responded, with varying degrees of consciousness, to political, economic, psychological, and even organic stimuli. Holmes, in one of his most famous apothegms, had said that "Law is nothing more pretentious than the prediction of what courts will in fact do." The Realists successfully demonstrated that by reference to rules alone, neither scholar nor practitioner could explain why past decisions had been made nor how future decisions were likely to be made. The Realists were much less successful in identifying the tasks the jurist should perform and the methods to be deployed.

In 1935, McDougal became associated, quite fortuitously, with Harold D. Lasswell, and the two began a close collaboration, more productive than the great collaborations of Marx and Engels or Parsons and Schills, to name only two. McDougal was instrumental in bringing Lasswell to Yale and in 1943 they published "Legal Education and Public Policy,"<sup>1</sup> their first joint exposition and one of the most quoted and cited law review articles ever published in the United States. Lasswell's insistence on contextuality, his wide-ranging and creative use of methodology, his psychoanalytic applications, and his refined conception of power, combined with his problem-solving orientation, provided myriad points for common interest and collaboration.

During World War II, McDougal worked in the Departments of State and Justice and in the Lend-Lease Administration, an experience that gave him first-hand knowledge of the

---

<sup>1</sup> Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

methods of mobilization, manipulation, and control in modern society. He was greatly influenced by Oscar Cox, the chief lawyer for Harry Hopkins. The Lend-Lease experience rekindled, among other things, McDougal's interest in international law, dormant since he had studied with James L. Brierly at Oxford. Thereafter, he devoted more and more time to what he called the public order of the world community.

McDougal was never the model of the retiring scholar. At different times he was active in politics at the state and national levels, and he took keen interest in the power struggles that often seem to be the *raison d'être* of scholarly organizations. He served as president of the American Society of International Law and of the Association of American Law Schools, was active in the American Law Institute, and was elected to the Institut de Droit International. He was counsel in two major international arbitrations, represented the United States at diplomatic conferences and was counsel for the United States in the *Nicaragua* case before the International Court of Justice. He advised corporations and foreign governments and actively supported many human rights initiatives. Upon retirement from Yale in 1975, he taught briefly at Temple University, in Philadelphia, as a visitor, and then established himself at New York Law School, where he taught for an additional ten years, commuting each week from New Haven, where he also continued to maintain an office and to see students.

His relationship to his students was close, usually dominating, always protective. One of his most famous students, Richard Falk, in a long review essay and reminiscence of McDougal, published in the *Yale Law Journal* in 1995, commented at length on the sheer force and magnetism of McDougal's personality and the "spell" that he cast on his students.<sup>2</sup> Perhaps less known is the fact that McDougal reserved a special concern for students from Mississippi who came to Yale College or the different graduate schools. Each

---

<sup>2</sup> Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 *YALE L.J.* 1991 (1995).

September, he would invite them all to a lunch where, some of them have subsequently recounted, he would patiently explain how to behave "up North." Like McDougal's law students, many of these students came to view him as their mentor and regularly repaired to his spacious office in the Sterling Law Building for advice or career counseling. McDougal followed closely the careers of many of his students who achieved high positions in the United States and abroad and frequently consulted him.

McDougal's key areas have been property law, jurisprudence and international law, but many of his monographs have also made recognized contributions to constitutional law and legal education. With the exception of his innovative property law casebook,<sup>3</sup> most of the work he did before his fifties was monographic. His major collaborative treatises in international law were all produced after that period, and in his view represent the application of his matured theory to major problems. His *oeuvre* is enormous, a fact due as much to his energy as to his capacity to attract gifted younger scholars in collaborations on which his intellectual imprint is always evident. He was able to work simultaneously on several projects, each with a separate team. This influence has been further extended by the work of many students who wrote under his strict supervision in virtually all fields of law.

Many of his early international monographs were events in themselves, prompting rebuttal and often angry debate. His work on the lawfulness of testing hydrogen bombs over the Pacific, a detailed study of the basic traditional policies governing the law of the oceans applied to a novel use, was immediately attacked. His theories on aggression and self-defense, now widely accepted, occasioned angry debates at the American Society of International Law. Part of the excitement and antagonism may have derived from the issues he chose; he always wrote on topical and explosively controversial subjects, for he was concerned with the application of law to current

---

<sup>3</sup> MYRES S. MCDUGAL & DAVID HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (1948).

problems. Although he explored all issues thoroughly, he always reached conclusions about the lawfulness of contemporary acts that many colleagues rejected. His methodology stung some, for it focused not on rules and their logical interrelations, but on claims and decisions, the latter tested by their contribution to all the public policies raised in that particular instance. This was a distinctive approach, and McDougal insisted that it be viewed not merely as an alternative, but as the only meaningful way of approaching law. He set out in detail and with fairness the theories, methods, and conclusions of others, but indicated with precision where he differed and why he believed they were wrong. Being criticized by McDougal was not an experience easily forgotten. Lasswell, his life-long collaborator, wrote:

McDougal was not one to be turned aside by an obstacle course. If a mountain persisted in standing in the way, McDougal took his intellectual bulldozer and knocked it down. His furious tenacity left the bones of many 'irresistible' objects strewn among the footnotes.<sup>4</sup>

McDougal's focus has two main components—the relevant communities to be studied and the conception of law to be deployed. McDougal insists on a globally comprehensive conception of community, for his work is premised on the interdependence of the entire earth-space arena in which people interact. A corollary of this premise is that efforts to understand or influence decisions cannot succeed without keeping that interdependence in mind. In his community focus, he insists that processes of effective power as well as those of authoritative decision be incorporated. Both of these focal elements represent radical departures from traditional jurisprudence. Positivism and Historicism have tended to be national in focus, even questioning the possibility of law between groups, and while Natural Law theory speaks in universal terms, the content of its focus on community tends to be general and imprecise. Almost

---

<sup>4</sup> HAROLD D. LASSWELL & MYRES S. MCDUGAL, 1 JURISPRUDENCE FOR A FREE SOCIETY at XXXVCI (1992).

all schools of jurisprudence focus only on authoritative decision, the formal institutions of the law, either ignoring processes of effective power or isolating them in closed categories, such as "political question," and then dismissing them as inappropriate subjects for jurisprudence.

McDougal insists that law, the second component of his focus, be conceived as processes of authoritative decision by which people clarify and implement their common interests. This process is investigated by special focal components, some original with McDougal, some incorporated from methodologies of other social sciences. Thus McDougal rejects behavioralism by insisting on a *balanced emphasis on both perspectives and operations*: what people say and think as well as what they do. He rejects formalism by insisting on a conception of law that incorporates both *authority and control*—i.e., the normative expectations of relevant actors as well as their actual participation in decision making. He emphasizes the processes by which the institutions for making indispensable decisions are established, maintained, and changed, but in studying this he dismisses the notion of a constitution as a document, insisting instead on a theory of "constitutive process" in which authority and control actually operate. He distinguishes this *constitutive process* from the *public order* of a community, the aggregate of decisions about the production and distribution of all values *other* than power, and distinguishes in turn, within the public order, a *civic order* or domain of privacy, in which production and distribution are effected through less severe sanctions.

These focal components have been designed with an intellectual task or a humanitarian goal in mind. The distinction between public and civic order is animated by McDougal's concern for the maintenance of private domains protected by the coercive power of the organized community but insulated from its operation. Here McDougal shares concerns with Philosophical Radicals and Liberals and some common ground with writers like H.L.A. Hart. Conversely, a Marxist conception of jurisprudence might consider civic order a bourgeois atavism and a pathological condition in a just society. But many of the other focal emphases are radical jurisprudential revisions. The insis-

tence on an integration of authority and control as prerequisite to a meaningful conception of law is distinctive and may be one of McDougal's major contributions to legal theory. The conception of the constitutive process is almost Copernican in its insistence that many postulates of right conduct in secular societies be tested with full attention to contemporaneous practices, rather than by reference to a totemized text.

McDougal's treatises in international law are rigorous applications of his jurisprudential theory. In each, a careful statement of the factual problem is followed by a comprehensive critical review of scholarship in the area and a postulation of the goals that should guide decision makers if community responses to that resource or practice are to contribute to a public order of human dignity. McDougal then details with great specificity the factual claims with regard to the resource in question and the *aggregate* international decision processes that respond to those claims. The heart of each treatise is a meticulous review of the decisions for each claim, the environmental and predispositional factors that condition those decisions, projections of likely future decisions, and the alternatives thought to give a greater approximation to community goals. The result in each treatise is a picture of the processes that make and apply the law under study, their past and probable future productions, the impact of the decisions on the values concerned, an appraisal of the aggregate performance of the decision process, and recommendations for improved future performance. Legal and social science literature are incorporated and documentation is enormous. The total impact of each book is magisterial.

While McDougal's interest in jurisprudence has been consistent, his shift to international law from the field of property law, in which he worked for 25 years and attained great prominence, is more puzzling. Property law is extremely localized; moreover, the common law variant is a strand in the unique web of English political history and hence shares little with other property law systems. In fact, McDougal's approach to property was radically different from that of his predecessors and exhibits many of the distinctive features that mark his



work in international law. His conception of property was not "land" but the aggregate of a community's spatial resources, and he viewed the function of law as the planning and implementation of the uses of these resources in ways that would optimize the common interests of the community. In cooperation with Maurice Rotival, a planner who had worked in many parts of the world, McDougal wrote a book on planning for a river valley.<sup>5</sup> He published a study of land planning for Connecticut and, with David Haber, a textbook of cases and materials on property law that placed land use in a global context.<sup>6</sup> The book was a popular teaching text, enjoying a long run, but it was so controversial that efforts were made to ban it in two states.

Throughout his career McDougal has been concerned with improving legal education. In 1943, as I mentioned, he published, with Lasswell, "Legal Education and Public Policy."<sup>7</sup>

He argued that one could not speak rationally of professional training without a theory of law and society and a conception of the preferred functions that the lawyer-in-training was to perform in his professional career. He applied his method to these issues, dismissing much of the inherited curriculum as obsolete and inappropriate for professional training in a free society, and suggesting a detailed radically innovative curricular process that might better secure the social objectives he had postulated. The article was widely discussed and republished many times.

For twenty-five years, McDougal chaired the Graduate Program at the Yale Law School and transformed it into an international teachers' training program. Through it, he played a major role in staffing law schools in the United States and abroad and in influencing the choice of deans. He traveled in the United States and abroad frequently, lecturing on legal

---

<sup>5</sup> Yale University, Directive Committee on Regional Planning, *The Case for Regional Planning With Special Reference to New England* (Myres S. McDougal & Maurice E.H. Rotival, Chairmen 1947).

<sup>6</sup> MCDUGAL & HABER, *supra* note 4.

<sup>7</sup> LASSWELL & MCDUGAL, *supra* note 2.

education and public policy. He was also an active member of the Association of American Law Schools and served as its president in 1966.

Intellectually, McDougal's perspective incorporates major contemporary concepts in several disciplines. His contextualism finds echoes in Alfred North Whitehead, Ludwig von Bertalanffy, David Easton, and many others. His insistent focus on the individual and on the importance of depth psychology is influenced by Freud. His commitment to social science techniques and to empiricism is contemporary. His theories of purposive decision resemble those in organization theory and in the policy sciences, of which he can be considered a co-founder. His rigorously contextual instrumentalism in social design, a feature traceable to his early work in property law, is Gropian, as is his emphasis on teamwork. His skepticism about objectivity, sensitivity to psychological factors, and commitment to action are recognizable components of the twentieth-century intellectual's dilemma. Yet in the field of legal scholarship, a fortress that has long withstood intellectual change, McDougal's work is utterly distinctive. Although he purports to find the origins of his work in pre-Socratic Greece and in some of the medieval Pandectists, the genealogy is hard to trace.

McDougal's intellectual enterprise is at core a method that yields insights and strategic options. In a profession that charges by the hour and is impatient for results, there is a tendency to overlook the methodological component and to concentrate on the exploitable insights. Virtually every lawyer in the United States knows his name, though many older lawyers still attribute his fame to his seminal work in property law. International lawyers around the world consult his work and respect him. Representatives of his ideas can be found in most leading law schools in the United States, though in many schools his exponents are likely to be considered eccentric by their colleagues.

Some aspects of McDougal's theory, however, have enjoyed wide acceptance. Conceptions of law as a process of decision are common, and policy analysis has become a fixture in much of legal education. Though both of these developments are attrib-

uted to McDougal, he has been critical of the style and method with which they are executed. Despite talk of empirical research in law, much research has merely incorporated various types of economic analysis and transformed them into a neoscholasticism. Lasswell had anticipated such methods of containing innovation, referring, in particular, with his characteristic dry irony, to "rejection by partial incorporation." Yet the overall influence of McDougal's methodology on professional consciousness, if often subtle, is everywhere evident. One can say of McDougal, as W.H. Auden said of Freud in 1939, that "he is no more a person/Now but a whole climate of opinion/Under whom we conduct our differing lives."

Intellectual innovation always generates resistance. In the case of the New Haven school, language may be a factor. Although law as a discipline is notorious for its jargon, there has been great resistance and confusion about some of the meta-language McDougal created or adopted from other social sciences. Ironically, many of his meta-terms have become common parlance, precisely because they refer to aspects of modern society of concern to law for which there were no terms in the traditional lexicon. Some contend that resistance is due to the absence of a simple manual setting forth his ideas – a "C-student's McDougal" – though he has in fact published a number of short and simple statements and Lasswell produced several widely-read short versions. The engagement of scholarship in contemporary political events, central in McDougal's thought, may also generate resistance, for it challenges the myth of the university's separation from practical life, which has provided it some autonomy. Historically, lawyers have cultivated a comparable technique of self-protection in the notion of the neutral technician, one that McDougal, like many Legal Realists, explodes. McDougal's open partisanship has generally alienated at least one side in a debate and has at times led to the charge that his theory is no more than an apology for American foreign policy.

Basically, this resistance may be less a matter of intellectual comprehension (his ideas are current and consistent with contemporary sophisticated thinking) than of distaste for the

tasks he sets for lawyers. For in the final analysis McDougal demands that lawyers look at phenomena and themselves in a radically different way. Instead of an orderly world of rules and a simple system of logic for their application, he presents a dynamic and shifting process in which certainties are few and the agency and responsibility of the lawyer great. Many of those who enlist in the legal profession may demand precisely the myth of certainty that McDougal has, for all time, undercut.