Theory About Law: Jurisprudence for a Free Society

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Theory about law was the center of Myres McDougal's intellectual enterprise. Each of his treatises and monographs, even his occasional papers and court pleadings, every dissertation, and, as many of you here know, every student paper done under his supervision, was and had to be an explicit and intentional application of his theory. Whether it was resource use and planning in the Connecticut Valley, in the oceans, or in outer space, whether it was the law of war or human rights, treaty interpretation or constitutional interpretation, each study tried to be an integrated application of the theory.

From the beginning, theory about law was McDougal's primary interest. Fresh from Oxford, a newly minted Analytical Positivist, he arrived at Yale and told a bemused Dean Clark that he intended to teach jurisprudence. And he did. Whether his course was negotiable instruments, debtors' rights, property, or any of the areas of international law he addressed, he was always teaching one year-long seminar on jurisprudence, closely analyzing the theories of others while elaborating his own.

With the exception of the theory of the constitutive process, the jurisprudence was essentially completed in manuscript by the late 1950s. Many of you here today studied jurisprudence with McDougal from different versions of that manuscript, then called *Law, Science and Policy*. For reasons biographers will explore, the manuscript was only published in 1992 in two volumes under the title of *Jurisprudence for a Free Society: Studies in Law, Science and Policy*.[1] It was co-authored by Harold Lasswell. A paperback student edition appeared in 1997. The dedication page of the volumes has three words: "To our students." To all of us here today.

Many modern theories of law trace their origins to a single insight. H.L.A. Hart saw that Austin's notion that law was the command of a

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1. MYRES S. MCDOUGAL AND HAROLD D. LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

political superior could not account for the authoritative component of law and addressed that missing item in the rest of his work.[2] Hans Kelsen saw that historicist conceptions of law could not serve the needs of decision-makers in the modernizing multiethnic empire that was the Dual Monarchy and invented a "pure theory of law" to rise above them.[3] McDougal's insight came from the deficiencies of Legal Realism, the persuasion to which he was converted at Yale, and which he then had the opportunity to test and revise in the powerfully formative experience of serving in the government during the war.

One of Realism's patron saints, Holmes, had said, "The prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law."[4] Legal Realists demonstrated that predictions about the future decisions of courts could never be made on the basis of text—black-letter law—alone and many of them scurried off in different directions in search of a silver bullet, a contextual factor that would provide the key to predicting the future. Returning to New Haven after the war, McDougal understood that the Realists were making six major mistakes.

First, in their search for predicting how decisions would be made, they were still locked in the essential passivity of Positivism. They were *predicting* what someone else would do. But McDougal understood that a critical part of jurisprudence's calling was to assist decisionmakers actively by helping to clarify goals, and to provide information about means, about the aggregate consequences of different options, and so on.

Second, in their focus on courts or on the application of law, Realists were ignoring all the components of decisions—pre-law making, law-making, law-terminating, law appraisal—that preceded and followed courts and other institutions of application. But McDougal understood from his governmental experience that these other functions are indispensable parts of understanding and practicing law.

Third, in their focus on law, Realists were overlooking what political and legal struggles were about: life opportunities or "values." They had no systematic way of designating and studying the production and distribution through time of these opportunities or values.

Fourth, in their focus on legal institutions, Realists were giving insufficient attention to the continuing impact of the rich dynamism of context and, in particular, to the role of power on decisions. As one of Harry Hopkins's hatchetmen in the Roosevelt Administration, McDougal came to understand that very well.

Fifth, in their focus on legal institutions, Realists did not grasp that the

2. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

3. HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., 1967).

4. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 173 (1920).

maintenance or adjustment of the institutions themselves was part of every decision and that the "institutions and structures," as political scientists called them, were products of an ongoing constitutive process.

Sixth, in their focus on the United States, Realists were ignoring the inevitable global dimension of influence and the impact of apparently local decisions.

The Copernican Revolution in McDougal's jurisprudence was in unseating rules as the mechanism of decision and installing the human being—all human beings, to varying degrees—as deciders. But this was not a libertarian or laissez-faire approach. Because McDougal committed himself to developing a theory about law that could establish and sustain a free society, he was not content with some so-called theory of rational choice by means of which individuals, deliriously libidinalized with greed, might pursue private interests on the happy assumption that, in the end, the great Invisible Hand would sort everything out for the best. The global depression and World War II had demonstrated that that didn't work. McDougal's aspiration was always wider, enhanced, and responsible participation in community decisionmaking. As he wrote in May 1997, in the last formal statement of his theory:

> [T]he most useful conception of law is as a process of decision that is both authoritative and controlling. The function of the responsible jurist, advisor or decisionmaker, who is a part of that process, is to develop an appropriate observational standpoint, clarify community goals, identify and then perform the intellectual tasks that will enable him or her to assist those who seek legal or policy advice in clarifying goals, and in implementing them in ways compatible with the common interests of the most inclusive community.[5]

You will note that, even in this final statement, McDougal focused on categories and conceptions. If law was not a body of rules but a process of community decision, and McDougal's goal was to enhance the operation of and participation in that process so that it contributed to the establishment of a public order of human dignity, the conceptual tools he could invent or adapt would be of critical importance. McDougal accepted Kant's notion of the centrality of categories of perception, and he set about consciously to devise categories that were, in Morrison's words, "deliberately and pragmatically chosen for the purposes in view."[6] Once McDougal had

5. Myres S. McDougal, *Preface* to HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY at v (Student ed. 1997).

6. William L. Morrison, *Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, *in* TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL 3, 3 (W. Michael Reisman & Burns H. Weston eds., 1976).

established his own categories, he devoted a great deal of time to understanding and critiquing the categories of contemporaries, precisely because he believed categories are central to the jurisprudential enterprise. Some of McDougal's students thought the explicit presentation and adaptation of the "scaffolding" was not necessary for every problem. He was convinced that it was.

Take observational standpoint. When a student in one of his classes made some judgmental or appraisive statement, McDougal was likely to ask: "Who are you?" By that, he didn't mean "what's your name" or "who authorized you," and it was certainly not an invitation to a Cartesian exercise by means of which the mere act of your cogitation is supposed to assuage your anxiety about your existence and hurry you past the relevant question of which one of the "yous" was momentarily engaged. Drawing on the philosophy of science, McDougal understood that the momentarily dominant self in your bundle of identities, at that point in time, or "history," if you prefer, will perceive and appraise differently from other selves and that self-awareness and consistency in observation are critical preconditions to the success of every other intellectual task. For the foreign student and the minority student in classes at Yale listening to un-self-conscious exponents of American viewpoints spout forth from lectern and floor, the "who-are-you" question made a lot of sense, and it was a relief to hear a professor express and understand it. But establishing and then consistently maintaining an observational standpoint throughout an intellectual operation and, in particular, clarifying a standpoint that assists in discerning and realizing the common interest—the standpoint of "citizens of the larger community of mankind"—was no easy task.

As important as "who are you?" is how you look at things and what you decide to look at. The Realists and, even more, the sociological jurists had, of course, said that the social process is important and the jurist has to look at it. Max Weber and Roscoe Pound had devised ways of looking at more than economics. McDougal stood alone, however, in insisting on a systematic way of gathering and organizing information about the comprehensive social process and, even more important, on the clearest design of the lenses through which the jurist looked—lenses that could distinguish between perspectives and operations, authority and control, constitutive and public order decisions, and so on. The division of things people want or "desired events" into eight, empirically referential value categories proved to be an important tool in this regard. Once McDougal embarked on the task, his extraordinary demand for precision led him to identify within the social process, community process, power process, the constitutive process, and the critical components that compose a decision, many of which jurisprudential analysis was ignoring.

Because McDougal had set the individual person at the center of law,

how that person decided—or made choices—became a critical focus of his jurisprudence. Hence the identification and elaboration, in Aristotelian fashion, of the critical intellectual tasks of decision: goals, trends, conditions, projections, invention of alternatives. This is an aspect of McDougal's jurisprudence that is unique among his contemporaries, even those of the utilitarian persuasion, which is puzzling, because it is what law is all about.

It is surprising that the most controversial aspect of McDougal's jurisprudence was his insistence that the end of law and the criterion for appraisal of particular decisions was their degree of contribution to the achievement of a public order of human dignity. Curiously, the charge that these were "American" values almost always came from Americans and almost always angered McDougal's foreign students and collaborators. I recall Eisuke Suzuki from Japan, bounding out of his chair in fury. "How dare anyone suggest," he said, "that America invented the concept of human dignity?" McDougal chuckled.

In May 1997, at the ripe age of 91, McDougal wrote what proved to be the valedictory statement of his enterprise and its aspiration. He said:

> The highest calling of all is to enhance human dignity in appropriate systems of public order. For those in the next generation who share this goal, Lasswell and I hope that our work may prove useful in providing principles of content and procedure and the tools for implementing them.[7]

Did he succeed in this aspiration? Over the years, McDougal's image evolved in the collective mind of the academy and the profession from *enfant terrible* and destroyer of the law to elder statesman and prophet of human dignity. In international law, the field in which his theory was most often applied, his writings are now considered classic and are routinely cited, but they are often in those pretentious style citations, along with the *de rigueur* references to Grotius, Pufendorf, or Vattel. In their study of how revolutionary political ideas diffuse, he and Lasswell called this "rejection by partial incorporation." But in looking for explicit references, I think McDougal, this once, may have used the wrong lens. His work has pervaded professional consciousness to the point where we may say, as Auden said in his eulogy of Freud, that "To us he is no more a person/Now but a whole climate of opinion/Under whom we conduct our different lives."[8]

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7. McDougal, *supra* note 4, at vi.

8. W.H. AUDEN, *In Memory of Sigmund Freud*, *in* COLLECTED POEMS 273, 275 (Edward Mendel ed., 1991).