Foreword

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In dedicating this issue of the Journal to Myres Smith McDougal the Editors pay tribute to a great teacher and scholar whose influence today extends throughout the world. How great a teacher some of the Editors, past and present, will know, and others perhaps dispute. How great a scholar, perhaps none of us can yet fully appreciate.

Mac's scholarship is untouched by modesty. In mid-career he perceived with others the inadequate, out-moded and intellectually barren foundations of international law. In contrast to others—who were content to demonstrate its shortcomings, or, even worse, the shortcomings of states in flaunting traditional doctrine, or, like Dean Acheson, to deny the existence of international law as "law"—Mac set about the prodigious work of providing a wholly new analytical framework for viewing and assessing the totality of international behavior. On that framework he and his associates have hung thousands upon thousands of pages of careful scholarship to the amazement, and envy, of scholars throughout the world.

What Mac faced when he embarked on his conquest of international law was an extremely rigid system which could be analyzed only in terms of the roles of states and their use of formal doctrine, mostly derived from 19th century learning and experience. Mac perceived that this system did not permit analysis of the roles clearly being played by many other formal and informal participants in the process. What was needed was a broader vision which would encompass all the many roles, encourage their description and permit their analysis.

To open up the closed system Mac simply suggested that "law"—national or international—is part of the process through which societies organize and pursue human values, and should be studied and understood as such a process. If that idea does not sound very revolutionary

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today, it is one evidence of Mac's tremendous impact on our thinking.

I do not suggest that Mac was alone in opening up our jurisprudence. But he was very alone in doing so in an international context. His methodology both permitted and forced academics and statesmen to think about old problems in new and creative ways which sought to assess the consequences of what was demanded and what was decided. The Law of the Seas moved from territorial analysis in terms of “territorial waters” vs. “high seas” into functional analysis of the various demands to be accommodated. The Use of Force ceased to be viewed as “war” or “peace” or “aggression” or “self-defense” and became a spectrum of violence and threat which came closer to reality. And so forth.

At times the very weight of his writing and scope of his analyses have led lesser minds to use the weapons of ridicule. His “basic human values” are obviously abstractions of a high level. The phrase “policy science” can turn off those who know that the frailties of man’s intellect and character make law-government something less than “science.”

But that is not the point. What Mac is demanding of academics and of scholars is that, to the maximum of their abilities, they make rational analyses of decisions—that they understand that all law is a process which can be molded to its purpose of meeting the needs and aspirations of people.

Mac did not conquer the field in one swift preemptive attack. No one, of course, could. Nor is it Mac's style to infiltrate the enemy camp and use the ambivalences of academic diplomacy to gain academic stature. His was a frontal attack—almost totally critical of what existed. But it was also more than that. Unlike many scholars, Mac has never destroyed for the pure joy of destruction. Always the destruction has been a necessary part of the building process, the creation of something new, more attuned to reality and to the needs of people as viewed by the dispassionate scholar (and, I would insist, the compassionate man).

Unquestionably, Mac's experience as teacher and scholar in the law of real property and future interests stood him in good stead in moving into international law. There he had converted the encrusted doctrines of the common law into the exciting frontiers of land use planning. So, too, with international law. What is “law” all about? Who is trying to do what to whom? What is the process through
which decisions are made, with what consequences, to whom? And those questions I can footnote—to my own (sparse) notes in Real Property I. These were not Socratic questions for students. These were the questions Mac put to himself—far more vigorously than he put them to students—and to which he has sought to suggest answers. But it is the questions, always, which are the mark of scholarship; the answers must necessarily be tentative, however convinced the response.

One should not write about Myres McDougal without mention of Harold Lasswell and what I believe to be one of the most curious and most productive collaborations in modern scholarship. Both men have in common the intellectual drive to broaden perspective, to bring new insights to bear on old problems, to seek to understand the social processes more deeply and more totally than traditional disciplines permit or even encourage. But beyond those generalities, I have never understood how two such different personalities and different predispositions could so productively collaborate. There is no question, however, that each stimulated the other, and that each contributed in a major way to the joint jurisprudence they authored.

At the outset I said that I doubted an assessment of Mac’s contribution to international law was yet possible. In part, this hedge is because I believe and hope Mac’s contribution is by no means finished. My guess—and that is all it is—would be that Mac’s influence to date consists more in freeing participants from the rules of the past than in influencing the decisions of the present. But that may be unfair. After all, providing a respectable intellectual basis for rejecting outmoded doctrine necessarily forces one to provide some new rationale, at least if one is conscious that one is both making a decision and influencing a far broader decisionmaking process. The decisionmaker may not employ Mac’s theories, but increasingly, I believe, the critics will. So, over time, the impact will build, at what pace no one can predict. And the timeliness of so much of what Mac has written—for example, the rethinking of war and violence—is bound to speed the process.

Perhaps one illustration is appropriate. Mac’s first foray into the international arena was his article (with Asher Lans) on executive agreements*—more a constitutional than an international law question. The impact of that particular article was the dream of every academic—complete, determinative, lasting. Rarely has one article so totally captured the field.

What Mac has done is to open up the closed doctrinal system to new perspectives, to new ideas. What he has written has been influential in affecting the decisionmaking process he talks about, most clearly in the law of the sea and the law of space. He has forced by sheer intellect (helped by judiciously placed students and graduate students throughout the world) new ways of thinking about and coping with the international lawmaking process. His writings have enabled many people in many situations to suggest solutions to problems—solutions which, under older approaches, would have had little respectability. That is an enormous accomplishment, for which he deserves, but may not always get, the lion’s share of credit.

A word about McDougal, the teacher, and McDougal, the man.
Mac has never suffered fools gladly, and he has found life too short, too stimulating, too important to rehearse for the pedestrian mind the rituals of legal learning. He has always taught for those who wanted a glimpse of the future; and he has sought consciously to use the best student minds he could attract.

As a consequence, there are hundreds of students who have graduated from Yale untouched by a great intellect and an extraordinarily warm and generous personality. That is their loss. There are others for whom their contact with—their “adoption” by—Myres McDougal has been the greatest intellectual experience of their lives.

Those who have experienced the intensity of Mac’s intellect and friendship have felt his hand upon their shoulders throughout their lives—encouraging, supporting, pushing them toward as much excellence as they could achieve—and a little more.

In dedicating this issue of the Law Journal to Myres McDougal the Editors speak for many of their predecessors over some four decades. I have no doubt that, as always, they speak also for themselves.
Writings of Myres S. McDougal

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Books

The Interpretation of Agreements and World Public Order (1967) (with H. Lasswell & J. Miller).

Articles

Planning and Development for Metropolitan Communities, in American Planning and Civic Annual 94 (1950).
Aims and Objectives of Legal Education, in Handbook of the Ass'n of Am. Law Schools 125 (1945).
Policy-Making as the Center of Emphasis, in Handbook of the Ass'n of Am. Law Schools 47 (1943).
Summary and Criticism of Answers to Question 8 of the Property Questionnaire (Report of Subcomm. on Property, Comm. on Curriculum), in Handbook of the Ass'n of Am. Law Schools 268 (1941).

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Dr. Schwarzenberger’s Power Politics, 47 AM. J. INT’L L. 115 (1953).


Argument in Favor of the Constitutionality of the Pepper Bill, 21 CONG. DIG. 272 (1942) (with M.T. Van Hecke).


Bankruptcy, in 3 ENCYCLOPEDIA BRITANNICA 100 (14th rev. cd. 1936) (with W. Douglas).

Writings of Myres S. McDougal

A Reply to Dean Acheson, 2 INT'L LAW. 729 (1968).
Foreword to Regional Planning and Development: The Process of Using Intelligence,
Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework
of Inquiry, 4 J. CONFLICT RESOLUTION 337 (1960).
The Influence of the Metropolis on Concepts, Rules and Institutions Relating to Property,
The Protection of the Environment and World Public Order: Some Recent Developments,
The Role of Law in World Politics, 20 MISS. L.J. 253 (1949).
Revision of the Geneva Conventions on the Law of the Sea—The Views of a Commentator,
NAT. RESOURCES LAW., July 1968, at 19.
Authority to Use Force on the High Seas, 20 NAVAL WAR COLLEGE REV. 19 (1967).
Jurisdiction, 9 NAVAL WAR COLLEGE REV. 1 (1957).
A Regional Development Administration, NEW ENG. WAR BULL., June-July 1945, at 14.
The Role of the Law School in Continuing Legal Education—Part II, PRAC. L.W., Oct.
International Law, Power, and Policy: A Contemporary Conception, 82 RECUEIL DES COURS
137 (Hague Acad. of Int'l Law, 1953) (with separate printing).
El Derecho Internacional Como Ciencia Politica, 3 REVISTA DE DERECHO Y CIENCIAS
SOCIALES 142 (1956).
The Impact of International Law upon National Laws: A Policy-oriented Perspective, 4
The Intelligence Function and World Public Order, 46 TEMP. L.Q. 365 (1973) (with H.
Lasswell & W.M. Reisman).
Title Registration and Land Law Reform: A Reply, 8 U. CHI. L. REV. 63 (1940).
Lasswell).
The Enjoyment and Acquisition of Resources in Outer Space, 111 U. PA. L. REV. 521
(1965).
The Genocide Convention and the Constitution, 3 VAND. L. REV. 683 (1950) (with R.
Arens).
Human Rights and World Public Order: Principles of Content and Procedure for Clarifying
Theories about International Law: Prologue to a Configurative Jurisprudence, 8 VA. J.
In Dedication to Dean Dillard: Man of Depth and Style, 54 VA. L. REV. 585 (1968) (with H.
Lasswell).
Nationality and Human Rights: The Protection of the Individual in External Arenas, 83
Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in
International Coercion and World Public Order: The General Principles of the Law of
War, 67 YALE L.J. 771 (1958) (with F. Feliciano).
Crisis in the Law of the Sea: Community Perspectives versus National Egoism, 67 YALE
L.J. 539 (1958) (with W. Burke).
The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 YALE L.J.
645 (1955) (with N. Schlei).
The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of
Democratic World Order, 61 YALE L.J. 915 (1952) (also in 1 AM. J. COMP. L. 24
(1952)).
The Veto and the Charter: An Interpretation for Survival, 60 Yale L.J. 258 (1951) (with R. Gardner).
The Rights of Man in the World Community: Constitutional Illusions versus Rational Action, 59 Yale L.J. 60 (1949) (with G. Leighton) (also in 14 Law & Contemp. Prob. 490 (1949)).
The Law School of the Future: From Legal Realism to Policy Science in the World Community, 56 Yale L.J. 1345 (1947).
Public Purpose in Public Housing: An Anachronism Reburied, 52 Yale L.J. 42 (1943) (with A. Mueller).
Fuller v. The American Legal Realists: An Intervention, 50 Yale L.J. 827 (1941).
Land Title Transfer: A Regression, 48 Yale L.J. 1125 (1949) (with J. Brabner-Smith).

Book Reviews
34 Ill. L. Rev. 109 (1959), reviewing J. Hall, Readings in Jurisprudence (1938).
32 Ill. L. Rev. 509 (1957), reviewing Restatement of Property (1956).
87 U. Pa. L. Rev. 495 (1939), reviewing M. Radin, The Law and Mr. Smith (1938).
58 Yale L.J. 500 (1949), reviewing C. Clark, Real Covenants and Other Interests Which "Run with Land" (1947).
50 Yale L.J. 827 (1941), reviewing L. Fuller, Law in Quest of Itself (1940).
48 Yale L.J. 1125 (1939), reviewing R. Powell, Registration of the Title to Land in the State of New York (1938) (with J. Brabner-Smith).
44 Yale L.J. 1278 (1935), reviewing W. Walsh, A Treatise on Mortgages (1934).

Briefs