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Property and Planning

Luther L. McDougal III[†]

In his famous article with Harold Lasswell on legal education and public policy, Myres McDougal hinted that his first major book might be a property casebook. At one point the article states:

[T]he organizing foci of the “property” courses are such concepts as “easement,” “profit,” “license,” “covenant,” “servitude” or “land contract,” “deed,” “delivery,” “covenant of title” or “reversion,” “possibility of reverter,” “right of entry,” “remainder,” and “executory interest,” and not such goals as the provision of healthful housing, in well-planned communities, for all citizens at prices that they can afford to pay or the promotion of the cheap, secure, and speedy transfer of land, without adventitious restraints having no basis in policy, or the appraisal of doctrines and practices about the transmission of wealth from generation to generation in terms of their effects on a balanced distribution of claims in society.¹

He expands on these ideas later in the article. I say “he” because Lasswell knew relatively little about property law. Five years later, in 1948, McDougal and David Haber published *Property, Wealth, Land: Allocation, Planning and Development*,² which incorporates his thoughts in the article plus much more. This casebook represented a radical departure from the traditional mold both in terms of organization and content. It contained both original writings and excerpts from other works putting property law in its economic and social context. The casebook changed not only property law and the organization and content of future property casebooks but also the content of most future law school casebooks. Casebooks with social science materials are probably the norm today.

The law of property that the young Myres McDougal studied was still largely based on English common law and the focus, for the most part, was

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1. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203, 234 (1943).

2. MYRES S. MCDUGAL & DAVID HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948).

individualistic, the law being concerned with protecting the rights of property holders and, through the complexities of future interests, enhancing the individual's power to control his property from the grave. Considerations of public policy, to the limited extent they were acknowledged, were largely concerned with protection of the individual's right to private property. This notion of relevant public policy probably resonated with the young Myres McDougal's own experience while growing up in rural Mississippi. His father, a doctor, acquired a good deal of land, and, in general, land was viewed as the most important form of wealth and the basis for enhanced status in society. The casebooks that were used at Ole Miss, where Myres McDougal first studied property, reflected these basic ideas. Although I don't know which casebook was used in his property course, a look at casebooks generally in use throughout the country at that time shows that they were primarily a collection of cases, many of them old English cases, with an occasional note that contained a list of supporting authority or a brief doctrinal statement expanding on what the court discussed in the principal case. Although Myres studied property again at Oxford, it is unlikely that any of the doctrines or the implicit policies were seriously challenged there because the study of law there was in the classical, historical, and doctrinal mode.

At Yale, the young McDougal was forced to reassess many of his ideas. Wesley Newcomb Hohfeld had provided a powerfully destructive tool for the Legal Realists, and McDougal was particularly enchanted with the possibility of demonstrating that the law of future interests, in which he had excelled, was essentially a network of word games in which the words themselves were genetically imprecise. But if the Realists provided young McDougal with the tools for destroying the inherited doctrines, they did little to provide him with a means for building an alternative system. His meeting with Harold Lasswell and subsequent collaboration with him to develop an alternative system is well known. But another individual, Maurice Rotival, a French planner, also highly influenced McDougal in the property area. Rotival had worked in many places in the world but settled in Connecticut and played a major role in regional planning in Connecticut. McDougal and Rotival became close friends and together published a book on regional planning in 1947.³ Lawyers and planners today could learn a lot about meaningful and effective regional planning from this relatively brief but insightful book.

Insights he obtained from both Lasswell and Rotival provided McDougal, now a property law professor at Yale, a way of viewing the

3. See DIRECTIVE COMMITTEE ON REGIONAL PLANNING—YALE UNIVERSITY (Myres S. McDougal & Maurice E.H. Rotival, Co-Chairs), THE CASE FOR REGIONAL PLANNING WITH SPECIAL REFERENCE TO NEW ENGLAND (1947).

aggregate of a community's spatial resources through the prism of the law and to conceive of law's contribution as developing a rational method for utilizing those resources in ways that served common interests. The first edition of the casebook, which dramatically veered away from the traditional doctrinal structure of property casebooks, was organized in three major parts: Part I dealt with the basic notions of "Property and Wealth," Part II covered "Land (Resource) Allocation by Private Volition," and Part III explored "Land Planning and Development." This organization permitted professors and students to gain new insights into what property law was really all about.

The introduction in Chapter One set the tone for the entire book. First, it defined property, wealth, and land: "Property is commonly regarded as an institution (pattern of practices), wealth as a value (goods and services), and land as a resource (potential value)."⁴ These definitions are far different from those provided in most property books that are usually in terms of bundles of rights. Much of the rest of the introduction raised questions that the authors thought the materials in the book would help answer and that they hoped professors and students would explore when using the casebook. A few examples are: "By what specific practices and doctrines are resources allocated, planned, developed, and exploited in the United States today?"⁵ "Behind the formal façade of authority, what is the structure of real and effective control over important decisions about how resources are allocated, planned, developed and exploited?"⁶ "What values do the people of the United States demand today from their resources and institutions and by what procedures can these values be translated into concrete programs of action and specific objectives toward which property doctrines and practice may be directed?"⁷

In addition to the introduction to Chapter One, each chapter had an introduction that put the materials in the chapter into a policy perspective. My favorite is the introduction to Chapter Three titled, "Dead Hand Volition: Trusts, Future Interests, Possessory Estates." Selected quotes reveal the general flavor of this introduction.

[The] projection of dead hand control over resources and wealth is a part, though not an invariable or indispensable part, of that continuing process, or flow of events, by which in our society wealth is transmitted from generation to generation, and it cannot

4. MCDUGAL, *supra* note 2, at 1.

5. *Id.* at 2.

6. *Id.*

7. *Id.* at 3.

be understood or appraised, for policy purposes, except as a part of that process or flow of events.⁸

Then, later in the introduction, the authors state:

The traditional categorization of possessory estates and future interests—that great structure of doctrinal nebulae: reversions, rights of entry, possibilities of reverter, vested remainders, contingent remainders, and executory interests—developed in an England of aristocratic family dynasties and primogeniture, when the maintenance of feudal dues and seisin were still important, when competition between the courts of Chancery and of Common Law was most severe, when modes of conveyancing were still primitive and formal, and before the community had developed generalized notions of freedom of contract and private volition. It needs no emphasis that the conditions, which may have at one time made these distinctions rational efforts to implement community policies, have long since disappeared. It will bear emphasis, however, that these distinctions linger on as irrational verbalisms, making shifting and ambiguous references to the whole range of very different contemporary problems.⁹

As one might imagine, the casebook received mixed reviews. Some professors considered it a major breakthrough in the way property should be taught. Others were far less enthusiastic. Professor W. Barton Leach, a well-known property professor from an institution north of here, had the following to say, after observing that all property professors who examine the book would be enriched by the “originality and vitality of the book”:

The use of this book in a *first-year* law course strikes me as impossible unless one is prepared to forfeit those things which I think of as professional standards of treatment. The emphasis of the book is upon evaluation of our system of property on the basis of its attainment of sociological and political values. It is clear to me that this cannot be engaged in at a professional level unless the student has a deep knowledge of the system he is criticizing, of the interrelation of its principles, of the courses of self-correction within itself, and of how the thing actually works and is used. . . . It may also be that it is not the best way to lead a young man into thorough understanding of a system to keep saying to him, “This is silly. There is no vision. People do not know what they are doing. The whole thing is wrong, wrong, WRONG!!!” I am well aware of how often impossibilities prove to be chimeras, particularly in the field of education; but experiments should not be tried by those

8. *Id.* at 247.

9. *Id.* at 250.

who think them improbable of success. McDougal has got to try this one, not I.¹⁰

Adverse reaction to the casebook was not limited to academia. The legislatures of three states passed statutes or resolutions that prohibited the use of the casebook in law schools in the state. They did so on the basis that the casebook was espousing communism. This, of course, showed a complete misunderstanding of the book and of what Myres McDougal was all about. From the earliest days as an educator he was an advocate of a free democratic society, and the thought of government owning all land and the means of production was the furthest thing from his mind. Although the casebook explored increased governmental intervention into the various patterns of practices constituting the notion of property, the end it sought to achieve was the removal of ancient concepts that prevented the legal process from serving the needs of the social process. Many of the controls he discussed, particularly those relating to land-use planning unheard of in 1948, have now become commonplace and have made the communities in which they have been implemented better places to live.

With these negative reactions aside, the reception of McDougal's book in the United States was astonishing. It is clear that the book marked a fundamental change in the way that American lawyers and law teachers would henceforth look at the area of property. A glance at the property books available today reveals that most of them contain some, if not many, themes that are found in his casebook. The book can plainly be considered, not simply the initiator of new ways of studying property, but also the foundation for new courses in land-use planning and in environmental law as well. No question exists in my mind that McDougal's work on property provided him with the kernel that became his law of the oceans and subsequently his law of outer space. The latter was written at a time when the possibilities of using space still seemed fantastic, more a subject for movies and television than for a law book. This book caused many of McDougal's friends and students to declare that this time the poor man has gone too far! They simply miscalculated how great Myres McDougal's vision was.

I first used *Property, Wealth and Land* the first year I taught property at Ole Miss in 1967. It was the perfect extension of what I consider the best intellectual experience I ever had in school, my year at Yale working on my LL.M. I had taken almost all of the courses Myres taught and had become an advocate of policy-oriented jurisprudence. Unlike Professor Leach's fears of what would happen to students exposed to the casebook, I found

10. W. Barton Leach, *Property Law Taught in Two Packages*, 1 J. LEGAL EDUC. 28, 38-39 (1948).

that students gained a better understanding of the traditional doctrines once they learned their limitations and considered relevant contemporary community policies. I continued using the book when I started teaching at the University of Arizona, but I had to stop using it because the publisher ran out of printed copies. I was forced to use other property casebooks for a while. I tried several and found them all lacking in organization and policy analysis. I mentioned the problem to Myres, and he suggested the possibility of a second edition of *Property, Wealth and Land*. After some discussions with the publisher and a determination that David Haber was not interested in participating in a new edition, we decided to begin working on the new edition.

After several months, I finally had a draft of the second edition completed. I sent it to Myres, and he then suggested that I come to New Haven for about a week so we could go over the book. This I did, and we worked on the book morning, noon, and night. This was the most invigorating intellectual experience I have ever had. He raised question after question, he posed policy issue after policy issue, he constantly questioned whether what we were saying conveyed the exact thoughts we wanted to convey, and perhaps most surprising to me was his frequent questioning of some doctrinal statements. I say it was surprising to me because it had been many years since he had taught property, yet he remembered doctrinal details that most people would have long ago forgotten. Because I had been a student of his and had read most of his writings, I already knew that he was a great mind and scholar, but until I spent a week working with him I did not fully appreciate how great he really was.