NOTES AND COMMENTS

MYRES SMITH McDOUGAL (1906–1998)

With sadness, we record the death, on May 7, 1998, of Myres Smith McDougal, Sterling
Professor of Law Emeritus at the Yale Law School, former President and Honorary
President of the American Society of International Law, recipient of its Hudson Medal,
long-time member of the Board of Editors of the American Journal of International Law,
adviser and representative of the United States, advocate before the International Court
of Justice, our teacher and friend.

I.

Myres S. McDougal was born in 1906 in the farming community of Burton, Mississippi.
His father was a country doctor and a local political boss. McDougal’s childhood blended
close and trusting family ties with prudent cautions against the machinations of 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, which McDougal
himself cultivated, was something of a myth. In his earliest years, McDougal 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 summer courses
in Chicago 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.
McDougal attributed his success in these contests more to an understanding of human
beings than of cows.

Nor was it the happiest of childhoods, myths aside. His 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 them. As
for young Myres, his childhood was disrupted by frequent moves; his father's medical
practice expanded and he transferred his family to ever-larger towns.

McDougal’s father wanted him to enter state politics and become a U.S. Senator. He
attended local schools and later studied classics and then law at the University of Missis-
pippi, where he earned 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. Holdsworth, and received his B.C.L. in 1930. Though invited to remain
and 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, syntax that had not advanced to the limited empiricism of C. C.
Langdell’s case method. Yale was then the center of Legal Realism, a diversified jurispru-
dential 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 re-
ponded, with varying degrees of consciousness, to political, economic, psychological,
and even organic stimuli. Oliver Wendell Holmes, in one of his most famous apothegms, had said the "[l]aw 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 or 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. McDougal was instrumental in bringing Lasswell to Yale and in 1943 they published Legal Education and Public Policy, 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 social science methodology, his psychoanalytic applications, and his sophisticated conception of power, combined with his problem-solving orientation, provided myriad points for common interest and collaboration.

II.

For the first twenty years of his academic career, McDougal dedicated himself to property law. He revolutionized the field, transforming it from a narrow study largely focused on the protection of private interests in land to an inquiry about the adequacy and consistency of law with policies for the optimal planning and utilization of all the spatial resources of a community, in ways that would benefit the common interest.

During World War II, McDougal worked in the Departments of State and Justice and in the Lend-Lease Administration, experiences that gave him firsthand knowledge of the methods of mobilization, manipulation and control in modern society. The Lend-Lease experience, in particular, rekindled McDougal's interest in international law, dormant since he had studied with James L. Brierly at Oxford. After World War II, he decided to devote the rest of his life to international law as an instrument for the construction of a public order of human dignity, and to do that McDougal decided that a new jurisprudence was necessary, since the inherited ideas and their vocabulary were, in his view, insufficient for the task. He called his jurisprudence "configurative" and "policy oriented"; the theory and its proponents are now generally, if not altogether accurately, referred to as the New Haven School.

McDougal's theory of law can best be appreciated by contrasting it with the operational jurisprudence of most lawyers. The latter define a "problem" as essentially a dispute between parties. Analysis teases out the legal issues, and answers are found by reference to given rules of varying origin, applied through logical derivation. Law in this traditional analysis is taken as a body of rules. The origin of the rules, the political forces that may establish, maintain, or change them, the degree of community commitment to sustaining them, and the quality of the content of the rules as tested against other criteria are "political" and not legal problems. McDougal, by contrast, viewed law not as a body of rules but as a process of making authoritative decisions about how values—power, wealth, enlightenment, skill, well-being, affection, respect and rectitude—are to be produced and distributed in the community. For the traditional lawyer, the disparity between goals and achievements is merely to be noted and regretted. For him, the function of the lawyer, advocate or decision maker, is to influence the process to achieve desired results; the scholar's function is to understand and appraise this process in its totality.

In this view, scholar and lawyer share a number of intellectual tasks. Each must identify problems and objectives, chart pertinent past decisions, and determine their conditioning factors in order to assess whether past trends approximated or deviated from goals or objectives. Both scholar and lawyer must also assess likely future decisions. According to some views, the advocate is distinct from the scholar in that he must clarify or adopt
goals and invent alternatives, but in devising them he may not go beyond the interests of his clients. McDougal, however, required the most encompassing goal clarification of the scholar, refusing to discharge anyone from the civic obligations flowing from their potential or actual "impact." McDougal's goals were those of a public order of human dignity, an order that holds concern for the realization of individual potential to be central, and one that secures a production and distribution of values sufficient for individual growth.

McDougal's emphasis on goal clarification and the testing of past or prospective decisions in terms of their contribution to goal realization led some commentators to call him a naturalist, since this has been one of the classic functions of natural law. McDougal, however, rejected any natural or transempirical content to law and specifically postulated the goals of human dignity; he did not attempt to discover or derive them. But there were naturalist elements in his thought; while he conceded that his goal choices were the products of his past and were basically existential, he also believed that they were part of a trend toward enlightened demands traceable to the pre-Socratics and to all the great civilizations. Moreover, he was convinced that they were widely demanded at the present time, though some critics insisted that he sometimes adopted a narrower, ethnocentric approach to their definition and implementation.

The goals and five intellectual tasks—goal clarification, trend description, conditioning factor analysis, projections, and invention of alternatives—were a central concern for McDougal. In developing methods for their performance, he rejected much of the inherited language and conceptual apparatus of lawyers, redefining, in Kantian fashion, the questions and concepts to be used, and reaching deep into the social sciences for appropriate tools. In performing these tasks, a key focus is on decision, on choices about how values are to be produced and distributed or "shaped and shared" in a given community. Values are things people profoundly desire, and for their analysis McDougal used a delineation developed largely by Lasswell, which seeks to identify desired events comprehensively by using the eight categories of values they had identified. To focus on the component operations involved in making a decision, McDougal and Lasswell developed a sequential analysis of decision making that yielded seven "functions"; intelligence, promotion, prescription, invocation, application, termination and appraisal.

By using these and other concepts, McDougal aspired to improve the performance of scholar and lawyer. To be useful, he believed a system must be contextual—i.e., take account of all the features of the social process of immediate concern, relating them to the larger context of events. It must be problem-oriented, and, given its emphasis upon contextuality, it must employ multiple method or interdisciplinary skills. The framework of inquiry for this endeavor is critical, for it must yield realism, permit application to dissimilar situations, and be sufficiently general to meet the requirement of contextuality, yet be economical enough to permit implementation. It remains a matter of some continuing debate among adherents of the New Haven School whether this relationship between contextuality and feasible practical application can be resolved without making the whole process overly cumbersome. McDougal was thus distinctive in insisting on detailed attention to social and power processes, even among sociologically oriented colleagues in jurisprudence.

III.

The practical application of this theory in international law produced five major treatises: studies on the law of war or "the legal regulation of international coercion," with Florentino P. Feliciano; the public order of the oceans, with William T. Burke; the public order of outer space, with Harold D. Lasswell and Ivan Vlasic; the interpretation of agreements, with Harold D. Lasswell and James Miller; human rights, with Harold D.
Lasswell and Lung-chu Chen; and the constitutive process of the international system, with Harold D. Lasswell, W. Michael Reisman and Andrew Willard, which remained to be completed at his death. All of McDougal's treatises in international law were 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 conditioned those decisions, projections of likely future decisions, and the alternatives thought to produce 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 literatures were incorporated and documentary reference was enormous. The total impact of each book was and continues to be magisterial.

Given his problem-orientation, it was no surprise that McDougal also wrote on the most controversial issues of his time. He made the conflict between democracy and totalitarianism—"contending systems of world public order"—a foundation of his work. His monographs on subjects as diverse as hydrogen bomb tests in the Pacific, the U.S. quarantine against Cuba, and the Security Council action with respect to Rhodesia generated great controversy, not simply because of the positions he espoused, which some critics contended bore the imprint of a Pax Americana view of the world, but often because of the very fact that a legal scholar was taking a position. Although public commitment on the issues of the day was relatively unusual at that time, it was a central task of his jurisprudence and, indeed, is now recognized in the profession as both appropriate and necessary.

There is no doubt that McDougal's insistence upon the relevance of international law to the major policy choices facing governments and other decision makers has been powerfully influential and of immense importance in helping to close the academic gaps between international law, international relations, and foreign policy. Some, including some of McDougal's friends and adherents, were doubtful about the linkages between the jurisprudential underpinnings of the New Haven School and recommended policy outcomes in relation to specific substantive issues such as arose in their most inflamed form during the latter stages of the Vietnam War. Some who were dedicated followers of McDougal as mentor and scholar thought that at times his dedication to community values became coterminous with support for American values; others thought that the distinction drawn by the famous McDougal/Lasswell article on contending systems of domestic public order did indeed identify the central normative fault line of the Cold War era with respect to the promotion of human dignity within the historical setting of the half century after World War II.

IV.

McDougal's work represented the most significant departure in recent generations from what had gone before. Undoubtedly, future generations will consult this work. They will not, unfortunately, know his extraordinary personality. He combined generosity, loyalty, and a high sense of personal honor with the most extreme combativeness. As an intellectual opponent, McDougal was honorable but unyielding. His colleague, Lasswell, once 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.” McDougal’s powerful and combative public style became legendary. In the 1960s and 1970s, it had only to be suggested that he would intervene at an international law meeting—whether at the Royal Institute of International Affairs in London, the International Law Association in its biennial meetings around the world, or the American Society of International Law in Washington, D.C.—for the hall to fill with those who relished the battle that was sure to follow, as McDougal turned his guns on the opposition.

McDougal’s pugnacious style on any intellectual matter in a public forum was contrasted by southern courtesy on all matters personal. He was adored by his students and respected and liked even by those who profoundly disagreed with him. Students who were lucky enough to study with McDougal often spent the rest of their lives under the influence of his ideas or contending with them; and he himself remained loyal and supportive of his students, following their careers and providing advice and support whenever called upon. Knocking on the door of his office at the Yale Law School, in student years or decades later, one would hear the shouted command “Come” (never “Come in”). When one entered the room, an imposing figure wearing a green eye visor could eventually be discerned among the thousands of books. No student ever felt rushed. The lucky ones might be invited to the Graduate Club or to Mory’s to continue the discussion over dinner. Professors from other schools or mendicant scholars who wended their way to Yale were invariably invited to lunch and dinner by a charming and solicitous host.

V.

Everyone who came in contact with McDougal was aware that he had an eye problem. The lenses of his glasses were thick. His study was strewn with powerful magnifying glasses and, of course, the green eye visor was as constant as his tie and jacket. No one who was present in the Great Hall of Justice of the International Court could forget the image of McDougal with a special bright lamp provided by the Registry, his head tipped sideways and peering with his best eye at his notes, as he argued his case. In midlife McDougal suffered retinal detachments in each eye and underwent four operations. For much of his last four decades—the period of his greatest productivity—he was effectively blind. He never asked for special treatment and never mentioned his disability. Indeed, he never thought of himself as disabled. Those who worked most closely with him and witnessed how blind he had become were awed by his courage and grace in this adversity.

VI.

McDougal’s written work will surely establish him as one of the seminal figures of modern international law. The vocabulary he assembled, which was initially resisted, has proved to be indispensable for describing the contemporary international legal process and distinctive objectives of modern international law. Despite themselves, many who still view themselves as opponents of his approach, now use many of his terms in their own work. In this respect, one can say of Myres Smith 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.”

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