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# Myres S. McDougal

Eugene V. Rostow†

The facts are not in doubt, and may be stipulated: born and brought up in Mississippi; graduated from Ole Miss, where he taught classics for two years; a Rhodes Scholar who studied to advantage with Holdsworth and Brierly; a Sterling Fellow and J.S.D. during vintage times at Yale. His youthful frolic in the classics aside, McDougal's whole working career (thus far at any rate) has been rooted in the Yale Law School, save for a lively apprenticeship (1931-1934) at the Law School of the University of Illinois and a season in the foreign affairs bureaucracy during World War II. His wartime experiences shifted the focus of his immediate concern from the law of real property, which he called Land-Use Planning, to international law, which he identifies as the Public Order of the World Community. Now Mac has reached Yale's retirement age, and he becomes Emeritus, at the peak of his creativity.

The facts, however, do not begin to suggest the magnitude of the task of accounting for the phenomenon of Myres Smith McDougal.

## I

Myres McDougal is not a complex personality, as many students of the subject have supposed. Scholars in the field, writers of theses and learned monographs, have created a mystery where there is none. Confused by Mac's diversity, they have missed the key point because it is too simple for their solemn methods: The Grand Cham is not one man, but three remarkable men contained in one man's skin.

The first of the three McDougals—perhaps we should identify him as Senator McDougal—is a consummate Mississippi politician of the old school: worldly, perceptive, and persuasive—principled, to be sure, but above all an artist in power. There is not a trace of Senator Claghorn in Senator McDougal—no bombast, nothing of the demagogue. But he knows about power, gathers it, cultivates it, and uses it, with a grace Senator Richard Russell and Mr. Sam Rayburn would have understood and appreciated. Senator McDougal has been the innova-

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tive President of the American Association of Law Schools and of the American Society of International Law. For many years he was a baron of the Yale Law Faculty, Chairman of its Graduate Committee, and mover and shaker in its vehement political life, which occasionally became internecine warfare. From time to time he has advised lawyers, government departments, and corporations, served on committees, and proved to be the architect of victory in international arbitrations and legislative contests, like that which effectively reversed the Supreme Court's first decision in *Sabbatino*.<sup>1</sup> Above all, he is the spider at the center of a worldwide Old Boy network which is the marvel of the age. It deals with the very stuff of power: appointments, promotions, honors, the make-up of key committees, assistance to a brother or a sister in difficulty for the moment. A sabbatical, let us say, in Bangkok? The deanship, hypothetically, at Freiburg or Florida or Cornell? A grant and a visiting appointment to tide over a period of political turbulence at home? Nomination to the staff or even higher reaches of a federal department? Nothing could be simpler. Nor could any set of decisionmaking processes be managed with greater elegance or discretion.

Mac has never given Senator McDougal his head, of course. He has interests and goals which have commanded priority. The other McDougals have required too much even of Mac's titanic energies to allow the Senator domination in his life. But in one realm the Senator has been permitted full sway. Professor McDougal was thrice Chairman of the Yale Law School's Faculty Committee on the selection of a dean.

The Yale bylaws provide that the University President place the names of prospective professors before the Yale Corporation for appointment "upon the recommendation" of each school's Board of Permanent Officers, a body which at Yale consists of the full professors. The naming of deans, however, is a different matter. The statutes say that the President nominates deans to the Corporation "after consultation" with the faculty of the school concerned. For as long as memory runs, however, this provision has had a special gloss of usage in the life of the Yale Law School. The Yale Law Faculty, proud of its autonomy, insists that it elects its own deans. Indeed, it is hard to imagine that a dean could lead our stiff-necked faculty unless he had a mandate running directly from it. On the other hand, the presidents of Yale are proud and stiff-necked, too, and jealous of

1. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); 22 U.S.C. § 2370(e)(2) (1970).

their prerogatives. They insist that deans are their representatives to the faculty, just as the faculties insist on the converse proposition. Yale presidents have a tendency to recite the literal words of the university bylaws on these occasions, and sometimes they try to avoid collective action by the faculty, which could be interpreted as an election.

The independence of the Yale Law Faculty goes beyond electing its own deans. On one celebrated occasion, Dean Henry Wade Rogers was appointed Judge of the United States Court of Appeals for the Second Circuit. In those comfortable days, the Judge thought it would be nice to remain Dean of the Law School as well. The faculty soon disabused him of that idea. Vigorous action led by Arthur Corbin induced Rogers to resign and obtained the appointment of Tom Swan as dean. Judge Swan was a great dean, and his consulship marks the true beginning of the modern Yale Law School.

In fact, a dean recommended by a majority of the Yale Law Faculty has only once been rejected by the President of Yale in modern times, in 1939. All other deans appointed to the post have first been chosen and anointed by the faculty, through a tribal rite I once described as "a procedure so arcane that only a few initiates understand it, and for most of them the postpartum trauma is so great that they forget, quickly and with relief, what really did happen."<sup>2</sup> It is an exercise which requires tolerance, forbearance, and humor on the part both of the faculty and of the President, and a high measure of diplomacy on the part of the chairman of the faculty committee. He is placed squarely between Scylla and Charybdis, and exposed to slings and arrows from every side.

Senator McDougal discharged these delicate duties on three occasions, each time to the grateful acclaim of jealous faculty and jealous President alike. Each time, needless to say, the dean of Mac's choice was elected by the faculty, and appointed, more or less meekly, by the President and Fellows of the Yale Corporation.

The second McDougal is the kindest and most generous of friends and teachers. I have never witnessed a finer human relationship than that of McDougal's enlarged family: the web of interest, concern, and affection which links him to present and former students and colleagues all over the world. The skills of Senator McDougal helped to place and promote many of them. But Professor McDougal has remained a living force in their lives, helping them to fulfill their highest potential as lawyers, government officials, scholars, or teachers

2. Rostow, *The View From Room 103*, YALE L. REP., Summer 1965, at 8.

by his encouragement and example. It is an extraordinary comment on Mac's spirit and character that his former students, much as they respect him, and apply his methods, remain free to disagree with him comfortably, and without strain. Mac has established a school, not a sect.

## II

McDougal III, McDougal the scholar and theorist of law, is the most remarkable and important of all—the McDougal whose substance gives meaning to the activities and achievements of Senator McDougal and Professor McDougal the teacher. The third and ultimate McDougal is a formidable man, altogether different in personality from both his siblings. Where the Senator is suave, and the teacher generous, sympathetic, and supportive, the intellectual McDougal is fierce. An argument he regards as shallow or erroneous arouses his righteous wrath. The world of ideas is the passionate heart of his universe. In that realm there is only one criterion, and his devotion to it is complete.

McDougal's achievement as a scholar is so original and bulks so large in our world that we find it nearly impossible to realize its scope, power, and significance. This is especially the case in his own School, where all the normal factors of family life inhibit the acceptance of such judgments. It is fair to say, I believe, that no American scholar save Story has built a house to compare with McDougal's. His vision is not international law, or the law of property, but the process of law itself. Having translated his vision into a theory and a methodological scheme, he has applied it with stunning power to panel after panel of the misty field of international law. Among the modern writers of treatises, Corbin is the only one whose work compares with McDougal's in coherence and quality. Like McDougal, Corbin developed a sophisticated and analytical method for studying law as part of the social process, and he used it superlatively well in his classic treatise. For all its sophistication, however, Corbin's way of identifying the issues at stake in the development of social policy through law is not nearly so complete, systematic, nor far-reaching as McDougal's. As a consequence, his analysis is not so fundamental.

It is impossible, and would be unfair, to contemplate Mac's accomplishment as a scholar without recalling his partnership with Harold Lasswell. Before the McDougal-Lasswell firm was established, Lasswell was well known as a pioneer in political and social science. He was one of the first scholars to use Freudian insights in the study of political behavior, and was a key figure in the serious literature of prop-

agenda and a number of other features of modern political life. The collaboration of McDougal and Lasswell has certainly been one of the most important, and most fruitful, in modern intellectual history. It has been developing over a period of nearly 40 years, and it embodies an achievement which is changing the way we think about law.

### III

McDougal came to Yale from Oxford at a definite stage of the revolution in jurisprudence which had become manifest 50 years before with the publication of *The Common Law*. McDougal's work can be understood only in the context of the American realist movement, the soil in which it was nurtured.<sup>3</sup>

Holmes's great book, and the intellectual process which produced it, were typical of the intellectual climate of the late 19th century. In every body of knowledge, from economics and political theory to literary criticism, two tendencies were at work, and often at war. One group of knights carried the banner of science, the other of history. The first school stressed the importance of "reason" and "theory," the second of "nature" and "fact." Both claimed the nearly magical prestige of natural science and its methods as authority for what they were doing. The theorists invoked the example of Newton, the historical school that of Darwin and the classifiers. In the din of battle, few of the protagonists ever perceived that both schools were right—that organized knowledge requires both facts and theories, both a static and a dynamic view, both logic and experience.

In law, or at least in American law, the late 19th century was a time when the rationalizing, system-building component of law was becoming oppressive. The judges and the lawyers tended to treat precedent (or at least to speak of it) as a rigid and nearly absolute rule governing the development of law. At Harvard, Langdell preached the gospel of a science of law, to be distilled by professors from the law library as a set of clear, symmetrical, and logically consistent propositions or rules. If the professors were good enough, the law could be reduced to a code or restatement that would end the sprawling confusion of the common law. Then judgment could be found, not made, and society could at long last enjoy a stable, certain, and perfectly predictable legal order.

3. I have commented on this movement in *The Realist Tradition in American Law*, in *PATHS OF AMERICAN THOUGHT* 203 (A. Schlesinger & M. White eds. 1963), from which some phrases are borrowed, and at greater length in my forthcoming book, *The Ideal in Law*.

To this view the opening page of *The Common Law* was a challenge direct:

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

In Massachusetts to-day, while, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.<sup>4</sup>

Holmes's intellectual formation showed the influence of English, French, and German historical studies, and the influence of William James and Charles Peirce as well, with their insight into the methods of science and the role of theory in the structure of knowledge. Holmes saw the social process as a historian, indeed, as a participant in history. The professor and later the judge never forgot that he had been a Brevet-Colonel in the Civil War. But he knew, too, that facts do not exist apart from the ideas we hold about them—that a flag is more than a bit of bunting.

The American debate about the nature and purpose of law developed as an integral theme in the formation of modern American intellectual life as a whole, starting 85 or 90 years ago. Holmes's essays and speeches, and his example, had influence. But he was hardly alone.

4. O.W. HOLMES, JR., *THE COMMON LAW* 1-2 (1881).

The debate had all the characteristics of American intellectual life generally. It was vigorous, colorful, insular, not very learned, and often naive; it was also, of course, curious, creative, and endlessly drawn to reality. Few of the participants, except for Holmes, Pound, and a number of later exceptions, had read much beyond the more obvious Anglo-American classics. Our legal literature was almost universally crippled, as so large a part of American intellectual life has been crippled, by philosophical ignorance, and especially by ignorance about the processes of discovery, the relationship between hypotheses and evidence—between “theory” and “fact”—in any system of organized knowledge. Most of us were content to proclaim our faith in “pragmatism” or “institutionalism” and our undying opposition to “abstract theory.”

The role of rules in the law was the most active front in the continuing battle, for reasons basic to the philosophical issues at stake. And it has remained a central one, with some shift in emphasis, ever since. The rules of law, however awesome in appearance, are tentative hypotheses advanced from time to time by judges, lawyers, legislators, and others who write law or write about it, in order to explain the changing patterns of social decision embodied in the law. The impulse to formulate rules is not simply a measure of the obsessive tendencies in the legal mind. It derives from an ethical imperative basic to every legal system: the principle that like cases should be decided alike.

Some of those who participated in the battle as “realists” attacked the rules root and branch. They were genuine nihilists, and denied the legitimacy, or indeed the presence, of a generalizing element in law altogether. For them, the rules of law were fig leaves of deception. Decisions were, in fact, based on unstated interests or value preferences: on the judge’s state of mind, his bourgeois prejudices, or the state of his digestion. The reasons he offered for decisions were afterthoughts, cynical rationalizations; the judge was not a conscientious lawyer working within the permissible limits of his craft, but a willful autocrat.

Other realists concentrated not on the existence but on the intellectual quality of the rules of law. They were content to demonstrate that what passed for orthodox rules of law no longer corresponded to reality, that they were meaningless, or circular, or self-contradictory, like the concept of “implied malice” which drew Holmes’s scorn.<sup>5</sup>

A third faction within the realist camp was fascinated by the fact

5. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894), reprinted in COLLECTED LEGAL PAPERS 117-18 (H. Laski ed. 1920).



that the judge often has a significant possibility of choice in deciding a case: a choice in finding the facts, which Jerome Frank stressed, or a choice among the rules which might be taken as major premise for the case. While nearly all the realists agreed with their opponents that most cases which reach appellate courts can only be decided one way, they felt that many of the remaining cases are settled by the judge's "qualification" or "classification" of the controversy, his nearly instinctive decision to treat it in one perspective rather than another. The rest of the cases are decided by changes in the rules of law, by the conscious determination of the judge or other lawmaker that one or another of the social interests at stake in the controversy should now be given a different weight in the balance, even at the expense of continuity in the law. This was the feature of the lawmaking process to which Holmes and Cardozo had given so much attention: the fact that judges, like legislators, had to make policy choices. There was no way for them to escape from their share in the sovereign prerogative.

#### IV

How and on what grounds were such choices to be made? Cardozo had said that the judge must "get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."<sup>6</sup> Holmes had preached with fire in his pen that the law must reach into economics, sociology, philosophy, and history—into all the sciences of man and of society—to help make its policy choices rational. But singularly little had been done to carry out Holmes's gospel by the early thirties, when Myres McDougal entered the fray, fresh from Mississippi and Oxford. He came to Yale at a particularly heady time in the life of that institution. He had benefited greatly from his tutelage with Holdsworth. He already had a strong sense of law as part of history and a clear perception of the central fact that law is the instrument of society for fulfilling its ideal of justice. But he had much to unlearn, too. His year as a Sterling Fellow was filled with the delightful crash of breaking icons. Sturges and Arnold were there, hooting at the very possibility of law. Others helped to demonstrate, in every class and at every cocktail party, that the rules the young Rhodes Scholar imagined were so clear and so settled were in fact nonsense—that they had ceased to correspond to the law-in-fact and had lost contact with the mores of the community.

6. B. CARDOZO, *The Nature of the Judicial Process*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 154 (M. Hall ed. 1947).

The young McDougal plunged into the pond with zest and enthusiasm. He never joined the camp of the nihilists, but he ranks with the best of the realists in an effort which has characterized his work ever since, the scrupulous and critical reformulation of the rules of law in the light of the tests and tenets of realism. One could pick illustrations at random. I have recently worked with his masterful reformulation of the principle of self-defense in international law, in which he shows that a dozen seemingly different rules and categories accepted in the older literature are simply instances along a spectrum of permissible peacetime self-help to remedy a breach of international law for which there is no other feasible remedy. The essence of McDougal's argument is that the identification both of the wrong and of the permissible limits of the remedy must be made in the context of all the facts, and of the conditions essential to the peaceful functioning of the state system.<sup>7</sup>

But while good, sinewy legal analysis of this order has always been a strong feature of McDougal's work, it has not been its central or most important thrust. From the beginning, McDougal perceived the main intellectual gap in the realist movement and addressed himself to curing it.

With few exceptions, both the realists who would have driven rules out of the law and those who devoted themselves to clarifying and improving the articulation of the rules stopped short of developing explicit criteria for judging the goodness or badness of law, beyond the single issue of the correspondence between the law in the books (positive law) and the law in action (custom). Reading their books and articles gives one the impression that the whole task of legal scholarship was to see to it that the law discover itself accurately and realistically as the mirror of custom. Professor Ackerman has recently remarked on this aspect of the realist movement, in writing particularly of Jerome Frank:

Once they accepted the broad range of conflicting ideals that coexisted within the received legal tradition, neither lawyers nor judges would be victimized by the illusion that a difficult case could be decided by reasoning from asserted legal principles. Instead, by creatively combining the disparate elements of the legal tradition, they would seek to fashion a legal solution which could serve as a just resolution of the conflicting interests involved in

7. See M. McDougal & F. Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961); Rostow, *Book Review*, 82 *YALE L.J.* 829 (1973) (of J. Moore, *LAW AND THE INDO-CHINA WAR* (1973)).

the case before them. Frank's book, however, made very little effort to define the substantive outcomes which would best accommodate social conflicts. To embark upon this task would be to commit the same old fundamental legal error, and Frank would not play Father Knows Best.

. . . Like Frank, . . . the other Realists did relatively little to formulate new criteria by which substantive legal outcomes could be evaluated. At the core of Realism was an extraordinary optimism, a belief that once men were free from all the damaging myths of the past, they would have little difficulty understanding the proper shape of a just society.<sup>8</sup>

One of McDougal's first significant contributions to the literature addressed this criticism. He was responding to Lon Fuller's charge that by concentrating on the law that is, the realists were neglecting the problem of what the law ought to be.

The American legal realism which Professor Fuller attacks is . . . a bogus American legal realism. John Austin, Kelsen, and others, from abroad and at home, may have done their bit to "separate the inseparable," but most of the men whose names appear upon Professor Llewellyn's famous list of American legal realists are innocent men. So also are most of their followers. They do not deny that the law-in-fact (rules and behavior) embodies somebody's ethical notions (how absurd it would be to deny it!); on the contrary, they are the people who have been most insistent that it has too often embodied an ossified ethics, inherited from previous centuries and opposed to the basic human needs of our time. More clearly than any of their critics, the realists have appreciated that legal rules are but the normative declarations of particular individuals, conditioned by their own peculiar cultural milieu, and not truths revealed from on high. Most of their writing has, in fact, been for the avowed purpose of freeing people from the emotional compulsion of antiquated legal doctrine and so enabling them better to pursue their hearts' desires. Not bothering to explain how judges can legislate, it is they who have insisted that judges do and must legislate, that is, make a policy decision, in every case. The major tenet of the "functional approach," which they have so vigorously espoused, is that law is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves. Any divorce they may at times have urged between *is* and *ought* has been underscored always as *temporary*, solely for the purpose of preventing their preferences from obscuring a clear understanding of the ways and means

8. Ackerman, *Law and the Modern Mind*, by Jerome Frank, 103 DAEDALUS 119, 122 (1974).

for securing such preferences. Directly contrary to Professor Fuller's charges, they have sought to distinguish between the *is* and the *ought*, not for the purpose of ignoring or dismissing the *ought*, but for the purpose of making a future *is* into an *ought* for its time.<sup>9</sup>

McDougal's reply to Fuller is full of brio; in retrospect, I conclude that while I still agree with its basic argument, the youthful combatant was perhaps too kind to many of his teachers, friends, and natural allies. They were indeed among the most devoted and effective reformers of their time. Many of them did use more or less explicit criteria for choosing one path rather than another in reshaping the law. But most of them merited Fuller's criticism, which Ackerman has now repeated. Some were indeed genuinely nihilist or nearly so, and devoted their time only to the cheerful toil of smashing idols. Many, perhaps most of the others, as Ackerman justly remarks, did singularly little "to consider in a sophisticated way the relationship between the legal order and the ends of social life."<sup>10</sup> But McDougal's paragraph on Fuller, now 30 years old, accurately describes the major theme of his own work ever since.

Holmes had put his definition of law into the future tense. It was never enough, he said, to discover what the law really was at a given moment. What would it become tomorrow? What forces would influence the law to change, and what fruit would come of the process of change? To answer that question, Holmes urged with equal zeal, the lawyer had to understand and consider the ideas playing on the formation of law: pressures for social change in many areas, from banking and bankruptcy to labor law and the law of torts. He had to master all the sciences of society, from anthropology to statistics. And he had to know the judges, their prejudices and predilections, their zeal to participate in the growth of the law, or to resist it. After all, Holmes spoke of law not only as a prediction of what the judges would in fact decide, but also as the "witness and external deposit of our moral life," and of its history as "the history of the moral development of the race."<sup>11</sup>

Several of McDougal's contemporaries perceived with him that the success of the icon-breaking period of the American realist movement had cleared the ground for an indispensable next stage in the devel-

9. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834-35 (1941).

10. Ackerman, *supra* note 8, at 126.

11. COLLECTED LEGAL PAPERS, *supra* note 5, at 170.

opment of American legal thought, the quest for standards and values in terms of which one could judge the goodness or badness of the living law, and guide the evolution of the law that is toward the law we think it ought to become. McDougal's contemporaries, Felix Cohen and Alexander Pekelis, wrote with distinction about the moral element in law.<sup>12</sup> Others dealt with the problem of policy goals in the context of particular areas of law: economic regulation, policies towards freedom of expression and of the press, equality for blacks. These men (and they were a small band within the American legal professoriate) realized that the events of the thirties and forties demanded a conscious renewal of interest in the relationship between law and ethics. An interest in the moral content of law had seemed derisory to the sophisticates of the twenties. In the thirties, in the face of Hitler and Stalin, a Great Depression, and the apparently endless prospect of war and revolution, ethics had ceased to be a laughing matter. A number of sensitive writers about the philosophy of law began to declare that it had been neglected too long. Thus it was not an accident that McDougal and others of similar views took an abiding interest in the modern revival of Natural Law, led by some of the law schools of Roman Catholic orientation. McDougal and his associates were seeking to build a secular democratic Natural Law for modern America, and the modern world community. They recognized their kinship with those who were seeking the same or cognate goals within a religious tradition.

How did it come about that McDougal and Lasswell emerged not simply as leaders and prophets of this movement, but as the creators of an analytic method whose purpose is to teach people how to think systematically about what the law is seeking to accomplish, and what it should seek to accomplish? Whenever one investigates an important creative act, one is always left with an unanswerable question: Why this man? It is not hard to identify the issues which agitated the intellectual world McDougal inhabited and the place of the problems he chose to study in the array of those issues. But short of psychoanalysis, it is impossible to explain how and why the young McDougal, fresh from Mississippi and Oxford, became the monument we know.

I shall not attempt here to put the McDougal-Lasswell system for clarifying and identifying the policy goals of particular social policies

12. See, e.g., F. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* (1933); F. COHEN, *THE LEGAL CONSCIENCE* (1960); A. PEKELIS, *LAW AND SOCIAL ACTION* (1950).

into the proverbial nutshell. Those who have not yet mastered those guides and checklists of the problems any student of social policy must deal with in a comprehensive analysis of a particular problem of law should repair at once to one or another of their classic essays in method and perspective.<sup>13</sup> I shall comment here on two features of their methodology which seem to me of major importance to legal and social science scholarship at the moment and for the foreseeable future.

First, the McDougal-Lasswell approach treats all lawmaking as of equal significance. It is completely free of the myopic concentration on what judges do, a concentration which makes so much of our traditional legal literature trivial. McDougal and Lasswell have fully accepted and digested the lesson taught by Holmes and Cardozo, that judges cannot help making law. They should, of course, make law as judges, and not as legislators or constitution makers, within the real, if necessarily impalpable, boundaries imposed on judges by the nature of their duties. But the McDougal-Lasswell method deals with law as the product of a social process in which many institutions and groups, beyond the courts, must participate responsibly: legislatures and corporations, foreign offices and other agencies of national states, élites and nonélites, "private" transnational bodies like churches and political parties, organs of the United Nations. The McDougal-Lasswell taxonomy is comprehensive enough to take account also of the effect on law of events themselves—wars, for example. For McDougal and Lasswell, law is a pattern of behavior deemed right by a society at a particular time in its evolution, and a set of peaceful and not so peaceful procedures for determining what that pattern of behavior is. In scope, it encompasses the whole process of making decisions of social policy, as it should.

Secondly, the McDougal-Lasswell approach rests on a disciplined distinction of the utmost importance to all social science scholarship: the distinction, often blurred in the literature, between the ethical norms of a particular society at a particular time and those of the scholar himself. Their stress on the necessity to define and clarify the observational standpoint of the detached scholar is one of the most useful features of the McDougal-Lasswell method. It liberates the schol-

13. McDougal & Lasswell, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); McDougal & Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943), reprinted in M. McDOUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 203 (1971).

ar to be conscious of the fact that he need not—indeed that he should not—always accept the moral code of his own or any other society at any given moment of time, since one of his highest responsibilities is to offer an independent and rigorously ordered criticism of that code. It is distressing to realize how many serious scholars mistake their own standards of judgment for those of a given society at a given time, or indeed for standards of universal validity.

What McDougal and Lasswell have done, on a majestic scale, is to transform the sociological-functional jurisprudence of the Realist generation into a jurisprudence of values. The most striking feature of their method is a scheme for classifying, clarifying and evaluating the variables necessarily involved in the analysis of any body of law in terms of the social policies the community wishes to see fulfilled by its law. The purpose of each such analysis is to discover (a) whether the law-in-fact corresponds to existing standards of social morality, (b) whether the existing standards of social morality correspond to the aspirations of that society for its law, and (c) whether the prevailing aspirations of the society for its law match those which McDougal and Lasswell believe should prevail over the long run.

As students of society imbued with a strong sense of history, McDougal and Lasswell never confuse their own value system with that of the social order they are studying and criticizing. They are developing a reasoned and fully articulated social philosophy of their own, a humane and democratic vision of the social order they wish to see realized through law. But the passion of their dedication to that ideal is never allowed to distort their examination of the relationship between the living law and the moral code of the society it purports to govern.

McDougal's retirement marks a date of consequence in a splendid academic career—not its end, but nonetheless a transition we are forced to remark. He has genuinely done what every professor is supposed to do: He has created, or re-created, his own version of the intellectual and moral universe which has been the nominal subject matter of his life-long scholarly effort. And he has been throughout his career a supremely generous and human teacher and colleague.

McDougal's work is not finished. Four or five books are in process. More gleam in his eyes. But what has been done already is grand, and good.