



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2009


Jupiter as Everyman: Michael Reisman and the Scholar as Teacher

James E. Baker
Georgetown University Law Center

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1430>
<http://ssrn.com/abstract=2552670>

34 *Yale J. Int'l L.* 533-540 (2009)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Educational Leadership Commons](#), [Legal Education Commons](#), [Legal Writing and Research Commons](#), and the [National Security Law Commons](#)

Essay

Jupiter as Everyman: Michael Reisman and the Scholar as Teacher

James E. Baker[†]

The scholar is not The Intellectual. He is Man Thinking. Man Thinking is not the member of a race apart. He is the citizen performing the function appointed for all citizens in a civilized state, a function without which there would be no civilized state. He is Everyman purposefully apprehending the meaning of things Between the true scholar and the teacher there is no fundamental incompatibility but a fundamental affinity of the most intimate kind.

—A. Whitney Griswold¹

Quod licit jovi, non licit bovi. What is permitted of Jupiter is not permitted of cows. I do not know Latin, but I do know this phrase. I learned it from Michael Reisman. It stuck with me because it captures the authority of the president in the area of national security. While serving as the Legal Adviser to the National Security Council (NSC), I found it useful in explaining to NSC staff why the president could accept gifts, but they could not. He was Jupiter and they were cows.

Today, the phrase offers a point of departure for considering Michael's contribution to the field of national security law. Although I am hesitant to suggest that Michael's academic colleagues are somehow cows (they are not), I have no hesitation in calling Michael Jupiter. That is because Michael's contributions stand apart.

There is, of course, his scholarship: twenty-two books, three hundred articles, and counting. This work is comprehensive, realistic, and it bridges the gap between law and legal policy because it describes where we should go, not just where we are, or have been. For that reason, it is useful to the national security practitioner.

Michael has also prepared countless students for careers in public service—in government and academia. He has done so directly in the classroom and in countless letters of recommendation. He has also done so indirectly by offering a distinct and distinctive voice at Yale on matters of international law, constitutional law, and jurisprudence.

[†] James E. Baker is a judge on the United States Court of Appeals for the Armed Forces. He has also served as Special Assistant to the President and Legal Adviser to the National Security Council (NSC), Deputy Legal Adviser to the NSC, Counsel to the President's Foreign Intelligence Advisory Board, an Attorney Advisor in the U.S. Department of State, a Senate aide, and a Marine Corps infantry officer. He is the author of *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* (2007) and co-author, with Michael Reisman, of *REGULATING COVERT ACTION* (1992).

1. A. WHITNEY GRISWOLD, *LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL* 36-37 (Yale Univ. Press 1962) (1959).

Michael is Jupiter because he is a Scholar-Teacher, not one or the other, but both as one—representing “a fundamental affinity of the most intimate kind.”² In this role, this most uncommon writer, intellect, and tutor is what Griswold called the “Everyman purposefully apprehending the meaning of things.”³ What is more, Michael exemplifies many of the traits most useful to the practice of national security law. No wonder that through his scholarship, teaching, and example, Michael has informed, tested, and inspired generations of lawyers.

I appreciate that now. However, I will admit that I did not feel so inspired the first time I talked with Michael. He did not seem like Griswold’s Everyman. And I felt like a cow.

* * * *

The knock on the door was followed by, “Come!” Lunch ensued in the faculty lounge. Michael had just invited me to co-write a paper on covert action based on a single comment I made in class. We continued “the discussion” at lunch, which meant that Michael and Myres McDougal continued the discussion. I grazed. I didn’t understand a word they said. Were they speaking Latin? No. It was a legal dialect I came to refer to as “Ladougalman”—a form of perfect prose derived from the scholarship of Professors Lasswell, McDougal, and Reisman, laced with phrases like “constitutive process,” “human dignity,” “modalities,” and “minimum and optimum world public order.”

What had I gotten myself into? After lunch, I called on Professor Eli Clark, whose reputation as the warm and kind undergraduate Master of Silliman College also characterized his open-door policy at the law school. I sat below the map Eli used as a pilot during “Operation Market Garden,” the Allies’ bold, but ultimately unsuccessful, attempt to drop airborne troops to seize the lowland bridgeheads to the Rhine. Then, I reported my predicament. Did he have a dictionary that would define the foreign phrases I heard at lunch? He did not. I would have to devise my own. But he did have words of encouragement and told me to jump at the invitation.

When I hit the ground, I found friendship, rigor, and an Everyman scholar dedicated to the study of force, minimization of suffering, and the advancement of human dignity and the law.

* * * *

Constitutional government is not on autopilot. It is a constant and incremental grind that depends on the moral integrity of the lawyers who wield the Constitution’s power and promise. This is especially true in the area of national security where much remains unseen and beyond external validation.

2. ALFRED WHITNEY GRISWOLD, IN THE UNIVERSITY TRADITION 112 (1957).

3. *Id.*

[E]xperience has obscured the fact that, no matter how carefully defined and administered, no government of laws is insensible to what Plato termed "the endless irregular movements of human things." Laws are made by men, interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself.⁴

Michael's work reflects this understanding. It stands apart in its willingness to address the three dimensions of national security law: the substance of the law; the process of decision; and the nature of legal practice, including the role that personality plays, or what he might call "human agency." Indeed, without understanding process and practice, substance can become an abstraction. Without understanding process, the lawyer cannot meaningfully apply the law because he won't be in the room to provide advice to the decisionmaker. He will also be excluded from the decisionmaking forum if he does not understand how to apply law to policy in a realistic, but value-based manner.

Michael's analysis is realistic. He analyzes the law as it is (or is not, as the case may be), not as he or others might wish it to be. Hence, Michael distinguishes between what he refers to as the operational code and the aspirational or normative myth system. "By operational code is meant a set of norms that operate in a certain sector and that actors deem to be authoritative even though the norms may be inconsistent with formal legal codes."⁵ Thus, the operational code recognizes that all states are not equal in defining international law, and on some matters, elites matter more than other persons. *Quid licit jovi, non licit bovi*. This is not a cynical view, nor a matter of *Pax Americana*; it is descriptive.

It is the operational code that informs policymaking. Thus, Michael's scholarship is immediately relevant to practitioners, that is to say, the President, national security principals, congressional leadership, and the lawyers who advise them. If you believe, as I do, that the law should regulate decisionmaking and can guide actors toward informed and wise choices, then these individuals are your most important audience. And decisionmakers need to know what the law is at the outset, without policy spin or preferential lean, just as they need to know what the intelligence is, without spin or lean. That does not mean lawyers should limit themselves to "yes," "no," or "I don't know," any more than intelligence analysts should eschew predictions or best judgments. It means they should indicate what is hard law, what is nuanced or debatable law, and what is legal policy directed toward preferred outcomes.

Michael's work is policy-based because it is value-based. Michael is realistic without losing sight of the law's ideal and the overriding objectives of human dignity and optimum public order. This interjection of values is accomplished not by pretending the law is something it is not, but by articulating what it should become by identifying preferred outcomes, showing decisionmakers how to achieve those outcomes, and demonstrating why those values improve our physical security and advance our liberty interests.

4. GRISWOLD, *supra* note 1, at 161.

5. W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777, 777 n.3 (1989).

[I]t is not sufficient for the scholar simply to identify and assemble trends in decision. Trends must then be tested against the requirements of world public order as a means of assessing their adequacy. Insofar as they are found wanting, scholars should take the responsibility of proposing alternative arrangements so that a better approximation of political and legal goals can be achieved in the future.⁶

In short, the difference between the operational code and preferred outcomes is the difference in practice between telling the decisionmaker what the law is, and advising the decisionmaker on the pros and cons of choosing one legally available option over another and how best to shape the law. The latter is legal policy. Put more bluntly, Michael is not on an academic hamster wheel. He aims to close the gap between the academic and the practical. He writes to inform, to guide, and to change, so that the law might better preserve public order and advance human dignity.

Michael's work is also distinctive because it identifies and incorporates the critical influence that process (good, bad, or absent) plays in legal and policy decisionmaking. Indeed, process and practice are often more important than substance, particularly if the decisionmaking process is colored by the pathologies of secrecy, speed, and immediacy, as is often the case in national security practice.

This understanding of process is reflected in the seven functions of decisionmaking: intelligence, promotion, prescription, invocation, application, termination, and appraisal.⁷ While the terminology is dense, the analysis is precise, with substantial emphasis on the first and last criteria. Decisionmakers learn at their peril that mastery of the intelligence instrument is integral to their roles. This understanding is crucial where the use of force is contemplated and the distinction between evidence and actionable intelligence is critical.

If the United States is sometimes found wanting in the area of long-range intelligence, it is even more wanting in the area of effective appraisal. In theory, and sometimes in practice, this happens during the process of decision—at Principals and Deputies meetings. But the focus tends toward the immediate and not the enduring consequences of policy choice. Moreover, rarely is there an effective process of ongoing appraisal—internal or external—to ensure that decisions are implemented as intended and that one problem solved does not mutate into a new problem requiring policy adjustment.

Michael also appreciates the sometimes dominant role of informal rather than formal processes of decisionmaking, as well as the role personality has in shaping decisions, whether those decisions are made at NSC meetings or faculty meetings. This is an operational code of a different sort. Lawyers, and certainly law schools, tend to focus on the formal—the textual conveyance of law or process. Michael looks behind the curtain to determine how and where decisions in fact are made, and by whom. This awareness of human influence

6. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 6 (1999).

7. Michael Reisman, 1995 Seibenthaler Lecture, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605, 612 (1996).

does not reflect the scholar apart. This is the scholar as part of the human condition—Everyman contributing to the meaning of things.

Whether or not you agree with his voice, students who are exposed to it “often spen[d] the rest of their lives under the influence of his ideas or contending with them,” which is how Michael himself described Professor McDougal.⁸ First, that means contending with the notion that the Constitution is designed to uphold and defend our physical security and our liberty interests—not one or the other, but both. The liberty interest entails the preservation of our constitutional values, including those values based on due process and tolerance, but also the notion of physical defense, found in the Preamble to the Constitution and enumerated Articles that follow. Security means not only physical safety, but also the sense of secure space that allows us to carry on a way of life that is diverse and tolerant. Second, one must also contend with Michael’s view that international law is not the aspirational refuge of the complex, elite, or weak. Shaped well and wielded wisely, international law is an instrument that advances our physical security and upholds our legal values.⁹

But these observations of Michael’s work represent the tip of the iceberg. The scholar who believes in law must also believe in the conditions that foster the law. That entails the training of men and women not just in the substance of the law, but in the process, practice, and values of law. In short, the scholar must also serve as teacher. If Michael’s scholarship has informed generations of national security officials, his teaching has directly shaped generations of national security lawyers. It is this contribution as the Scholar-Teacher that runs deepest, but it is hidden in plain view, disguised by an overwhelming written legacy and hidden beneath the waves in the practice of others.

It turns out that Michael’s attributes as the Scholar-Teacher include many of the values necessary to meaningfully practice national security law. In no area of law are these values more vital than in addressing questions involving intelligence and the use of force. The pressure is greatest where lives are at stake and the law most subject to malleable claims of authority. I will describe a few of the traits I have in mind.

Rigor. The best skills training I ever received as a lawyer was as a Marine Corps infantry officer. I got screamed at a lot, operated under pressure, and was held accountable for the decisions I made, or should have made. The best analytic training I ever received came from Michael Reisman. The Reisman tutorial was my Legal Boot Camp. It was there that fledgling arguments were broken down, tested, and rebuilt as I gained the intellectual confidence to find my legal voice and then defend it.

When we were working on our book, the first chapter I submitted to Michael was met with a single-word response: “No.” This was succinct feedback. It was also a bit “Marine” in character. But it came with something more, which made all the difference. Michael also conveyed the confidence of

8. Richard A. Falk et al., Comment, *Myres Smith McDougal (1906-1998)*, 92 AM. J. INT’L L. 729, 733 (1998).

9. James E. Baker, *What’s International Law Got To Do with It? Transnational Law and the Intelligence Mission*, 28 MICH. J. INT’L L. 639, 651-54 (2007).

high expectations and the certainty that he knew I could do better. He asks for rigor because he expects rigor, and in expecting rigor, he shows respect for his students and his colleagues. This is the difference between the teacher who assumes a student is up to the task, and the teacher who assumes that the student is not.

Endurance. I was startled when I was asked to contribute to a celebration of Michael's seventieth birthday. Naturally, I was happily surprised that I was asked at all. I was also surprised because it never occurred to me that Michael was seventy years old. He is ageless. His scholarship is ageless. His engine is stuck in full steam ahead, and it always has been.

I once met someone who went to grade school and high school with Michael. "Really?" I asked. It had not occurred to me that Michael entered this world as something other than a professor. I had to ask, did he speak in prose then as he does now? "Yes." Did he write book reports, or just books? "Just books," was the answer. Ageless indeed!

Work ethic. John Kenneth Galbraith was renowned for the spontaneity of his written voice. When asked the secret to this spontaneity, he responded: five drafts.¹⁰

In contrast, Michael is known for speaking in publishable prose. In 1992, I attended a conference at the Naval War College on the use of force. The audience was invited to comment after the primary presentation. Hands shot up throughout the hall; Michael spoke first. Following his remarks, the presenter again asked for comment; not a hand went up. Nobody wished to follow Michael's publishable observations. Fortunately, with some coaxing, the conversation continued.

But if Michael is a verbal printing press, he gains his insight the old-fashioned way—through study, inquisition, and an open mind. James Russell Lowell said that President Abraham Lincoln was a great lawyer because he was able to see both sides of every argument.¹¹ No one who has benefited from Michael's presence at Yale will fail to see that, where international and constitutional law are in play, there are at least two sides to every argument. Here the iceberg metaphor remains apt. There is much hard work beneath the waves of prose.

Humility. The first rule of intelligence is to know what you do not know. Michael is a lifelong learner because he knows what he does not know. In 2001, I co-taught a course with Michael entitled "Managing National Security." I was uncertain at the outset about the allocation of speaking roles. At the first class, when it was clear that Michael did not intend to speak, I began to talk about the subject of national security process. After one hour, I was near the end of my "contingency" outline. During the break I asked, "Aren't you going to say anything?" Michael responded: "Why would I? I am learning too much." This exchange also reminds me of something else Griswold said about teaching: "From the standpoint of the student, . . . if he's

10. Interview by Harry Kreisler, Inst. of Int'l Studies with John Kenneth Galbraith, *Intellectual Journey: Challenging the Conventional Wisdom: The Art of Good Writing* (Mar. 27, 1986), available at <http://globetrotter.berkeley.edu/conversations/Galbraith/galbraith2.html>.

11. See James Russell Lowell, *Abraham Lincoln*, in *ESSAYS ENGLISH AND AMERICAN* 441, 445 (Charles W. Eliot ed., 1910).

at all curious intellectually . . . he's bound to learn more from the man who is himself learning than he is from the man who just tells him about learning."¹² That is the scholar as teacher. On the train ride home, I prepared a detailed outline for the remainder of the course.

Grace. Michael may be an intellectual drill instructor, but he instructs with grace. He respects his students and his colleagues, even if he disagrees with their arguments. Michael's answer to a bad idea is a better idea, not a louder voice.

Moreover, Michael bears the moral authority of someone who "practices what he teaches." In practice, Michael remains focused on the use of force, humanitarian values, and the realization of minimum, if not optimum, public order through law. He then, in turn, applies and teaches these concepts. Consider, for example, his tireless efforts to bring the Eritrea-Ethiopia boundary dispute to peaceful resolution and his work on the Inter-American Commission. Michael honors the legal profession and the academy by acting as well as professing to advance the interests in which he believes. This informs his teaching and it inspires others to do the same.

Moral courage. Finally, Michael illustrates in the academic context what it means to be Teddy Roosevelt's "Man in the Arena."¹³ Michael is not a fence-sitter and he does not play to the audience. He calls it as he sees it. And, if you are on a fence, he will ask you off.

He makes predictions. He is wrong some of the time, but he is right most of the time. Consider that Michael was writing about nonstate actors and terrorism in the 1970s.¹⁴ And, in the 1990s, when the executive branch was having trouble attracting congressional support to amend the law to better counter terrorism, Michael was speaking about the looming threat.¹⁵ Michael said the following in 1995 regarding the threat of terrorism:

Terrorism appears to be evolving into the preferred form of covert action of weaker states and, to an extent that cannot yet be gauged, of groups that are not affiliated with any state. . . . One way, if not the only way, to prevent terrorist incidents is by covert counteraction. Are we witnessing the birth of a holy war against irregular terrorist forces about the planet? If so, it is likely to be a "dirty" war unless the normative restraints that are appropriate are carefully clarified and applied.¹⁶

For those with innate confidence, the Arena is a welcome mat. But for those persons with innate modesty, the transition from student to advocate to public official can be difficult. Nowhere will the scrutiny become more glaring for the lawyer than where questions of force are involved. We should hope so in a system of democratic accountability. But it is good to have a role model like Michael when the kitchen gets hot.

12. GRISWOLD, *supra* note 1, at 197-98.

13. Theodore Roosevelt, *The Man in the Arena: Citizenship in a Republic*, Address at the Sorbonne, Paris (Apr. 23, 1910), in THEODORE ROOSEVELT: LETTERS AND SPEECHES 778-98 (Louis Auchincloss ed., 2004).

14. See, e.g., W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1 (1973).

15. See, e.g., W. Michael Reisman, *Remarks, Covert Action*, 20 YALE J. INT'L L. 419, 423 (1995).

16. *Id.* at 424.

Because Michael is always in search of preferred outcomes to better serve human dignity and public order, he is often in that kitchen. That, in turn, puts him in the Arena. And, like the man in Roosevelt's Arena, he takes his shots. Consider Michael's article on the 1996 Qana incident in which he suggested that states should assume compensatory responsibility for collateral damage as a matter of humanitarian instinct and as a vehicle to reinforce discrimination in targeting.¹⁷ The article was not embraced in government circles. But the marketplace of ideas was better for contending with an idea that had as its goal the minimization of suffering in warfare.

In short, he is not the critic, but Man Thinking, apprehending the meaning of things and how the law might inform a more civilized society.

* * * *

As Scholar-Teacher, Michael has brought credit to Yale and its law school. He has honored Yale University's commitment to public service, measured in the scholarship and deeds of teachers, judges, presidents, civil servants, and the many lesser-known names on the walls of the Woolsey Hall rotunda, whose commitment to service was greatest of all. Most of all, he has used his remarkable intellect in the interest of a civilized society founded on order, dignity, and law. In this regard, Michael is everyman, or at least Griswold's Everyman. He is also Man Thinking, a scholar dedicated to apprehending the meaning of things to advance our common interest in a civilized state. And, for this, I thank him.

17. W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 397-98 (1997).