

A Common Lawyer Looks at the Civil Law (Book Review)

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Holmes' much vaunted tolerance of other peoples' faith is made crystal clear in a letter to Pollock on April 5, 1917. He says: "If I had to choose, I think I would rather see power in the hands of the Jews than in the Catholics"—not that I want to be run by either." Such characterizations of public officers need no comment.

A striking illustration of the ability of the author to read his own views into Holmes' mind is illustrated by the *German Language Cases*. There Holmes dissented from the majority holding that statutes banning the teaching of German in public schools were unconstitutional. Mr. Rodell calls his opinion "a troubled dissent," adding that the dissent was the ". . . more troubled by reason of the fact that McReynolds, scarcely a champion of human rights, was this time the Court's chief spokesman."² Nothing Holmes ever wrote justifies this inference. What our author neglected to mention was that Sutherland, whom he calls a "reactionary corporation lawyer," joined both in the dissent and in the opinion.

This book, contrary to some opinion, is not a menace. The popularizations of the author are well known. His point of view is so obviously compulsive that most scholars will just smile and feel sorry.

The other day this reviewer appeared at a hearing before a federal administrative agency. There were a number of lawyers present representing various parties. When one of them, younger than the rest, became very abusive, and another objected, the hearing officer said wisely, "[n]ever mind, it's easier to ignore him than to try to correct him."

MAURICE FINKELSTEIN.*



A COMMON LAWYER LOOKS AT THE CIVIL LAW. The Thomas M. Cooley Lectures. Fifth Series. By F. H. Lawson. Ann Arbor: University of Michigan, 1955. Pp. xvii, 238. \$4.00.

Dr. Charles Phineas Sherman, a keen scholar and researcher in Roman Law, writing almost forty years ago, made the following profound observation:

The revival in the United States of the study of the Civil Law has already assumed ample proportions which are yearly increasing, and its full fruition with many far-reaching consequences is but a question of time. The greatest contribution of this revival to American law will be a powerful influence operating for the betterment of the private law of the United States, purging it of

² P. 206.

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its present dross of redundancy, prolixity, inconsistency, and lack of uniformity, and crystallizing it into the compact form of a codification.¹

Dr. Sherman, therefore, quite appropriately dedicated his work to the continued success of this movement of revival which in his opinion was "so fraught with benefit to the progress of American jurisprudence."² The passage of time confirmed his view that the "world mission" of Roman Law since Justinian was "[s]till effective for progress in Modern Jurisprudence."³

Professor Lawson's new book *A Common Lawyer Looks at the Civil Law*, embodying the timely and instructive lectures delivered at the University of Michigan as the Thomas M. Cooley Lectures, is a book which was conceived in the grand traditions of the Roman Law. Written in discursive, clear and simple language, this book will serve as a source of continued inspiration to those students of Roman Law who have been aware of the humanizing influence of that great system in world law.⁴ Professor Lawson is quite aware of the distinction between Roman Law as a local city law and Roman Law as a world law embodying principles of Natural Law applicable to all mankind and for all times. Hence, he does not deal at any great length with specific rules of Roman Law but, rather, devotes his energies to a broader demonstration of the influence that the principles and concepts of the Roman Law have exerted on the development of the legal systems of the world and the law of Continental Europe in particular.

Although one might suspect that the very broadness of the outline would detract from the merit of the work, on the contrary, it is that very universality that establishes the particular worth of the book insofar as it confirms the belief of so many scholars that the contribution of Roman Law to world culture is second only to the advent of Christianity.⁵ "Indeed it was the Roman Empire," states Bryce, "and the Church taken together which first created the idea of a law common to all subjects and [later] to all Christians, a law embodying rights enforceable in the courts of every civilized country."⁶

The reader is reminded that many of the beautiful phrases of natural law philosophers embody the eternal principles of justice of

¹ I SHERMAN, *Preface To First Edition*, in *ROMAN LAW IN THE MODERN WORLD* v (2d ed. 1922).

² I SHERMAN, *op. cit. supra* note 1.

³ I SHERMAN, *Preface To Second Edition*, in *ROMAN LAW IN THE MODERN WORLD* vii (2d ed. 1922).

⁴ See SMITH, *A GENERAL VIEW OF EUROPEAN LEGAL HISTORY* 1, 4-5 (1927).

⁵ Yntema, *Foreword*, in LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* vii, xvi (1955). "In the opinion of Buckland, . . . one of the greatest Romanists of our time, next to Christianity it 'was the greatest factor in the creation of modern civilization, and it is the greatest intellectual legacy of Rome.'" Yntema, *Roman Law And Its Influence On Western Civilization*, 35 *CORNELL L.Q.* 77, 79 (1949).

⁶ 2 BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 571 (1901).

the corpus juris of Rome. As indicated by Sherman, the American Declaration of Independence, a monumental declaration that may be regarded as the crowning achievement of eighteenth century philosophy, "enshrines many a tenet of Roman jurists who confessed the alliance of philosophy with law."⁷ The inspiring statement that "[b]y natural law all men are equal" is the expression of the great Ulpian as is the noble definition that "[j]ustice is the constant and perpetual will to allot to every man his due." Although all students of the Common Law know the Latin maxim "volenti non fit injuria," few know that that also, in addition to countless others, represents the survival in modern law of the genius that was Ulpian. In portraying Papinian and Ulpian, Professor John Henry Wigmore, in his instructive and most enjoyable *Panorama of the World's Legal Systems*, reminds us that "[f]or us, these two bear also this sentimental distinction, that [with Paulus] they once dispensed justice in the island of Britain, as Roman magistrates in a Roman basilica."⁸

The foregoing sets the stage for Professor Lawson's lectures entitled in the ensemble, *A Common Lawyer Looks at the Civil Law*. Although it is now recognized that extremely valuable comparisons can be made between the Common Law and the Civil Law, it is almost impossible to commence a study of the Civil Law without an appreciation of the Roman Law approach to legal problems. The common element of the Civil Law countries is the reception, to a lesser or greater degree, of Roman Law. Professor Lawson states that what is needed, in order to make the study of Roman Law completely alive, is "a course which will show the debt of the modern world to Roman Law by using it as a vehicle for teaching modern Civil Law."⁹ Although he does not say that this book entirely meets the need for such a course, he does show what can be done in that direction by giving "a brief anatomy of the Civil Law."¹⁰

The lectures, five in number, quite naturally set forth as separate chapters, present the subject in the following order:

- Chapter I. The Historical Background.
- Chapter II. The Form and Sources of the Civil Law.
- Chapter III. The Contribution of Roman Law.
- Chapter IV. The Advance Beyond Roman Law.
- Chapter V. Non-Roman Elements in the Civil Law.

After explaining what is meant by the "Civil Law," Professor Lawson indicates that "[t]here are certain features common to all the Civil Law systems, but within the Civil Law one can detect a number of

⁷ I SHERMAN, ROMAN LAW IN THE MODERN WORLD 61 (2d ed. 1922).

⁸ WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 428 (1936).

⁹ P. 1.

¹⁰ P. 2.

families."¹¹ Just as the law in the various common law countries differs on particular matters, there is nevertheless what the author calls a "general family likeness."¹² In the civil law countries, the common bond, of course, is the Roman Law. This is neatly summarized in the following passage:

The places where the Civil Law systems most resemble each other are where Roman Law was received, and the greatest dissimilarities are where the old customary laws survived more or less unchanged.¹³

The introductory chapter sets the pattern for an understanding of the Civil Law. The various sources and agencies of transmission are sharply distinguished. First, the Civil Law countries possessed a mass of customary law; secondly, Roman Law was transmitted to medieval and modern times in the *Corpus Juris* of Justinian; and, thirdly, the animating spirit of Natural Law and the Canon Law not only influenced the customary law, but also the Roman Law itself. By suggesting to jurists the possibility of law founded on reason, the latter sources presented a more moral and more ordered system of law than had appeared theretofore. Professor Lawson, however, is, perhaps inadvertently, in error when he suggests that the Canon Law "prepared the way for natural law."¹⁴ Natural Law finds its roots in the early philosophers and attains its pre-Christian peak in Aristotle. Obviously, it antedates the Canon Law of the Church. Nevertheless, to the extent that the various countries received the Roman Law, a unity resulted which was in turn reinforced by the Canon Law. As for the Canon Law, being an agency of transmission of the Roman Law, it is interesting to note that it served a similar purpose in transmitting the Roman Law into English Law.¹⁵ At this juncture it should also be remembered that Professor Lawson admits having "no concern here with natural law as a philosophical concept," and he is not sure whether "it exists or that it is of any use if it does exist."¹⁶ Hence, unfortunately, the unifying tendency and influence of the Natural Law is disposed of rather superficially in a matter of several pages.

The author is clearly at his best when he discusses Roman Law and its reception into the various civil law countries. Under the chapter on the Form and Sources of the Civil Law, extremely interesting observations are constantly made concerning codification, the various types of codes and the motives underlying codification. He

¹¹ P. 5.

¹² P. 6.

¹³ P. 7.

¹⁴ P. 10.

¹⁵ See WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 55 (1925). Blackstone described the Canon Law as "a body of Roman ecclesiastical law." CHASE'S *BLACKSTONE* 47 (2d ed. 1884).

¹⁶ P. 30.

also discusses the "Literary Quality of the Civil Law,"¹⁷ and the "Conceptualism" of the Civil Law.¹⁸ In presenting this civil law system the author presents in a masterful way the influence of the "jurists" and the institutional writers. An appreciation of the role of the "jurists" in the civil law world will undoubtedly help the student of comparative law who wishes to learn the methodology of the Civil Law. The lawyer steeped in the Common Law instinctively turns to the decisions of the courts to ascertain the law. The book will show that civilians, on the other hand, think of law as "existing quite apart from the courts and before the courts can have a chance of settling it in doubtful cases."¹⁹ The book, however, will also make it clear that no point of difference should be exaggerated. The law-making function of the courts in the civil law system cannot be underestimated. Unquestionably, even the codes are occasionally "mauled" by the courts.

Although it was stated at the outset that at "the heart of each Civil Law system is a large body of received Roman Law,"²⁰ it is in the third chapter that Professor Lawson discusses some specific characteristics of Roman Law and evaluates its specific contribution to the modern Civil Law. In this chapter the author demonstrates the universality of Roman Law and in a discussion of "Roman law as a law of movement" indicates why he considers it to be "really very remarkable."²¹

In the chapter entitled *The Advance Beyond Roman Law* the author shows that, though a knowledge of Roman Law is the necessary step toward an understanding of the modern Civil Law, more remains to be done. The student, for example, must learn the more important changes that took place in Roman Law in the middle ages and in modern times. The final chapter entitled *Non-Roman Elements in the Civil Law* deals with matters such as the passing of property, family law, succession and matrimonial regimes. Even this chapter, although dedicated to the non-Roman elements in the Civil Law demonstrates in striking fashion that the study of Roman Law is perhaps the indispensable starting point for an understanding of the Civil Law.

The book contains an illuminating foreword by Professor Hessel E. Yntema. Professor Yntema records some thoughts worthy of repetition concerning the problems confronting the teaching of law in the United States. He quotes the words uttered in 1821 by Mr. Justice Story who referred to the "frightful calamity . . . of being buried alive, not in the catacombs, but in the labyrinths of the law."²² The

¹⁷ P. 63.

¹⁸ P. 66.

¹⁹ Pp. 80-81.

²⁰ P. 91.

²¹ P. 101. See SMITH, *Four German Jurists*, in *A GENERAL VIEW OF EUROPEAN LEGAL HISTORY* 110, 121 *et seq.* (1927).

²² P. ix.

reference, of course, was to the increased number of printed decisions. Professor Yntema exclaims "[i]n what terms, if Justice Story were to speak today, might he characterize the existing law!"²³ The immediate solution seems to be "specialization." The tendency toward specialization, however expedient or inevitable, Professor Yntema cautions, "must not unduly sacrifice the seamless web of the law to disintegration in vocational compartments."²⁴ He refers to the strong "vocational influence" in legal education wherein topics deemed of inferior importance for vocational purposes are excluded. As a result, "law students enter upon the practice of law . . . essentially monolingual, and in that language indisposed and indeed unprepared to cultivate those general or comparative aspects of law, which lend perspective, significance, and splendor to their chosen vocation."²⁵

Professor Yntema is indeed pleased with the 1953 Thomas M. Cooley Lectures delivered by Professor Lawson. He asserts that the lectures contain "observations that deserve consideration in any serious reappraisal of American legal education."²⁶ He indicates in his Preface, and elsewhere,²⁷ that the basic common legal language of the laws of Western Europe stems from Rome. He concludes that "without knowledge of the Roman sources, it is difficult to appreciate readily or accurately the conceptions used not only in the modern civil law, but also in international law, jurisprudence, and even in substantial degree in the law of England."²⁸

It is submitted that it is perhaps not premature to say that we are entering upon an era comparable to the twelfth century revival in learning. It cannot be doubted that the wealth of comparative law literature that has very recently appeared²⁹ indicates that we have perhaps really given up our "parochial attitude" toward foreign institutions.³⁰ If this modern tendency is to assume the influence for the good predicted in Dr. Sherman's Preface to his work, more books such as *A Common Lawyer Looks at the Civil Law* should be written. Winfield has stated that by a study of Roman Law men gained "a knowledge of the principles of legal architecture."³¹ *A Common*

²³ *Ibid.*

²⁴ P. x.

²⁵ Pp. xi-xii.

²⁶ P. xv.

²⁷ Yntema, *Roman Law as the Basis of Comparative Law*, in 2 *LAW: A CENTURY OF PROGRESS 1835-1935* 346 *et seq.* (1937); Yntema, *Roman Law And Its Influence On Western Civilization*, 35 *CORNELL L.Q.* 77 *et seq.* (1949).

²⁸ P. xv.

²⁹ See the most impressive bibliography in SZLADITS, *BIBLIOGRAPHY ON FOREIGN AND COMPARATIVE LAW* (1955), and also the Comparative Law section in MARKE, *A CATALOGUE OF THE LAW COLLECTION AT NEW YORK UNIVERSITY* 889 (1953).

³⁰ Niles, *Preface*, in SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* vii (1954).

³¹ WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 60 (1925). See also Coleman-Norton, *Why Study Roman Law?*, 2 *J. LEGAL ED.* 473 (1950).

Lawyer Looks at the Civil Law helps bring that knowledge to the American reader. In the words of Professor Yntema "[i]t is a signal merit of these lectures to introduce the American law student to the palladium of private rights on the Continent of Europe—the civil law."³²

EDWARD D. RE.*



YOUTH AND THE LAW. A Youth Counsel Bureau Project. By Frederick J. Ludwig. Brooklyn: Foundation Press, 1955. Pp. xxii, 386. \$5.50.

This book reads almost as easily as a novel, though it is a serious and authoritative treatise on a most important subject. It would be a mistake, however, to read it superficially or too rapidly. It is imbued with a deep insight into life and law. As the title makes clear, its material concerns itself with the controversial subject of the treatment of youth by our laws, both state and federal. The subject is discussed from its origin, causes, development, understanding and lack of understanding of the problem through the past, up to the present day, and from the point of view of the alleged modern approach to a solution.

In the true tradition of an authority writing what I believe is a most valuable text and top grade reference work, the author has carefully refrained from imposing his own theories upon the reader and has allowed the facts to speak for themselves, as it were. The reader will acquire a clear understanding of the problem of juvenile and adolescent delinquency, an understanding of the degree of responsibility to which parents are and should be held. From such understanding, the minds of the readers may produce ways and means to reduce, or at least alleviate, the condition.

The book fills a very definite need and should be, and possibly will be, adopted as a text book in schools of social work and for use by social workers, welfare agencies, probation officers and all persons dealing with youth.

It is divided into five parts. The first deals with the responsibility which the law has imposed on young offenders from the time of the Romans to the present day. The second part shows the fragmentation of the problem, handled as it is in five different courts in New York City, and illustrates the work being done in the federal

³² P. xvii.

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