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Judicial Legislation: A Study in American Legal Theory (Book Review)

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Roscoe Pound on *The Causes of Popular Dissatisfaction with the Administration of Justice.* It pays tribute to Langdell's *Summary of Equity Pleading* and to Ames' Casebooks. To all these monuments, marking the progress of the law, Chief Justice Vanderbilt has now added a new book, worthy to stand beside these great predecessors, explanatory of the theory underlying the movement for the New Rules and the work for the improvement of Judicial Administration, in the eternal effort to effect greater justice and make human rights more secure. It is a remarkable achievement.

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JUDICIAL LEGISLATION. A STUDY IN AMERICAN LEGAL THEORY. By Fred V. Cahill, Jr. New York: Ronald Press Company, 1952. Pp. ix, 164. $4.00.

For those who might find it unrewarding to read through the countless pages of recent American juristic writing, this book will be a heaven-sent boon. In a few paragraphs, pages or, at most a chapter, the author, with deft skill, epitomizes the essence of the thinking of almost each and every worker in the field. The result is so successful that one is left without any desire to check the author's summaries or to gain first hand information by examination of original sources. It is, of course, not the author's fault that the stuff he works with turns out to be difficult to utilize in the construction of any satisfying legal theory.

There are a number of reasons for this failure, but the principal one is the effort to wed law to modern science and to make all law a handmaiden of a particular economic theory whether of laissez faire or of socialism or of some compromise between them.

The natural order of justice cuts across any economic system and any observable scientific data. Our quarrel with the Russians, for example, is not that they have a different economic system than ours, but that they impose it upon their people by methods so tyrannical, so inhuman and so unjust, and that they apparently plan, by like methods, to impose it upon the rest of the world as well. The patriarchs of the Old Testament were men of wealth, as well as of faith. They had abundance of coin, as well as flocks, land upon which to graze them and a good supply of wells of living water. The men of the New Testament were likewise men of faith, but they had merely their daily bread, if that, and were in fact warned that wealth itself might prove an insurmountable obstacle to salvation. Modern Americans seem to be steering a course somewhere between the two. On the one hand they do not despise wealth nor do they think it an evil to labor to acquire it. On the other hand, few of us now subscribe to the notion that wealth is the reward for virtue.

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As the author recognizes there are two separate questions in jurisprudence: How do judges in fact arrive at their decisions? And how ought judges to arrive at their decisions? The more they "do" in the way they "ought," the more perfect human justice will become, but absolute perfection is achieved only by the Divinity itself.

The legal theorists reviewed can be said to concern themselves primarily with the first question. In the main they do not consider the second question. They are, in fact, rather convinced that there is no answer to the second question, and hence, that it is idle to seek one. This conviction of futility is not a product of their own thinking. On this score the author traces its origin to pragmatism and to Darwin. He has not, however, told the full story, for he has failed to mention the influence of Marx and Freud on these chaps.

Naturally, if one seeks to find out how judges decide cases in fact and in doing so, limits points of reference to the world of sense, the science of jurisprudence will be pulverized. How many different ways there are to "balance the interests," as Pound suggested, it is difficult to enumerate. This, however, is the frame of reference which necessarily resulted in the views of Mr. Justice Stone to the effect that ". . . the law is what the judges having jurisdiction of the cases declare it to be." [1]

Lesser luminaries than Pound and Stone whose views are summarized give different emphasis to the general proposition that there is no such thing as law in the abstract. They maintain that the opinions of judges are either determined by psychological considerations, themselves too difficult for a human being to understand, or by self-interest either of the judge or of the class to which he belongs.

This shattering of standards is most likely inevitable in a world whose thinkers refuse to accede permanence to social or juristic ideals. Under the influence of such theories judges and legislators are indistinguishable. Too frequently we have seen in recent years courts of high repute writing merely *"affirmed"* or even worse, *"reversed"* without opinion. The Supreme Court achieves this same legislative prerogative with its mounting crescendo, *"certiorari denied."* Often judges attempt to justify these occurrences with the explanation that the pressure of business prevents the expenditure of more time in the process of reaching an opinion, but such haste to accomplish judicial chores changes the course of the court's output and abolishes the differential between judicial and legislative legislation.

Of course judges legislate. Recognition of this antedates most of the jurists discussed in this volume.[2] Nearly every case is to some extent new. The sun rises and sets on a different world each day, but that these objects of sense are the only reality is the erroneous conclusion which dictates the current crop of juristic expressions summarized by the author. If it were so no judge could ever be right or wrong—only honest or dishonest. Of course he would have some limitations. As a judge he would have the semantic problem of serving up his opinion in proper juristic language. He must also con-

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[1] STONE, LAW AND ITS ADMINISTRATION 19 (1915).
[2] DICEY, LAW AND PUBLIC OPINION IN ENGLAND (1905).

sider the rule of stare decisis. This and like obstacles, however, will not prevent our pragmatic, Darwinian, Marx-inspired, Freudian judge from saying *"certiorari denied"* or *"reversed"* without opinion or make any arbitrary judgment to which, as one of the greatest of them put it, "the sky is the limit."

The obsequies on Natural Law are supposed to have been pronounced by Holmes. But even he recognized that those who expound the doctrines are buttressed by a reasonable philosophy. He could hardly claim otherwise. He said: "But I do agree with them in believing that one's attitude on these matters is closely connected with one's general attitude toward the universe." [3]

Holmes' views of the universe are not kept secret. He dismisses the entire non-visible world of reality as "a brooding omnipresence in the sky," and therefore thinks that every faith is temporal because so many "fighting faiths have been upset by time." [4]

Of course, that the Constitution of the United States protects those who hold these views, does not make them sound. It will take more than the Constitution of the United States to abolish man's faith in God or our basic realization that there do exist eternal verities which must be taken into account in ordering our lives in the *hic et nunc.*

Many people confuse Natural Law with the law of human nature. They are laboring under the influence of Locke and Rousseau. The invention of an imaginary "state of nature" which is good or bad, as the thinker may wish, was an Eighteenth Century achievement. It led to fantastic views of natural law as illustrated by John Courtney Murray, S.J.[5] He cites Van Doren's example in the Great Rehearsal of "How one disturbed New Englander objected to the two-year senatorial term proposed by the constitutional convention, on the ground that a one-year term was a 'dictate of the law of nature'; spring comes once a year, and so should a batch of new senators." [6]

I am much afraid that modern jurists avoid natural law first, because like the confused New Englander they think of it in Eighteenth Century terms and second, because the concept severely taxes the human mind. The general attitude seems to be that a creature as ingenious and mature as man, who can make ice cubes in an electric ice chest in a few minutes, ought to be able to deep-freeze philosophy, religion and natural law. Alas, such simplicity cannot be trusted. At least not by those of us who have a realistic approach to epistemology; who recognize that the "real" is the measure of knowledge, and that intelligence can reach it, that is, can get a picture of the nature of things.

Once grasped, that idea causes many of the problems of both philosophy and jurisprudence to fall neatly into place. In law it gives us democracy which, whatever else it entails, involves the recognition that there are certain human rights that are as inviolable by the majority today as they were by the absolute monarchs of former days or the tyrannical dictators of our time. Whence come these rights—the rights of the person, the family, religion and

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[3] Holmes, *Natural Law,* 32 HARV. L. REV. 40, 42 (1918).
[4] Holmes, J., dissenting in Abrams v. United States, 250 U. S. 616, 624 (1919).
[5] MACIVER, GREAT EXPRESSIONS OF HUMAN RIGHTS 69 *et seq.* (1950).
[6] *Id.* at 72.

the like? Not from the state, but from an order higher than the state, the natural order of justice.

Anthropologists who spend much effort in bringing to us the nature of lost civilizations are delighted when they can describe these ancient worlds in modern terms and show resemblances between them and us. This yearning for continuity finds its human practical counterpart in the devotion of parents and children to each other. Who can doubt that such manifestations are part of a great natural order, large enough to encompass the idea of justice—to which all man-made law, judicial as well as legislative, must strive.

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LAW AND PEACE. By Edwin D. Dickinson. Philadelphia: University of Pennsylvania Press, 1951. Pp. xii, 147. $3.25.

Professor Edwin D. Dickinson, a leading authority in international law and international relations, in "Law and Peace," has made available the fruits of many years of experience as a teacher, scholar, and participant in public affairs to all those interested in a world society where law and peace insure the freedom and tranquillity to which the world aspires. In a thought-provoking little book, consisting mainly of four lectures [1] which he delivered at Northwestern University in February 1950, Professor Dickinson has expounded a philosophy of law and world organization that may very well be carefully examined by world statesmen and diplomats. Surely, those charged with the overwhelming burden of establishing the firm foundations designed to maintain and promote a lasting peace, will benefit immeasurably from a careful study of this terse report on the failures, achievements and possibilities of international law. The book, therefore, deals with the principles and practical application of that system of law designed to resolve world conflicts and to govern the relations of nations.

In his foreword Professor Dickinson informs the reader that his general title, "Law and Peace," is the product of ". . . a bit of personal history which may be of interest." [2] The title originally was to be "Peace under Law," but since law provides no panacea for world problems such a title was discarded and the author tentatively formulated the title "Law under Peace." This was in turn discarded and the essays finally appeared under the present title. The

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[1] Other parts of the book have already appeared in the author's casebook on international law and in a law review article. See DICKINSON, CASES AND MATERIALS ON INTERNATIONAL LAW (1950); Dickinson, *International Law: An Inventory*, 33 CALIF. L. REV. 506 (1945).

[2] P. xi.