St. John's Law Review

Volume 15
Number 1 *Volume 15, November 1940, Number 1*

Article 36

The Law in Quest of Itself (Book Review)

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1937, more than sixteen and one-half billion dollars of claims were administered in bankruptcy on which a little less than one and one-half billion dollars was realized. It has many interesting charts, beginning with the life cycle of industry generally and explaining the receiverships in particular cases. These are of invaluable aid in the study of the causes of the failure.

The second part of the volume is dedicated to an explanation of the steps necessary to be taken under the various systems of reorganization, including valuable data with respect to a variety of effectuated reorganization plans. Not least valuable are the inclusion of specimen reports of the Securities and Exchange Commission with regard to particular plans of reorganization.

Those of us who sat through endless meetings of committees and lawyers arranging reorganizations large and small will recognize in this volume a compilation of experience which should prove a valuable short cut to the student. The volume can certainly serve as an excellent text book in a course on reorganization.

MAURICE FINKELSTEIN.*

THE LAW IN QUEST OF ITSELF. By Lon L. Fuller. Chicago: The Foundation Press, 1940, p. 207.

The function of legal philosophy is, in Professor Fuller's arresting phrase, an attempt "to give a profitable and satisfying direction to the application of human energies in the law." [1] The direction which such human energies shall take depends, of course, largely on our definition of law itself. Shall they be directed to the examination of the law *that is,* as the legal positivists admonish, or of the law *that ought to be,* according to the exponents of the school of natural law? The author's answer is that it is impossible to dissociate law in action from the law of the case books; that there is no "rigid separation of the *is* and the *ought*"; [2] that it is neither the sovereign, in Austin's formal sense, nor the temporary numerical majority of the people, as Hans Kelsen, the leader of the Vienna School, believes, that creates the law, but that there is a field of "autonomous order", in the author's phrase, which so surrounds the positive law that there can be no sharp division between the rule that is and the rule that ought to be.

The author maintains that legal positivism has proved itself entirely inadequate to formulate a true definition of law, and that it is necessary to enlist the services of natural law in order to clarify the goal of legal philosophy as he has defined it. This then is a round to be scored in favor of the followers of natural law. However, natural law has many definitions of its own. The term is used by the author, not in the sense of natural rights, or of divinely created rights, or of Rousseau's goal of ideal perfection, but in the ethical [3] rather than

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[1] P. 2.
[2] P. 5.
[3] BOWMAN, ELEMENTARY LAW (1937) 15.

the metaphysical sense. Although the author avoids the use of the word "functionalism", his conclusions would not offend the Functionalists. The story told by this little book is not new, nor is novelty claimed for it; yet the story is well worth the re-telling.

Professor Fuller reviews with thorough scholarship the views of the Positivists from Hobbes, Compte and Savigny to, rather surprisingly, Holmes, whom the author classifies as a realist whose occasional explorations into the realm of the impact of social needs upon law render only more dangerous, by their appeal to the sympathies of the sociological legal philosopher, his insistence upon the *is* in the law. With this characterization of the late Justice's legal philosophy there will be many who will take issue. Was it not Holmes himself who said, "Certainty is only an illusion, and repose is not the destiny of man" ? [4] The author's thesis proceeds, however, with no less logic, because of a possibly abortive sortie, to its major démarche.

If we ask ourselves the question "Is this a steam engine?" the inquiry overlaps with the question "Is this a good steam engine?" [5] In law, surely no less than in engineering, "value and being are not two different things, but two aspects of an integral reality".[6]

The author arrives at this conclusion perhaps the more willingly because of his identification of legal and moral values. This is shown in his criticism [7] of Austin's conclusion that a criterion exists which would distinguish law from morality, in which he states that "the facts most relevant to legal study will generally be found to be what may be called moral facts," [8] and his emphasis on "the extent to which the law, particularly judge-made law, shapes common morality." [9] Here, too, many would take issue with the perhaps too roseate view of the closeness with which law approaches morals. However, a divergent view would in no wise militate against the soundness of the ultimate conclusion that law cannot dissociate itself from that body of non-governmental norms, sometimes called *mores,* sometimes a combination of custom and natural law, which, although influenced by the positive law, effectively rules the conduct of men.[10]

This viewpoint of the nature of law is of importance to a lawyer preparing a brief, in choosing a point of anchorage for his argument; [11] for the judge, in deciding whether to take as his model Holmes or Cardozo, Eldon or Mansfield; [12] and for the professor of law, in answering the problem of how he shall spend the working day outside the classroom; whether as an "intellectual scavenger whose function it is to clean up the conceptual debris left behind in the advance of the law," [13] or "to anticipate the future by giving legal form to

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[4] Lochner v. New York, 198 U. S. 45, 76, 25 Sup. Ct. 539 (1905).
[5] P. 11.
[6] P. 11.
[7] P. 58.
[8] P. 65.
[9] P. 135.
[10] P. 112.
[11] P. 13.
[12] P. 11.
[13] P. 14.

emergent ethical values"; [14] whether to prepare to expound "the existing law as of, let us say, 4 P. M., Tuesday, April 2, 1940",[15] or to impart an insight into the ethical background against which " 'the law as it is' appears as an accidental configuration without lasting importance." [16] A similar problem of choice confronts the law student in directing his own studies. "The way in which the law student decides these questions transcends in importance its effects on his own career, for, through the subtle pressures he exerts on his instructors to teach him what he thinks he ought to be taught, he exercises an influence on legal education—and indirectly on the law—much greater than he has any conception of." [17]

The most dangerous quality of legal positivism, the author points out, lies in its inhibitive effect on "the development of a spontaneous ordering of human relations." [18] The view that law is static until changed directly by the sovereign acting legislatively "simply ignores the plain fact that ideas are capable of growth," [19] and that there is a process by which the common law, in Mansfield's phrase, "works itself pure." Though in many fields of life the form of government of men by ideals, with a temporary moratorium today in certain parts of the world, is being extended, and there are distinct signs in the law of the cases of "an element of creation and discovery in the law," [20] Professor Fuller concludes that "there is precious little evidence that it has as yet substantially affected our law schools."

In the opinion of the reviewer the reason for this reactionary tendency lies deep in the roots of human nature itself, based on the deep-seated human antipathy to change, as threatening a breaking away from the ancient moorings which give the delusion of security to which Holmes referred: "Perhaps one of the reasons why judges do not like to discuss questions of policy or to put decisions in terms upon their views as lawmakers, is that the moment that you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reason seem like mathematics. But the certainty is only an illusion nevertheless." [21]

A statement of Ernest Albert Hooton, in his most recent book,[22] encountered in the course of a desultory summer's reading, may have a very direct bearing on Holmes' "inarticulate major promise." [23] Professor Hooton's statement follows:

> "Possibly the outstanding characteristic of primitive or savage societies is their rock-ribbed conservatism. That is perhaps why many of them have remained primitive. Under these circumstances the progressive has hard sledding. People persist in doing things in the old, stupid ways, and in

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[14] P. 14.
[15] P. 15.
[16] P. 15.
[17] P. 15.
[18] P. 110.
[19] P. 114.
[20] P. 140.
[21] COLLECTED LEGAL PAPERS (1920) 126.
[22] ERNEST ALBERT HOOTON, TWILIGHT OF MAN (1939).
[23] COLLECTED LEGAL PAPERS (1920) 167.

using implements which are ineffective and obsolete, merely because of the ease with which motor habits are formed and the impermeability of the low-grade brain to new ideas. The innovator in the field of mechanical science is regarded with suspicion, fear, and hatred, because his inventions are misunderstood and because they seem to give him an unfair advantage and to depreciate the time-honored methods, inferior tools, and lesser ingenuity of the ordinary worker. These observations are valid in primitive societies and probably held true in civilized nations up to the last century. Only within that time have innovations become the rage of industrialization. The primitive inventor had to overcome a far greater inertia of stupidity and conservatism than it is easy for us in our mechanical age to conceive. He had to possess not only the mental ability to formulate mechanical principles and to translate them into working models, but also the moral courage to persist in the contrivance and use of the novelties which made him suspect." [24]

And again, "With the advance of knowledge consistency ceases to be a jewel and is nothing more than an obdurate chunk of useless rock." [25]

Is this conclusion of a physical anthropologist not an explanation in terms of his science of the "inarticulate major premise", that craving for the illusion of certainty and security, in which Holmes phrases precisely the same conclusion with regard to innovations designed to relate law to life?

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ESTATES PRACTICE GUIDE WITH FORMS. By Homer I. Harris. New York: Baker, Voorhis & Co., 1939, pp. xxxviii, 1281.

The administration of an estate is a skill that calls for the maximum abilities of the legal practitioner. Since the state is an interested party, the process of administration is hemmed in with legal technicalities that require not only an expert knowledge of the law, but also the art of putting into proper form the facts that must be revealed to all the interested parties. The Surrogate's Court Act and the Decedent Estate Law form the background of estate administration, but the practitioner would be ill prepared if his expertness were limited to these two statutes. An intimate knowledge of the tax law, both federal and state, with respect to death transfer taxes and income taxes, is virtually a prerequisite. Two sovereignties seek their pound of flesh before the estate may be transferred to the ultimate beneficiaries and the portions which must be allotted to these powers is quite a substantial one. The devices employed by testators to deflect assets away from the state to their beneficiaries, in the form principally of trusts and gifts, are so delicate that even a proper understanding of what the testator

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[24] ERNEST ALBERT HOOTON, TWILIGHT OF MAN (1939) 23, 24.

[25] *Id.* at 96.

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