

The Catholic Lawyer

Volume 1
Number 2 *Volume 1, April 1955, Number 2*

Article 9

March 2016

Preface to Jurisprudence, Text and Cases

Brendan F. Brown, A.B., LL.B., LL.M., J.U.D., D.Phil.

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PREFACE TO JURISPRUDENCE, Text and Cases by *Orvill C. Snyder*. The Bobbs-Merrill Company, Inc., Indianapolis, 1954. Pp. xxxvi, 882. \$10.00.

Reviewed by

BRENDAN F. BROWN, A.B., LL.B., LL.M., J.U.D., D.Phil. (Oxon.) †

The author of this book, Professor of Law at the Brooklyn Law School, states that its purpose "is the examination of the persistent core of meaning of words of large import, like *law, state, sovereignty, legislative, judicial, executive, proof, right, liability, duty, power, privilege, immunity, property, thing and person*, as those words are used in deciding concrete cases."¹ Implicit in this purpose, however, is a thor-

¹ Gerhart, *op. cit. supra* note 4, at 126, citing M. D. Howe: "For those of us, however, who doubt the cosmic significance of human values, I wonder whether the rejection of the absolute necessarily entails such destructive consequences. May not the value which is merely human have an influence on law as decisive as that which is gloriously absolute?" But the question is not of the decisiveness of influence, but of the beneficial and binding nature of the influence. The Communist influence is human and decisive upon the fate of millions.

†Professor of Law, Loyola University, New Orleans, La.

¹ Snyder, Preface to Jurisprudence, Text and Cases v (1954).

ough exemplification of the analytical school of jurisprudence, founded by Austin through inspiration from Hobbes and Bentham, and later developed by such jurists as Holland, Salmond, Kocourek, Kelsen and Hohfeld. Indeed the work is partly dedicated to the memory of Albert Kocourek from whom Professor Snyder probably derived his juridical faith as a result of two courses in jurisprudence under his instruction at Northwestern University Law School.² He hails Professor Kocourek as the greatest analytical jurist of them all,³ and acknowledges his intellectual indebtedness to the late Walter Wheeler Cook.⁴

The book consists of six parts. A similar structure appears in each part, save the final one, namely, chapters in which a short text by the author, presented from the point of

² *Id.* at 18, footnote.

³ *Id.* at 9, footnote 29.

⁴ *Id.* at 18, footnote.

view of analytical jurisprudence, is followed by current cases, generally selected from courts of last resort, plus other materials, and lastly by a note containing questions about the cases, usually without answers, for classroom discussion. Commendation is due the author for employing a structure which distributes case materials in such a way as to stress function in relation to contemporary legal problems. The limitations of the book do not stem from any deficiency of structure or failure to exhaust the possibilities of analysis.

All schools agree that analysis and classification of positive law are essential for any jurisprudential study. But these alone are not adequate to avoid sociological sterility and moral aridness. The inherent deficiency of the analytical school, and hence of this book, is its over-preoccupation with positive law, its failure to integrate positive law with the social and rational sciences, and its physical power concept of law and the state. But besides this over-all deficiency, there are two additional weaknesses, namely, first, the insufficient and inexact treatment of theories of natural law, and secondly, what appear to be statements later in the book, tending to contradict the basic assumptions of the analytical school.

Not more than five or six pages have been devoted to a discussion of natural law⁵ in a book of over eight hundred pages. But even this brief reference is not exact; indeed it may unwittingly mislead the unwary or untrained reader, especially a law student. The natural law concept in its stoic-scholastic form, however, is the oldest in jurisprudence, with a continuous tradition of thousands of years. Currently, it is one of the two most dominant and influential in

⁵ *Id.* at pages 6, 7, 25, 26, 62, 71.

the United States; the other is the sociological.

The author has cited Lord Bryce as an authority for the statement that "the medieval metaphysicians further elaborated on the naive notion [of natural law] and the Greek and Roman theories, liberally injecting theology."⁶ The reviewer has consulted the citation,⁷ but was unable to find where Lord Bryce had used the word "naive," or stated that the medieval jurists injected theology into the concept of natural law. Actually in this citation, he praised St. Thomas of Aquinum by writing that he "introduces a useful distinction which exercised an enduring influence. The Eternal Law which governs all things is the expression of the Reason of God, the Supreme Lawgiver. That part of it which is not revealed, but is made known to man by his own reason, may fitly be called Natural Law, as being the outcome of human reason, itself created and directed by the Divine Reason. Thus the sharing in the Eternal Law by a rational creature is Natural Law."⁸

The discovery of this notion by the Greek philosophers was the result of profound thinking by gifted intellects. It was not "naive" in the sense in which that word is popularly used, with its connotation of "credulity" or "gullibility." Even though this word also means "artless," "native" or "innate," nevertheless it may very well unintentionally communicate an erroneous meaning.

⁶ *Id.* at 7, footnote 21.

⁷ The author has referred to Essay 5, of Bryce's *Studies in History and Jurisprudence*. Apparently reference was intended to Essay XI which discusses the law of nature.

⁸ Bryce, *Studies in History and Jurisprudence*, Essay XI, 594, 595 (1901).

The medieval metaphysicians did not inject theology into the notion of natural law but rather theodicy. This is a most important distinction. Theology is the science of the knowledge of the divine will obtained by revelation through faith, while theodicy is the science of that knowledge, known by reason. The medieval metaphysicians did combine theodicy with the notion of natural law in the sense of regarding the latter as the law of a personal Lawgiver, promulgated in the human intellect, so that in regard to its more fundamental principles, it is knowable proximately through the conscience.⁹ They showed that while the reason of man could not attain to a knowledge of the supernatural law, yet that law was not unreasonable and did not violate the natural law, because the supernatural and natural laws were integrated in the divine will and intellect. If the statement that the medieval metaphysicians liberally injected theology into the concept of natural law means that they taught that man could come to a knowledge of a personal Law-maker only by revelation, and not by reason alone, then it is totally erroneous.

Not only may the word "naive" be misleading, but also the word "rules" in the definition of natural law as "a set of enduring and unchangeable rules of conduct,"¹⁰ which Professor Snyder has given. The natural law is not made up of "rules" of conduct, but rather of principles, ideals or moral values, which are broader than rules. It may be defined as "that objective, eternal and immutable hierarchy of moral values, which are sources of obligation with regard to man because they have been so ordained

by the Creator of nature."¹¹ These values are more general, therefore, than rules of conduct, which are derived from the application of principles. The natural law is not a code of precise rules in the sense of a moral arithmetic. There were erroneous theories of natural law which did identify it with such a code of rules, but the author of the book has not distinguished these from the scholastic conception of natural law.

Professor Snyder has written that "in the era of the French Revolution, there was a rash of constitution and code making. . . . The speed with which many of the constitutions and codes disappeared in the tide of events brought, in the nineteenth century, a reaction against the presumptions of the natural-law theory."¹² The author has failed to state that this reaction was against subjective, post-Reformational theories of natural law, such as the theory of the supremacy of the individual reason, as followed by the French Revolution. It was not against the scholastic concept of natural law, which in effect was the basis of the theory of the American Revolution insofar as it was justified by recourse to the authority of absolute and objective moral values and self-evident inalienable rights, beyond the just power of popular majorities or political sovereignty to destroy.

Again the author has stated that "the natural law theory . . . seems to be susceptible of sustaining communism. . . ."¹³ It is obvious that a notion of objective natural law based on right reason as understood by a scholastic jurist could never be susceptible of doing this because the ideals of communism are fundamentally opposed to nat-

⁹ See Brown, B. F., *The Natural Law, The Marriage Bond and Divorce* (to be printed in the March, 1955, issue of the *Fordham Law Review*).

¹⁰ Snyder, *op. cit. supra* note 1, at 6.

¹¹ Brown, B. F., *op. cit. supra* note 9.

¹² Snyder, *op. cit. supra* note 1, at 7, 8.

¹³ *Id.* at 15, footnote 49.

ural law. Here Professor Snyder has not made clear which theory of natural law is meant, with resulting ambiguity which may lead some readers to believe that his statement refers to every possible type of natural law thinking.

The scholastic notion of natural law is basically concerned with the justice and morality of positive law, not with the moral goodness or badness of those who make the law. Hence the author's statement that "any theory which sinks into the minds of men the thought of what positive law ought to be lodges there acceptance of who ought to make and enforce that law . . ." ¹⁴ refers only to a subjective conception of natural law. According to the scholastic idea, positive law made in contravention of the natural law is to be condemned as unjust, whether the law-maker was morally good or bad. But it does not necessarily follow that the law-maker in such a case is to be personally condemned. If he acted in good faith and was in invincible error after adequate investigation, then he was not personally culpable. Hence Professor Snyder's conclusion that "it would have been surprising indeed, if variations of the natural law theory had not appeared," ¹⁵ because there is no distinction between the morality of the positive law and that of its maker, does not relate to the scholastic position. According to the concept of objective natural law, the personal condemnation of the act of the law-maker in making the law does not render a positive law unjust, but rather the impersonal, non-psychological conflict between the positive law and the natural law.

The second weakness of the book accord-

ing to scholastic jurisprudence results from the unsuccessful effort to escape from the inexorable conclusion to which the analytical school leads, namely, that might makes right. This school can not offer any ideal or theory of moral right to interpose as an authority against the tyrannical and despotic will of a dictator, an oligarchy, or the people themselves. A power concept of law and of all that pertains thereto, such as justice, the judicial process, and sovereignty, is presented throughout the book, but on a few pages, ¹⁶ the author makes reference to the ideal of freedom and accepted notions of justice. This reference is either a contradiction or is juridically irrelevant.

The power concept of law may be seen in the definition that it is "the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction." ¹⁷ Law is regarded as the command of the sovereign. The command arises from the sanction. If there is no sanction, there is no command and hence no law. ¹⁸ Only the threatened evil of physical force is sanction. ¹⁹

Complementing this power notion of law is the amoral approach. The problem of the moral duty of obedience is concealed by the definition of law as a sequence of events. "If one occurrence, called the condition, takes place, another occurrence, called the consequence, follows." ²⁰ Kinds of law differ only in regard to "how the condition and the consequence are connected." ²¹

¹⁶ *Id.* at 537, 605.

¹⁷ *Id.* at 72, 73.

¹⁸ *Id.* at 222 *et seq.*

¹⁹ *Id.* at 223, 224.

²⁰ *Id.* at 71.

²¹ *Ibid.*

¹⁴ *Id.* at 7, footnote 23.

¹⁵ *Ibid.*

The author extends the power concept from law to justice. Thus he states that "a theory of justice ends as a theory of sovereignty and a theory of sovereignty as a theory of justice."²² Justice and sovereignty are interchangeable, therefore, as are legality and justice.²³

A power notion is also extended to the judicial process by Professor Snyder. He maintains that judges are free to select whatever they like from such so-called source material as "customs, moral principles, economic, political, and social facts,"²⁴ as long as they have the legal power to do so, with ultimate reference to the Constitution, which in turn is subject to no moral criterion but only the authority of force.²⁵ Even the doctrine of judicial supremacy of the Supreme Court of the United States is treated as a concept of power, limited in turn by the power of electoral pressure brought to bear on the other branches of the government.²⁶

That the author has based his theory of the Constitution and of sovereignty on force is evident from his statement that the sovereign is "limited by that law of nature which is the stubbornness of mankind that stops even an oriental despot and by such laws of nature as that water does not run uphill."²⁷ Thus he reduces the law of nature to the physically compulsive, and accepts the fact of the human jungle.

But after this presentation of the power notion of law, justice, the judicial process,

and sovereignty, the author states, on page 537, that the ideal of our legal system is "that the public force be used to promote and protect the maximum of individual freedom possible in a complex society. With us, this is the first value. . . ." Again, on page 605, he writes "if they [the judges] prove steadfast to those 'accepted notions of justice,' 'fused in the whole nature of our judicial process' and 'deeply rooted in the compelling traditions of the legal profession,' they will not err." Moreover, he states on page 520 that "laws may be made to protect against injuries to and to promote the health, safety, morals, convenience, and general welfare of the community and its members."

These statements are either contradictions of what appears in other parts of the book, or else they are juridically meaningless. Law may or may not be a method of protecting freedom and the common good according to the command of the sovereign. But those who hold the power concept of law must agree that whatever the sovereign makes law do as a means to an end is what law ought to do.

It is to be hoped that Professor Snyder in his next edition will change the orientation of this book. Adoption of a type of legal philosophy, which will provide perspective for the legal order and place it under a *duty* to be responsive to those permanent values which reason and experience require in all social sciences, would greatly enhance the usefulness of his contribution. It is regrettable that a book which contains so much technically valuable material and which represents an enormous amount of research and careful planning should be handicapped by the strait-jacket of the analytical school.

²² *Id.* at 143.

²³ *Id.* at 16.

²⁴ *Id.* at 220.

²⁵ *Id.* at 136 *et seq.*

²⁶ *Id.* at 141.

²⁷ *Id.* at 108.