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Review of “Jurisprudence,” By Francis LeBuffe and James Hayes

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JURISPRUDENCE. By Francis P. LeBuffe and James V. Hayes. New York: Fordham University Press, 1938. Pp. xxiii, 273.

Writing in the eighteenth century, Blackstone observed that municipal law is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." To many candidates for admission to the bar, this definition has had a full life by enabling them to answer the first question quickly and correctly. Moreover, if the examiner ever inquires, the average candidate can reflect the juristic development of the nineteenth century and bury this definition beneath the weight of a devastating critique. However in this little volume, Blackstone's notion is resurrected with fitting ceremony, and in a display of zeal and ardor reminiscent of medieval scholasticism it becomes enshrined and haloed under the label of truth.¹

The purpose of the ceremony is to find and formulate a set of fundamental, universally valid principles of law. The discovery of these principles is only possible by following in the footsteps of the "old masters" and, along with them, accepting the doctrines that go to make up what is known as natural law. In this treatise, natural law is given a theological foundation entirely, and though its "immediacy may rest in reason, it proceeds ultimately from God."² Hence with an Aquinian fervor for abstractions, the underlying basis of the treatise may be illustrated by saying that law is either good because it accords with divine existence or bad because it does not.

Coming to the detailed content of the book, it may be said that the record never leaves the realm of theology. Some concern is evidenced in defining the nature of law, its origin and effect. There is a surface treatment of what the authors call American Schools of Jurisprudence. Apparently, the word American in this title means no more than that the various protagonists live in America. The cultural determinism of Pound and the psychological positivism of Llewellyn are considered defective because their systems are not based on natural law. In the section dealing with implications of law the word *ought* comes into its own. Modern jurists have attributed to the word a psychological meaning, *viz.*, what the law ought to be.³ Of course, the answer to this is almost anybody's guess. Properly used, the word *ought* refers to the character of law in the sense of what is obligatory, and is not concerned with what ought to be, or with the tenet that what is has experienced a becoming because it ought to be. An interesting part of the book contains a veritable blast against the prevailing ideologies of Europe. Totalitarian regimes are condemned because they fail to accord with the fundamental principles of natural law.

Historically, the significance of natural law is its insistence upon certain natural rights which pre-exist the state and which must be exempted by all positive law. In this treatise, the following are listed as immutable:

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1. P. 67.
 2. Pound, *Law and Morals* (1926) 7, 8.
 3. See Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 Col. L. Rev. 431, 439.

“right to life; right to personal liberty; right of free speech; right of liberty of conscience; right to private property; right to a just wage; right to marriage; right of parent over child.”⁴ The mere reading of this list will suggest to many common-law lawyers that there isn’t anything absolute about any of them. A parent’s relation to a child is limited by labor and school legislation and enforced medical attention. When separation occurs, the right of one spouse may be denied completely. Marriage is limited by the institution of monogamy and the prohibition of marriage between certain races. Incidentally, it would appear that the right to marriage should be accompanied by an inherent right to divorce. However the authors deny that a divorce may be granted on any ground. This permits the conclusion that there is a deal of activity in forty-seven states which is *wrong*. The state of South Carolina seems to be the only jurisdiction that properly reflects the fundamental principles of natural law. However, in this state the effect is to cause the courts to over-work the annulment statute and to create a floating class of people who maintain a dual residence—one for the ordinary affairs of life and one for divorce. The right to a just wage is a recent addition to the roster. Doubtless the impetus which resulted in this discovery may be found in the economic distress of the last few years and the consequent rise to power by labor. An attempt is made in the treatise to connect the right to a just wage with the action of *quantum meruit*, and thus create a respectable lineage. *Quantum meruit*, of course (and emphatically), has nothing to do with wage levels. Even granting that the laborer is entitled to a just wage, the problem remains as to what amount is just and what machinery is available for enforcing this right and, at the same time, remaining within the bounds of permitted actions. When wage levels become established, an older natural right—freedom of contract—disappears in large measure.

The inherent right to life (personal security) is the one frequently used to establish the existence of natural rights as the substance of natural law. In the treatise this right is illustrated by placing *A* and *B* on a desert isle and then asking if an assault by *A* on *B* would be wrong. In other words, personal security exists because of the nature of man and not because of some political organization. However, no matter what answer may be made, consideration should be given to what the answer would be if *A* is a Chinaman and *B* is a Japanese. As for the right to liberty, it seems to be limited by the possibility of military conscription, and in many states there are highway regulations that require each citizen to work on the roads so many days in the year. The inherent right to private property yields to the inherent power of eminent domain, and in recent years the increasing difficulties connected with getting, retaining, or using property should leave only the optimist who can think of ownership as an absolute right.

So it seems that the claim of natural law to principles of universal validity, which are immutable and absolute, is somewhat doubtful. However, an exercise of reason in the light of an ideal man or an ideal state will always play a part so long as courts are called on to decide conflicting

4. Pp. 153-199.

claims. Today, the substance of natural law is traditional; and now that the Whigs and Tories seem to be engaged in a dance to the death, insistence upon recognition of inviolable natural rights may aid in arriving at a compromise.

However, natural law, with its identification of law and morality, with its ideal man in an ideal state of nature, with its insistence upon criteria of universal validity, is only a phase of Jurisprudence. Arm-chair speculation on man as man will not produce a science of law. Historically, natural law afforded a basis for calling to question what had been received as authority, and today it plays an important role in filling in the gaps of the common law. But legal science must take an account of the need for Prosecutor Dewey and blue ribbon juries and what it was that happened between *Swift v. Tyson*⁵ and *Erie R. R. v. Tompkins*.⁶ As to the former, one may ask why it is that right principles are revealed only in the presence of Mr. Dewey, and as to the latter, why it was that Justice Brandeis caught the gleam but Justice Story failed. However, little can be gained by rehearsing the dissentient notions of unbelievers. In fact, the authors attempt to forestall argument by two methods: first, by declaring that those who disagree with them are the sort of people who do not believe that "two and two make four";⁷ and second, by an unqualified use of such words as inherent, truth, fundamental, absolute, and justice. Yet even in the light of such a *caveat*, there may be among the sinful those who persist in unbelief, and for them, the following sentence from Holmes is suggested as a complete creed:

"The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."⁸

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THE CONSTITUTION RECONSIDERED. Edited by Conyers Read. New York: Columbia University Press, 1938. Pp. xviii, 424.

Offspring of a gathering of the American Historical Association met to commemorate the sesquicentennial of the "greatest document ever struck off at one time by the hand of man," this volume comprises twenty-seven papers, the contributions of as many historians, economists, and political scientists. Short but meaty, they offer within the compass of some four hundred pages a commentary on the Constitution that combines the learning, the judgment, and the reflection of a galaxy of intellectual stars. The general high quality of the several essays, born to the occasion under the aegis of a program committee chaired by Walton Hamilton, is matched by the deftness with which shades of emphasis and variations in theme have been utilized by Conyers Read in editing them for publication.

5. (1842) 16 Pet. 1.

6. (1938) 58 S. Ct. 817.

7. P. 53.

8. Holmes, *Natural Law* (1918) 32 Harv. L. Rev. 40.

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