

Book Review: Review of *How High is Up: Space Age Law and Other Legal Marvels* by David Loth and Morris L. Ernst

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in direct interviews with state legislators who were lawyers and their non-lawyer counterparts, the authors proceed as follows: In chapter I, they shoot down a number of familiar straw men concerning lawyers in politics; chapter II examines several traditional explanations for the high incidence of lawyers in politics and finds them wanting.

The remaining three chapters contain the primary new contributions of the authors. Essentially, the authors show that law and politics are converging professions, and use this as a theoretical explanation for (a) the large number of politicians who are lawyers, and (b) for the fact that lawyer-politicians and non-lawyer-politicians tend to act similarly in the political arena.

Since this volume's validity rests more on statistical demonstration than on argument as such, it is essential that the reader be able to appraise the methods of data-collection used in the study. For this purpose, the authors have an appendix on method which is highly useful.

QUENTIN L. QUADE*

How High Is Up: Space Age Law and Other Legal Marvels. By David Loth and Morris L. Ernst. Indianapolis: Bobbs Merrill Co., Inc. 1964. Pp. 275. \$4.50.

This book is written for the most part by a layman at the law and is candidly for laymen; it is, perhaps, not inappropriate therefore that it be reviewed by a layman. There is probably little, if anything, here for the lawyer. Yet the book has achieved what its authors intended, and that was a service to the law. Its theme—and it adds interest to a fast-paced account—is a summary of some problems that face the courts because of our rapidly advancing technology and the attendant social conditions it inspires. The initial chapter loans its title to the book and traces the development of law regarding the question: Who owns the air above us and how much of it? It is inevitable that the second chapter be entitled: "And How Deep is Down?" Little is said about advertising but the rights to privacy and publicity in commercial endorsements are considered. There is a chapter on the legal status of so-called test-tube babies. There are descriptions of the development and status of law touching atomic power, sonic booms, rain-making, flood control, and community expropriation. The description of the change from a nearly absolute *caveat emptor* to a socially sensitive *caveat vendor* reflects the complexity of modern merchandising. Most of the decisions cited occurred in civil courts but criminal law is incidentally mentioned in the last chapter which discusses the legal problems of new methods of uncovering evidence, especially the mechanical and chemical truth tests.

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The aim of the book, however, is not a recitation of cases but a profile of the law taken from its most advanced trouble-areas. A remarkable feature of this fifth, slight collaboration between journalist Loth and lawyer Ernst is that, by presenting the difficulties, contradictions, and uncertainties of the law in these new areas, it commands respect for the law as an instrument of human justice. What emerges is more than a simplified sketch. To the layman unfamiliar with the law in its breadth and complexity the imperfectly noble character of the law shines forth. The undertaking is marked by a responsible yet critical sympathy for the spirit of reasonableness which is the parent of the law.

We are told that the law changes: the right to the space above our homes has shrunk from an indefinite height to 1000 to 200 to a mere 75 feet, if we are to take certain judgments as normative. Yet the changing decisions are not paraded in a manner which confounds the law or diminishes our respect for it, for reasons are given for each decision and we see the law as the balancing of "risk for risk" in which temporary and private claims are weighed against future progress and the community's good (p. 84). We are told that the law is at variance with itself; that in Texas a rain-cloud may be considered the property of the rancher as long as it hovers over his land but that New York resort-owners do not have similar property rights. Yet the intricacy of the conflicting claims and differing circumstances are set forth. We are told that the law sometimes lacks the precision it ought to have: a doctor must get our consent before using an experimental drug upon us, "but we are not sure what the law means when it says he may dispense with this formality if in his judgment it is not feasible to take us into his confidence" (p. 79). The remedy suggested is "time and a few lawsuits," which may provide more precise norms to the advantage of both doctor and patient. We are told that the law sometimes lags behind technological and social change, as when it seeks to classify sonic booms legally with outmoded concepts of legal explosion and pressure rupture (p. 145). Yet the authors balance nicely the advantages of an appeal to past judicial experience with the demand for new legal concepts (p. 119). There is no concession to arbitrary fiat. Instead, through these new difficulties we are invited to see the law striving for adequate and reasonable solutions. An ardent defense of federalism in the law is made precisely because the fifty states are experimental laboratories where various viewpoints and circumstances on a point of law can be accommodated until a larger consensus can be reached which is "workable and fair" (pp. 80, 85, 153).

The several aspects of a workable and fair legal decision weave themselves through the book. There is the *search for evidence* which is taken up in the last chapter. Are polygraph and drug tests of guilt or

innocence admissible evidence? And if not, are they permissible for investigating officers even if not admissible in court? There is the *search for fact* which has been traditionally assigned to the jury except in non-jury trials (p. 211). Yet in highly technical testimony such as radiation injury they may have to decide between expert but conflicting estimates (p. 111). There is the *search for law* which is the special task of the judge, for if the "first duty of the law" is to test for truth, the special dignity of the law is to discover and apply that rule which will render justice to the litigants (pp. 151-52, 176, 180). The search for law, then, is radically a *search for justice* and may drive a judge to declare that "if a litigant pleads the wrong law, it is the court's duty nevertheless to apply the correct law to the facts of the case" (p. 162). What is more, it may drive him to consider the law as a social instrument in order to protect a consumer inevitably condemned to ignorance about the quality of the product he buys (pp. 48, 53). Without doubt many readers may have misgivings at this view of the courts. There is no doubt, on the other hand, that Mr. Loth agrees wholeheartedly with such a "creative" view of legal decisions. Yet he seems not wholly unaware of its dangers and can be fairly said to present it with some restraint, showing the considerations which moved the judge to this or that innovation. He does not present a simply revolutionary conception of the law, but rather seems to locate the wisdom of the law in just the right and difficult balance between proven precedent and necessary innovation. Of such vision, he implies, is the legal genius made (p. 48).

The origin of new law is illustrated with the history of decisions regarding the Food and Drug Act (p. 73), the right of privacy (p. 158), and the gradual concern of the law for standards of beauty (p. 224). The reader is also offered predictions of the direction law may take, for example, in deciding legal responsibility in testimonial advertisements (p. 83) or in adjudicating a major atomic disaster (p. 89). Mr. Ernst risks prediction about the legal problem of weather forecasting and control (p. 132). Mr. Loth cites the need for more stringent testing and reporting of new drugs (p. 73) and for stricter licensing of polygraph operators (p. 251).

As to the separate qualities of the contributions, the language of journalist Loth is usually clear and brisk, getting quickly to the point without getting in the way. Almost never do the twin faults of journalistic style appear: only very occasionally is there an awkward and unhandsome sentence, and there are few cleverly cute phrases to annoy the reader, although he must read again and again of the "genie in the bottle" instead of plain "atomic power." This reviewer cannot estimate the adequacy of the selection of cases, but Mr. Loth makes no pretense of preparing a legal brief or even of writing scholarly legal history, and what he does prepare for the innocent at law adds up to a more

intimate understanding of what the law is and how it comes to be. Mr. Ernst contributed only about one-eighth of the book, in the form of letters containing comments and additions. Nevertheless, his contribution adds considerably to the value of the book. He is especially helpful in providing additional historical background and perspective, such as the relation between population growth and changing responsibilities for the manufacturer (p. 83), the claims of Magna Charta and water-resource control (p. 131), and the pressure for settlement in areas repeatedly flooded (p. 236). Nevertheless, the special quality he brings is a somewhat short-tempered love of the law. It is perhaps such a love that accounts for the harshest words in the book, directed at members of his own profession who, he charges, "have little concern for the defense of liberty," adding that the criminal bar should bear the honorable title of "Freedom Bar" (p. 274). It is undoubtedly a passionate concern for due process that renders his scrupulously suspicious of mechanical and chemical tests for truth (p. 274), a suspicion that runs counter to Mr. Loth's more enthusiastic and legally less sensitive account of them. This difference in emphasis adds not merely a certain charm to the book, but even a clearer vision of the essence of the law and the need we have for men who give their lives to its pursuit. "Surely," pleads lawyer Ernst, "we will be better off if many guilty people escape than if we live in a culture which compels cowardly acquiescence to new kinds of tests, remote from man's self-will and unrelated to intellect and reason" (p. 274).

To this reviewer's mind the least satisfactory parts of the book are two. The first is largely the work of Mr. Loth and is the chapter on artificial insemination. Here more than anywhere else he injects his own opinions into the material presented, which is not to be wondered at, for the topic is at once a delicate and passionately intimate matter. The chapter is the most humanly sensitive yet least perceptive, for he does not seem to realize the unique character of the marriage union (p. 188) and his discussion of adultery manifests an insufficient appreciation of what Gabriel Marcel in *Home Viator* called the ontological character of parenthood. What is at issue is not just illicit fun or even abstention from it through artificial insemination, but the very issue of the dignity appropriate to being human. Whatever disagreements readers may share with Mr. Ernst's interpretation of the adverb "exclusively," they can surely recognize the soundness of the general hope that "the law will develop in the direction of a system which will be concerned exclusively with the welfare of the family, and that means primarily children" (p. 202). Secondly, it is perhaps Mr. Ernst's jealous love of the law which has led him to what this reviewer considers an unsatisfactory and inadequate recognition of social action outside the law. Picketing and public protest are medicines for social remedy that

should be used only as a last resort, but it is too easy to brush off protesting teachers as taunters of the constabulary (p. 181), or a group of people protesting a municipal ruling as having "lost faith in courts" (p. 238). It is perhaps not without significance that in this book of new problems for the law there is no mention of the current social and legal difficulties of civil rights.

A legal mind may be tempted to say that the really hard problems facing the law have not even been broached. But, all in all, the book achieves *its* end, and a worthwhile one, for it presents the law with a genial, honest, yet human face, struggling towards being "the protector of people first and property second" (p. 80). Of the attempt of a mother to have her test-tube children declared illegitimate, Mr. Loth writes eloquently:

Every once in a while behind the cold façade of the court records the warmth of the human emotions which are being chafed shines through the rather stilted phrases. The man who has acted as the father of these test-tube babies has as much affection for them as if they were his own. The loves and hates of the family are the real issues, but how can a court of law apply the principles of jurisprudence to these human passions? It should not surprise us that there is a lot of fumbling when it tries. In this case the court was able to cut clearly through the confusion. It simply refused to hear any testimony . . . (pp. 193-94).

The book does not pretend to be more than a slight and popular consideration of some of the more fascinating aspects of the law (p. ix). It does not claim to be a serious study even for the layman. Yet it makes its point. It pictures the authority of the law as manifold, arising out of the people's demand for justice (p. 82) according to the norm of reason (p. 113) and lighted by the genius of great judges (p. 184). It shows that the life of the law is the search for truth and justice. And it professes that our tradition of law is rooted in the immense hope that both will be best served in the contest of trained adversaries guided by an impartial judge in the quiet of the courtroom (pp. 271-72). This book has been written for the uninitiated and casual reader in order to clarify that vision.

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