

The Elements of Law, by Thomas E. Davitt, S.J.

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BOOK REVIEWS

Thomas E. Davitt, S.J.,* *The Elements of Law*: Little, Brown and Company, Boston, 370 Pp., 1959.

What should a textbook in Philosophy of Law set out to do? The major works of the last generation or more have generally taken one of two approaches, both of which in any case are rather closely related to each other. They have either been "Great Books"-type anthologies which have sought to present in some detail the main ideas of the leading juristic thinkers of the present and past ages, arranged conveniently, as in Julius Stone's monumental "Province and Function of Law" or for that matter Wolfgang Friedmann's "Legal Theory", under broad functional classifications like Stone's three-way analysis of the differing approaches to law as "logical", "philosophical", and "sociological"; or else they have deliberately focussed, like Patterson's "Jurisprudence, Men and Ideas of the Law", upon the Judicial Process, as the most important and interesting *locus* of community policy-making from the viewpoint of the law schools and legal profession, and sought to present the various schools of legal thought *seriatim*—Positivism, Natural Law, Pragmatism, Realism, Sociological Jurisprudence—treating these as alternative or competing methodological approaches to legal doctrine to be appraised in terms of their usefulness or otherwise to particular groups of judicial decision-makers in particular space-time contexts rather than as ultimate ends in themselves. What we have, then, in both cases, is an essentially eclectic form of jurisprudence which aims to present all schools of thought with equal emphasis and without any open commitment to any one school, except, of course, in so far as the avoidance of absolutes and avoidance of making a personal choice inevitably involves, in itself, acceptance of something in the way of a pragmatic approach to values.

There is, of course, a third type of work in the field of Philosophy of Law which does not fit into either of these two categories. I refer to the sort of study represented by Judge Jerome Frank's "Law and the Modern Mind" and "Courts on Trial" and Karl Llewellyn's "Bramble Bush", Lon Fuller's "Law in Quest of Itself", Northrop's "The Complexity of Legal and Ethical Experience". This type of work is normally highly opinionated and critical and does not hesitate to commit itself in terms of Values and techniques for Value-choice. It will normally become the source material, in the future, for future "Great Books"-type anthologies of jurisprudence. But it does not purport to be a textbook for law school use,

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being written rather for the education of the law professors and the legal profession generally than for the education of law schools; and as an independent monograph-type study in itself can hardly be made the basis for comparison with something designed essentially as a textbook, as Father Davitt's present work is.

As a legal textbook, Father Davitt's study must be understood in the light of several special factors. It is a text designed intentionally for use in Catholic Law Schools or at least by students with a background in Catholic philosophy and thinking on law generally: hence the particular, four-way division of the subject matter into "Man-made Law"; "Man-discovered Law"; "Integration of Man-made Law"; "Background of Law". Second, it is a text designed as an introductory work on law—either for students in college or graduate school or else for students in the earlier years of law school,—a purpose that is undoubtedly greatly assisted by a clarity and simplicity of style and formal presentation unusual in a work on jurisprudence and by the wealth of illustrative detail and concrete, field application of general philosophic principles. It is the latter aspect of the work that perhaps calls for the most notice for it both conflicts with generally accepted, North American stereotypes of Catholic studies on law and also enables, in a very meaningful way, the drawing of comparisons and contrasts with predominantly Protestant or non-sectarian American legal doctrine.

For Father Davitt's is not a study of Catholic legal ideas in the abstract—a set of ultimate principles or values divorced from every-day application—but an empirically-based examination of the main bodies of substantive law in the United States. These bodies of substantive law are treated in their traditional, analytical jurisprudence divisions of Constitutional Law, Crimes, Torts, Property, Contracts, Equity; but it is a treatment in terms of the special analytical skills and techniques of Catholic philosophy. This is therefore no ivory-tower exercise in the postulation of *a priori* legal principles, but, in accord with the best teachings of American legal pragmatism, it is a demonstration of principles in action, in the particular fact-complex of specific problem-situations. Methodologically speaking, the fascinating aspect of Father Davitt's study, to non-Catholic readers, will be his strong emphasis on legal techniques; for he concentrates as much or more on the actual modes of implementation of particular values in particular contexts as on the values themselves. Thus in discussing the ambit of the constitutional guarantee of Due Process he rightly recognizes that the clause has never had a fixed and immutable content jelled for all time, but that the constant principle has been a conception of a

certain necessary relationship of Ends and Means: "In spite of fluctuations in the interpretations of due process caused by the inevitable tensions between private and public claims and differing socio-economic influences, the steady guide has been the norm of the means-end relationships." (p. 162). Again, in the same discussion, he specifically recognizes the process of interest-balancing—of weighing interests advanced by the parties in particular problem-situations against other, countervailing interests, whether private or public—that is at the core of American judicial decision-making, whether in the Due Process area or more generally, when he notes that Due Process has "come to mean a method by which private versus public claims may be decided and balanced in substantive law". (p. 162). And I find this same pervasive emphasis in Father Davitt's suggestion that Government be viewed as "Prudence" rather than as "Science", and in his correlative definition of "Prudence" as the "habit of rightly directing means to end. The habit of mind by which a man deliberates, evaluates and decides what means are actually to be used in best attaining an end and directs his actions accordingly. . . ." (p. 313).

All this, of course, is very close to the dominant methodological emphasis in American legal pragmatism at the present day. The acceptance of law as a process of reconciliation or choice between conflicting claims or interests is the main teaching of the American Sociological school. The lack of concentration upon ultimate values in law and the concomitant unwillingness on the part of the leaders of the Realist and Sociological schools to provide definite criteria in advance for guiding the judicial choice between competing values—in effect the failure to attempt any firm ranking of values and to set up, so to speak, a hierarchy of values—need not necessarily reflect either an insensitiveness to moral issues in law or an intellectual incompetence to debate specific problems in moral terms. I think it is clear, if one looks to the works of the leaders of pragmatic thought in American law in the post-war years, that many of the apparent deficiencies for which Catholic thinkers have occasionally criticized them stem from a certain intellectual humility that itself stems from an awareness that many, if not all, the great disputes that have rent our democratic society in North America in modern times have been less disputes over ultimate values than disputes over alternative modes of social control, over alternative methods of realizing and achieving agreed social purposes. The judge who prefers to rest his decision, in a great constitutional *cause célèbre*, on consideration, against a background of social facts, of concrete techniques actually utilized by executive-legislative authority to implement community interests in particular cases,

may, so far from being timid, simply recognize the merits of making an ally of time and, by deciding the case narrowly on the facts, allow the opportunity for further public debate and the give-and-take and reconciliation, through time, that that normally involves. This particular thought, I think, lies behind Mr. Justice Holmes' conception of "truth" in the democratic society, as the "power of the thought to get itself accepted in the competition of the market", (*Abrams v. U.S.*, 250 U.S. 616, 630 (1919)); and it seems to me, also, to be at the kernel of Mr. Justice Frankfurter's technique-oriented philosophy of judicial self-restraint which owes intellectual debts, of course, to Brandeis and ultimately to Holmes himself. And Frankfurter, and through him Holmes too, would on this interpretation of the pragmatist judicial tradition in the United States, be less interested in a skepticist's deriding of other people's absolutes, as some Catholic writers have perhaps tended too easily to assume than in an opening up of the possibilities of fruitful reconciliation of competing partisan positions through centering the discussion first on those aspects of a problem on which there can always be room for confession of error—considerations of means, of machinery devices for implementation of ultimate values.

In the period, immediately before his untimely death in 1957, when he was mapping out for himself a program of creative intellectual activity for the next decade or so ahead, the late Judge Jerome Frank concluded that the main needs of American philosophy of law in the emerging 1960's would lie in comparative, eclectic, "integrative" jurisprudence that could try to synthesise the main bodies of autonomous, apparently competing, philosophy in American society; and it was his feeling in this regard that, in particular, the gap between American legal pragmatism and American Catholic thought on law was more apparent than real. I know, from conversations with Judge Frank, that he was impressed with the similarities in methodology of these two bodies of thought; as indeed I have been myself, as one trained in the Pragmatist-Realist-Sociological tradition, on delving into St. Thomas and Catholic secondary writings. Is the barrier, which the occasionally splenetic exchanges in the law reviews have sometimes highlighted, a result of unnecessary misconceptions—on the one hand that Catholic legal thought is a closed body of dogma that is quite unyielding as to choice of modes of application, and on the other hand that the Pragmatist school's failure to articulate its value position represents a necessary hostility to all systems of thought resting on ultimate, (articulated) value premises? Would it be so surprising to find that in the one society, North America, after all, agreement could frequently, if not usually, be reached, even on value-choice,

in given problem-situations, between the two bodies of thought? This latter question, of course, will properly be answered by empirically-based studies directed to tension areas like the relationship of Church and State in released-time programs, State financial aid to education, control of blasphemy and obscenity in the communication industry, and similar problems. Meanwhile Father Davitt, though directing himself, as noted, specifically to introductory students and students with a Catholic background, has, I think, managed to render a clear and objective interpretation of much of the dominant thoughtways—the distinctive skills of thinking and the specialized techniques—of American law at the present day, meaning essentially the Pragmatist-Realist-Sociological approach to law as the dominant body of thinking in American law at the present day. And in achieving this for Catholic students of law in the United States, Father Davitt has at the same time afforded non-Catholic lawyers with an opportunity for introducing themselves to much of the distinctive modes of thought of Catholic lawyers, thereby facilitating the process of “integration” of jurisprudence to which Judge Jerome Frank gave such high priority.

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