



1920

BOOK REVIEWS

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Recommended Citation

BOOK REVIEWS, 30 *YALE L.J.* (1920).

Available at: <https://digitalcommons.law.yale.edu/ylj/vol30/iss1/13>

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BOOK REVIEWS

A Treatise on International Law, with an introductory essay on the definition and nature of the laws of human conduct. By Roland F. Foulke. Philadelphia, The John C. Winston Co. 1920. 2 vols. Pp. 482, 518.

This is an unusual work. Instead of presenting the rules of positive law as developed in the practice of states, by custom, agreement, diplomacy, arbitration, etc., the learned author has apparently set himself the task of finding the underlying philosophy and legal force in the rules of conduct which characterize the intercourse of nations. His work therefore constitutes a critical analysis of the views of modern writers on the so-called rules of international law and an effort to deduce from conflicting opinion what seems to him the fundamental truth. This analysis is made from the point of view of the lawyer, the important conclusions of writers as to rules of law being measured by the test of legal accuracy. Where the practice of states differs, the author seeks to present the reasons, found in the external factors influencing state conduct, for departure from a norm, if there is one. The author evidences throughout a critical legal mind which takes nothing for granted; the book, therefore, cannot fail to be of interest to the student of international law.

The arrangement of the topics is also unique. It is divided into three parts: I. Preliminary; II. Substantive International Law; and III. Remedial International Law. Part I includes three chapters, entitled respectively, Definition and Nature of Law, Facts of International Life, and Definition and Nature of International Law. Part II includes six chapters, entitled respectively, Intercourse between Independent States; The Territory of an Independent State; The Open Sea and its Branches and the Maritime Belt; Treaties; Independent States and Aliens; and State Conflicts. Part III includes ten chapters, entitled respectively, Redress for Damage to a State Interest; War; Neutrality; Conduct of Hostilities; Property in War; Public Property in War; Private Property on Land and in Maritime Belt in War; Private Property on the High Sea in War; Private Individuals in War; Character of Individuals and Property. Each chapter ends with a useful summary, and a final chapter contains a summary of the conclusions of the entire work.

It will readily be admitted that this division is original; it cannot be said that clearness or logical order has been subserved by this particular arrangement. In fact, much of it seems fairly arbitrary, but an excellent index makes the contents accessible.

The author's method is to present in the text succinctly the conclusions he has reached and in the footnotes some of the instances in which the rule or practice discussed in the text has been applied, with citation of authorities.

The contribution of the author consists primarily in Part I, dealing with the fundamental conceptions of Law and International Law. He recognizes at once that much of the dispute as to the legal nature of International Law turns necessarily on the definition of Law, and as to this men differ. Failing to reach a common understanding of the nature of Law, certain polemics on the nature of International Law printed some twelve years ago failed to arrive at any satisfactory conclusion. The author points out that the Austinian conception of law, with a political sanction ever present, is not adhered to universally; hence it is not unnatural that a like difference of opinion as to the nature of international law should prevail. Logical adherence to the Austinian view has finally led to the inevitable conclusion that inasmuch as independent

states have no visible political superior, international treaties merely embody moral, and not legal obligations. Yet what international tribunal could so hold? The error in the conclusion, it is submitted, shows the error in the premise. Our author defines Law as the conception of human conduct as determined by external factors; and International Law as the conception of the conduct of independent states as determined by external factors other than the forces of nature and external political power, and excluding ethics. His inquiry is directed to the conduct of states as determined by these factors, which include self-interest, inherent prejudice, international public opinion, custom, or precedent, and pressure from one or more states. His distinctions evidence careful thought; his differentiation between municipal and international law will prove helpful. He correctly assails the ambiguous use of the term "right," but when he substitutes "interest," "power" or "privilege" he does not always enlighten. Although writing as an analytical lawyer, he is not apparently familiar with the contributions toward correct fundamental legal conceptions made by the late Professor Hohfeld [(1913) 23 *YALE LAW JOURNAL*, 16; (1917) 26 *id.* 710]. In his use of the concept "power" he occasionally confuses physical and legal power (e. g. sec. 802).

The principal defects of the book become apparent in the treatment of positive law. Here the author has relied upon other writers and while he has undoubtedly consulted with intelligence and discrimination much of the English literature on the subject, he has often missed some of the best monographic studies and has apparently avoided an examination of the continental literature. On many of the controversial points with which he deals, e. g. the rules as to aliens, mob violence, *postliminium*, etc., some of the best thought is published in foreign languages. Nor has he seen some of the studies in English that would have aided him; for example, he makes no mention of John Bassett Moore's study on *postliminium*, a doctrine which is not, as the author suggests, "inapplicable in international law and should accordingly be discarded as unnecessary and confusing" (sec. 810). Familiarity with Latin-American boundary disputes would have shown the invalidity of this conclusion. The same lack of published information where its absence may be deemed to have impaired the author's conclusions is evident in the treatment of such topics as the responsibility of states, the effect of war on treaties (in which the important Resolutions of the Institute, recently approved by Judge Cardozo in *Techt v. Hughes* (1920) 229 N. Y. 222, 128 N. E. 185, are ignored), the status of gulfs and bays (where no mention is made of the important rule that an assertion of jurisdiction over wide bays and acquiescence therein has sustained a claim of sovereignty, as affirmed in the award of the Fisheries Arbitration, 1910), and several other topics. Inasmuch as the author takes the view that municipal statutes and decisions dealing with rules of international law cannot be regarded as international law proper, the almost complete absence of citation of judicial decisions may be excused. Yet the important awards of international tribunals might on the same reasoning have been included. Some of his statements are not supported by authority: e. g. the federal courts of the United States (vol. II, p. 29), *do* assume jurisdiction of suits between foreigners (*The Belgenland* (1884) 114 U. S. 355, 363, 5 Sup. Ct. 860, 863); the expulsion and exclusion of aliens is *not* frequently (sec. 429) but very rarely regulated by treaty. Rome was *not* friendly to aliens (sec. 426). On the other hand, some of his conclusions show keen judgment. For example, the principle he announces that expatriation without the consent of the national state is impossible, while contrary to the professed American theory, is nevertheless supported by actual practice, and even our federal statute of March 2, 1907, impliedly admits it by denying to American citizens the privilege of expatriation in time of war.

The author is a lawyer with a lawyer's demand for accuracy of reasoning and statement; and he is also a realist. He recognizes that a state's title to its territory rests upon its physical ability to maintain and vindicate it. His thesis that international law is merely a conception of the conduct of nations as determined by certain external factors makes him keenly alive to the nature and force of those factors; he therefore is eminently practical in his examination and solution of motives for international action. Yet at times his statements (secs. 805, 840) are marked by a want of judicial restraint inappropriate in a scientific treatise.

As a philosophic and analytical study the book is to be welcomed. Critical works ought to be encouraged. With the technical equipment in positive international law of a Westlake, Moore, or Renault, the author's power of critical legal analysis would have given us a splendid treatise. The absence of such equipment, and the unique, almost bizarre, arrangement of the topics, has made many of the sections quite inadequate and therefore often misleading. The physical make-up of the work is attractive. It deserves the serious consideration of the profession.

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Federal Taxes. By George E. Holmes. Third Edition. Indianapolis, The Bobbs-Merrill Co. 1920. Pp. xiv, 1151.

The federal government's taxing arm is so long and is reaching so many subjects that books upon federal taxation are vitally necessary. These books are usually of two kinds, one a manual of suggestions for the business man who is his own lawyer, and the other a legal treatise for lawyers. While the present volume will be of undoubted help to laymen, it is distinctly a lawyer's book for lawyers. The authorities are collected and discussed in an extremely complete manner. Such subjects as the constitutionality of taxing capital gains as income, or the admission in evidence of documents not properly stamped, are adequately treated. One will not find here, it is true, direct suggestions as to the rate of depreciation he may allow himself, though he will find the legal rules governing such allowances. Obviously, however, this is a book of legal authorities and not of suggestions for lessening the amount of your tax. One may perhaps feel disappointed that the author's own prophecies of law from the authorities are not more definitely stated, but otherwise the author's purpose seems to have been admirably accomplished.

Mr. Holmes deals not only with income and excess profits taxes, but also with the capital stock tax, the stamp taxes and the tax upon the employment of child labor. A particular feature is an appendix containing schedules for depletion and information for computing such depletion in connection with the oil, gas, mining and lumber industries. The author's previous connection with the Corporation Trust Company, whose Income and War Tax Service he freely cites, stamps him as an authority upon the subjects of which he treats, and the volume must be consulted by all those who wish to keep in touch with the best authorities upon the legal problems involved in federal taxation.

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Primitive Society. By Robert H. Lowie. New York, Boni and Liveright, 1920. Pp. viii, 463.

Dr. Lowie writes nothing that is not painstakingly and conscientiously accurate in detail. Each of his chapters is a careful little monograph. Seven

of them deal with aspects of marriage and the family, including kinship usages, the sib, and the position of woman; one is on property, and five on associations and the regulative organization. Each topic is liberally supported with evidence. There can be no doubt as to the value of this book to advancing students of the subject.

For there is no doubt as to the tendency of the student, against which the author sets himself, of swallowing bodily the attractive generalizations of earlier writers on anthropology and sociology—generalizations which subsequent advances in the field of the social sciences render, in some cases, unwarranted or shaky. Mr. Lowie is especially concerned because he thinks that various classes of students who require the data of anthropology are thrown back on Morgan's *Ancient Society*, a pioneer book by a very intelligent man, but one nowadays out of date. Hence he proposes to present something to take its place, and this book is intended to give the layman a brief summary of what is now known regarding the science as a whole. It will correct many impressions that may have been derived from Morgan and other of the older writers.

The most obvious omissions, if this survey is to be comprehensive, are chapters on religion and the industrial organization. One would like to know wherein the author thinks the work of Tylor, for instance, is antiquated. One would prize highly a criticism of the very suggestive *Kulturgeschichte* of Julius Lippert, a work whose hasty construction in an interval of a laborious and constricted life has left it assailable in many matters of detail. Morgan is not the only classic that students become acquainted with; in fact, many a graduate student does not encounter Morgan except incidentally. Perhaps all students in pure anthropology do, but Mr. Lowie has a good many bricks to throw at sociology, and the sociologist also seeks enlightenment.

The angle of vision which we do not share with the author is the one from which he envisages evolutionary series of social phenomena. He speaks now and then of the folly of trying to establish chronological sequences; "An attempt to embody the exuberant variety of phenomena in a single chronological sequence seems hopeless." But who talks of chronology in science? That talk is of the historian. Science, especially since Darwin's time, is interested in series, irrespective of the dating of the members of series. Lowie discriminates between what he calls the theory of independent development, "which I have again and again advocated, and a belief in laws regulating the independent reproduction of the same *series* of stages which I now at the close of my investigation formally abjure." "Neither the examples of independent evolution from like causes nor those of convergent evolution from unlike causes establish an innate law of social progress." But who is talking about any such "innate" law? This sounds as if the author were tilting at the philosophers, not the scientists.

We are willing to join him in scoring the view that there is such a thing as "natural law," or a "moral sense," or any other of those figments of unballasted meditation. But if he is hitting at scientists who are trying to synthesize from the givings of facts, he is not fair in his assaults. If he thinks that all who seek to make out the outlines of social evolution are bent upon demonstrating "social progress," then he is involved in the old fallacy that evolution and progress are synonymous. If he took evolution to mean simply what Darwin meant by it—adjustment to environment, many of his strictures would become pointless. Men adopt many and diverse ways of adjusting their social life to the conditions that confront them. As they get wiser and understand conditions better, they modify these ways. Former adjustments, such as slavery, fall away and others take their places. This is an evolutionary process, whether it represents progress (which cannot be appraised absolutely) or not. Out of these phenomena a series can be formed which is broadly enlightening. Its justification lies in its demonstration. The

world has thought differently about the organization of society and its evolution since Spencer's day, just because Spencer, with all his faults, opened a larger vision which permitted, among other things, a view of society as a whole and therefore a better understanding of the articulation of its parts. Lowie does well to correct foolish and inadequate generalization, but he does ill to set himself against generalization *in toto*.

There are too many allusions to technical categories—too much assumption of previous knowledge—to allow of the use of this book in elementary classes, unless the classes are small and conducted in such manner that the instructor can supply matter at all stages. For this reason, and because the style of the work is heavy, *Primitive Society* is likely to find its place as a corrective of views already acquired rather than as an original introduction to the discipline it represents.

A. G. KELLER

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The Unsolved Riddle of Social Justice. By Stephen Leacock. New York, John Lane Co.; London, John Lane, The Bodley Head; Toronto, S. B. Gundy, 1920. Pp. 152.

Although the reading public is used to Professor Leacock's humorous style and thinks of him rather as humorist than as economist, it will find his sober attack on the "unsolved riddle of social justice" a vitally interesting contribution to the conservative solution of that riddle. Despite the great increase in productive efficiency wrought by the introduction of machinery, some of mankind still starve and shiver and slave to produce luxuries for others. This is the riddle, the "most perplexing industrial paradox ever presented in the history of mankind."

Leacock attacks the principles of the system of justice underlying our capitalistic competitive economics, that is, the system of natural liberty, extreme individualism, enlightened selfishness; he denies the fundamental premise of the classical theory of value and distribution, namely, that "under perfectly free competition the value or selling price of everything equals, or is perpetually tending to equal, the cost of production." He calls this equation a truism, and "all the social inferences drawn from it absolute, complete and malicious fallacies."

His argument is (1) that each side of the equation is used as the measure of the other, mere arguing in a circle; (2) that the quantity of labor does not govern value, for it cannot be defined and measured; (3) that the erection on this false basis of a system of so-called "natural prices" (wages, rents, profits, interest) and the justification of them on this "undeniable ground of fact" are wrong and mischievous, for they give equal justification to millionaire, landlord, pioneer, capitalist and wage earner; (4) that wages and prices do not in actual fact tend toward social justice, for they depend upon "economic strength" in a competitive struggle, a war of each against all. He looks for social advance, not at all through technical industrial progress and labor-saving devices, but through the restriction of individualism by the force of organization and by legislation.

He then considers Socialism as a remedy for our present social ills. He treats it indulgently. He subscribes to the validity of the socialists' criticism of our capitalistic society, but hammers home the idea that the socialist "loses sight of the supreme fact that after all, in its own poor clumsy fashion, the machine does work," whereas the one and only thing that is wrong with socialism is *that it won't work*. It won't work because it requires an elaborate system of

elective control under democracy, and it is wholly impossible, except among angels, to find "elected managers—a sagacious and paternal group, free from interest of self and the play of baser passions and animated only by the thought of the public good," who will "gravely deliberate, wisely and justly decide." The most probable result, in the light of the known peculiar weaknesses of elective democracy, would be the rule of cliques, interests, bosses, incompetents, popular spendthrifts, and crooked partisans, in an unending conflict between business and politics, between private gain and the public good. Besides, under socialism freedom would cease; the elected boss would command the worker to his task and he must obey, under penalty of ostracism, prison, or starvation.

In this dilemma between the present failure of individualism and the prospective failure of socialism, Professor Leacock urges moderation and sanity as against the dreams and demands of the perfectionist. He urges greater limitation upon our individualism by legislation and organization and by cultivation; he urges a higher sense of collective responsibility for the less fortunate of our people; he demands that we cease justifying manifest injustice by the principles of natural liberty and natural value and some of its extravagant doctrines, such as Malthusianism. He names certain pressing reforms.

It is a pleasure to find a critique of socialism which is not sheer ranting, intolerant and violent verbiage. Professor Leacock's attitude is markedly sane and composing, and his criticism is aimed at socialism reduced to its bare essentials. The sooner the opponents of socialism take this attitude and drive home the one essential objection that it is a mere perfectionist's dream and won't work, and leave off extravagant arraignment of its religious, political and social incidentals, the sooner will the Bolshevik menace be scattered.

His proposals for social reform represent the changing attitude of social philosophers from individualism to collectivism as the basic premise. The war has had a tremendous effect in forcing the social point of view upon thinkers. These ideas of reform are in the air; they represent the program of conservatives, not of radicals, as against the Bolshevistic radicalism that demands a complete change of system.

While his argument that the equation of value and cost of production is a worthless truism is quite debatable and is not essentially necessary to his conclusions, his charge that the social inferences based upon it are non-sequitur, and fallacious, and deterrent to social reform, is quite tenable when the inferences are carried to their logical conclusions and considered with respect to particular persons, places, or times. Applying his method of logic, it is true that production for profit and not for satiation of human wants of everybody for the necessities does prevent an excessive disposition of human effort to a few simple products, does diversify our activities and satisfy a diversity of tastes which we are pleased to regard the measure of our civilization, and does promote social and industrial progress, so measured. Whether these results are preferable to the satiation of all necessary wants is, of course, debatable. At present, prices and profits do direct human energy, and behind these lie human wants and desires.

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