

BOOK REVIEWS

THE LAW AND MR. SMITH. By Max Radin. The Bobbs-Merrill Company, Indianapolis, 1938. Pp. 333. Price: \$3.00.

Here in jurisprudence made popular a distinguished law teacher comes to the defense of judges and lawyers. Mr. Smith, addressee of the book, is any layman. When in deciding a case about airplane flights the United States Supreme Court relies on a statute passed in 1790 and an English case of vintage 1773, Mr. Smith (so a blurb informs us) throws down his evening paper and erupts anger and disgust. For such emotions Professor Radin seeks to substitute "confidence" and sympathetic understanding. His purpose is to explain to Mr. Smith what law is, how it got that way, and how it functions in certain traditional fields. He divides his discourse, accordingly, into three main parts.

Part One on The Nature of Law (6 chapters, 46 pages) begins, in a manner not unknown to social scientists, with Alexander Selkirk marooned alone on his happy island. Here there is no law. But introduce even one other person, a fortiori millions, and rules become necessary to keep down conflicts and provide that certainty without which life is intolerable. Rules are habits made conscious. Of the multitudinous rules in any society those are *legal* which a court will enforce. Law *now* is a prophecy of *future* court action. Courts are made up of judges, uninspired human beings "extremely like the rest of us." Judges do not do as they please; they bow to precedents, statutes, principles and justice. Precedent, logical fitness, gets more deference than justice both because justice is often indifferent and because while "we can always recognize consistency," "we cannot generally recognize justice."¹ Still justice—high and low—gets some hearing. Rules from precedents do not form a complete system and, furthermore, judges are clever in the art of distinguishing. Low justice is custom, common agreement. High justice, it later appears, is what we take on faith.

Less arid is Part Two (10 chapters, 180 pages) on the Development of Legal Institutions and Ideas. Primitive societies, North American Indians, Babylonians, Egyptians, Israelites, Greeks and Romans are all on parade as the author demonstrates how "law" has developed from an "undifferentiated mass" of "morals, manners, religion, propriety and communal self-protection." Chapter headings are reliable indices of content and style: *Judges and Governors, The Mystery of Procedure, The Interstices of Procedure and the Growth of Codes, The Sage and His Authority, The Concentration of Legal Authority, The Law Attempts to Get Above Itself, Good Law and Better Law, The Insoluble Problem* (of getting "the facts"). Two additional chapters contain more explicit contributions to the author's general apologia. In *Legal Authority Becomes a Command* he points out that judges in applying a statute must, because of the inherent ambiguity of words, "interpret" whether they will or not and that in interpreting it is perfectly "right and proper", even inevitable, for them to consider the practical consequences, the results desirable or undesirable, of competing interpretations. In *Authority Is Content to Be Persuasive* he expands his defense of precedent. Its basis is in human

1. Professor Radin elsewhere suggests that it is not always easy to recognize consistency.

nature. Economy of effort apart, "a definite trait of the human mind impels us to prefer to our unguided, self-derived judgment the direction or protection of a mind we regard as better."² Furthermore, "consistency is a real and powerful constituent of justice"; reasonable expectations of the public are not lightly to be denied. Happily precedent's "binding quality", "a late and special development" and most offensive to laymen, is fast disappearing.

Part Three (7 chapters, 87 pages) on The Substance of Law offers brief essays, oriented largely toward the past, on torts, contracts, property and crimes. Property created by the Supreme Court under the aegis of "due process" gets a single brief paragraph. Though raising "the most crucial legal issue of the future", such property is expressly exempted from the author's survey. In two final chapters the author vigorously reaffirms his conviction that lawyers should not be abolished. They are indispensable so long as we cannot get back to that happy island with which our story began. The thing for the layman to do to promote "the growth of the law and the discovery of justice" is to discard his "unreasonable attitude of irritation and suspicion." What we need is more "confidence" from laymen and more "persistent thinking" by lawyers. Law is not "a mysterious instrument by which miracles can be effected." A court "is not properly supposed to have as its purpose the task of reforming our social life." That is not a *legal* function.

Such is Professor Radin's thesis. In obvious contrast with his philosophy of acceptance are the iconoclastic protests of Frank and Arnold. A reader's preference is likely to depend upon his social values. Professor Radin is an accredited member of the "realistic school" of legal writers.³ Right-wing members of this group will be pleased with his performance. Left-wing members will tend to think his benedictions indiscriminate. He could have defended our democratic governmental framework, with its peaceful settlement of disputes by arbitration and compromise, without defending its incubus of ideology and folklore.⁴ He could have assigned a much greater creative, reforming, function to judges. His definition of "law" as prophecy, as doctrine, is insight from a very limited perspective only. From a broader perspective any differentiation of "law" from morals, manners, economics and so forth is illusory. Indeed the greatest present concern of the layman is with that growing edge of social change where "law" and "economics" are hopelessly intermingled. Some probing into the "conflicts" which here produce "law" and into the kind of "law" so produced might have arrested Mr. Smith's attention. *Sed quare*. When the definitive theory of social change comes to be formulated, it scarcely seems probable that a high place will be given to books either praising or damning lawyers. Such books, with rare exceptions, are born to waste their fragrance on the desert air.

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CASES ON PUBLIC UTILITY REGULATION. By Irston R. Barnes. F. S. Crofts & Co., New York, 1938. Pp. xx, 984. Price: \$7.00.

Would a medical student make a case study of wounds by studying court decisions dealing with the liability of doctors for the proper treatment

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2. The phrasing is from an earlier chapter.

3. Cf. Professor Llewellyn's famous roll call (1931) 44 HARV. L. REV. 1222 at 1259.

4. He does state that much of our lawyers' "jargon" is today "unnecessary".