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Book Review: Law: The Science of Inefficiency

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really have no standing at all in a serious book on jurisprudence. Just because a judge or bar journal contributor has disgorged some ill-digested phrase about "eternal liberties" or, worse yet, "natural law," this ought not to make him a footnote, much less a prophet of jurisprudence. There simply are too many after-dinner prophets in this book.

On the bright side, apart from its many printing mistakes especially of foreign names and phrases (French accents and German Umlaut signs are not up to the writer's discretion!), the book treats adequately those whom it treats. The discussion of the pre-Revolutionary New England leaders and jurists and also the one of Dean Pound is sound and lucid. The description of the ideas of such scholars as Judge Frank, Karl Llewellyn, or Edward Robinson is thorough and exhaustive. The analysis of Hans Kelsen shows that the author belongs to the American minority who understand the great master.

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It is probably an understatement to say that our profession has had its fair quota of smugness. Yet there could always be found some brave souls who believe that the law can be better and have gone out to make it so. Much of the modern approach to judicial administration can be attributed to Jeremy Bentham, who spent a long and productive life as juristic critic and reformer. More recently, a lively movement in American law schools nurtured the development of legal realism which so materially aided the Constitutional about-face of the thirties. Usually this movement is traced back to Justice Holmes; according to one view, he charmed and misled the law professors, who, in turn, seduced the Supreme Court from the "erasure" into the "rubber stamp" era of judicial review, to borrow from our present author's ample storehouse of epigrams. These are but examples from a substantial and an honorable roll of legal reformers.

While the volume under review has much kinship with these and other valiant attempts to improve the law, it can hardly be classified with them. Indeed, the author himself would be the first to object. He completely eschews all idea of reform. Such vagaries are curtly dismissed with pronouncements of which this is typical: "Despite Bentham and Benthamism, and 'the century of law reform' inspired by him, no changes have fundamentally altered the law's operations." Not only is the law the epitome of inefficiency—the author's underlying thesis—but nothing can be done to change it. All attempts at reform are characterized as more than faintly ridiculous. One would have to go back to Professor Rodell's Woe Unto You, Lawyers! to find a comparably bleak view; but even Rodell was a crusader who hoped for a better day and a dawning realization by his brethren of their folly. Such an attitude, I take it, would draw from our present author only a derisive smile. Seagle's pessimism is complete. Withal it is a genial pessimism, mellowed by contentment with hopelessness discovered and understood. This book has to have an ivory castle completely of its own.

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Reader reaction may well be interesting, possibly more important than the book itself. To the legal optimist it can hardly be other than a red rag; things surely cannot be that bad. To others there will be occasion for considerable amusement and sardonic glee—at least once they get beyond their own pet interests. I found a second reading instructive and pleasurable. My first reading, however, was clouded by an adverse reaction to the author's treatment of "The Ordeal of Procedure." He is one of those who subscribe to a view, now somewhat current, that procedural reformers are unusually naive and stupid individuals whose endeavors are at best ineffectual, at worst positively harmful. Consequently he understates what they have done and even distorts events of recent judicial history to support his position.\(^1\) But after I had resolutely set myself not to reread these sections, I discovered much solid instruction elsewhere. So here is my advice: get some one else to peruse the sections dealing with your pet projects and prepare yourself to enjoy the rest of the book.

The reader will find the author pretty catholic in his distastes. One whole chapter, "The Bogus War on Crime," is devoted to his version, if not distortion, of libertarian concepts to hold that "liberty and inefficiency are one and inseparable." Seagle's thesis is surely anathema to apostles of light generally; he goes so far as to say, "The visitor from another planet would be particularly puzzled by the difficulties put in the way of the police in their struggle with crime," while the significance of the jury "is that the grossest amateurism dominates the prosecution of crime." In the chapter on "Government by Inefficiency" he finds that "the criminal law, for all its inefficiency, does not reveal legal inefficiency at its worst. That is reserved for the supreme branch of public law, which is constitutional law." And he then goes on to describe the various means resorted to in order to keep government inefficient. As a result one is hopelessly torn between rushing to laissez-faire, for which the author has some nice barbs, or governmental activity, which is of course equally vulnerable. Toward the end he goes on to the promise of "New Horizons of Inefficiency." The book closes with "A Warning to Law-mongers" to give up reliance on the law or "the process of tinkering known as law reform" and to trust more to, say, "the superior validity of economic laws or other directly acting forces." And since the law "has never displaced its old competitors, custom, religion, and ethics," and society has come to live more and more without law, "it is idle to wonder about the effects of law upon its activities."

If one does try to follow the author's thesis beyond its surface cynicism, one will experience difficulties. For there is no attempt to penetrate deeply into the philosophy of social institutions. Even the "science" of the title is only a convenient barb upon which to impale legalistic foolishness. So there is a scattering of shots with no thought-out standard of evaluation of what might be acceptable and what not. The author features his dislikes; but many of his likes appear, at least interstitially. They seem at least as curious a collection as do his aversions. One does not get an ordered and logical critique in the style of the great law reformers. So the going often gets heavy; one misses the joyous humor of such a book as Thurman Arnold's *The Folklore of Capitalism*, with its famous parable of rabbits masquerading as horses—for tax

\(^1\) E.g., the implications of such a statement as this (emphasis supplied): "Moreover, the Federal Rules of Civil Procedure *had to be* extensively revised in 1947, after they had been in force for only a decade."
purposes only. But one should not take the book for something other than what it purports to be. Its drive is against legal clichés and cliché thinking in the law; it does not try to build anything. And on this level its bull's-eyes are numerous. Even the title is a palpable hit, though it does force the author to strain a bit thereafter to live up to it. So is this: "A particularly absurd American custom is that of trying the jury before trying the prisoner at the bar." So likewise is the characterization of the trial judge's "most perilous moment," when he must charge the jury in the midst of instructions requested by the lawyers: "This is really a legal examination, which the judge is quite as likely to flunk as a bar examination." The conclusion is, however, characteristically sweeping: "If he does, another criminal will escape when he takes his appeal."

Is there a place for a book such as this in the average law library? Surely, if for no other reason than to help one look, if not at oneself, at least at his lawyer associates. And how useful it can be made for a beautifully ironic address to a bar association if one must speak and rebels at any further shivering over attacks on our fundamental institutions—which still seem to be standing up pretty well. Beyond this, too, is the cleansing grace which comes from direct criticism and re-examination of legalisms, both sacred and profane. More one should not demand. There will be found no direct aid to improvement either of oneself or of one's mistress, the law. Far from it indeed! Not content with shattering the idyl of improvement, the book ends on a note of dire warning: "It has been said that those who live by the sword shall perish by the sword. It is equally true that those who live by the law shall perish by the law!" All hope is lost, and the outlook entirely Stygian, albeit pleasantly so withal.

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