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THE ROLES OF LAWBOOKS

*Alfred F. Conard**

The law is a bookish profession. It is not the only one to depend on books, but it displays a unique veneration for them. A clergyman or a literary critic might have his portrait painted with a book in his hand, but only a lawyer would choose to be portrayed against a backdrop of a hundred volumes in well-matched bindings. When Langdell sought to dignify the study of law as a science, he declared that the lawyer's library is his laboratory.

Langdell's dictum brings smiles to our lips today because Dean Pound diverted our attention from "law in books" to "law in action." We want to know how the law works, and what it works upon in the areas of human behavior, beliefs, and desires. But since we lack firsthand means for discovering these facts, we still depend on books to inform ourselves about the interactions of legal rules with the human and social matrix in which they operate. The quality of the law at any time, therefore, is profoundly dependent on the quality of the books relating to law that have appeared in preceding years.

The *Michigan Law Review's* annual review of books provides us with an informative sample of the recently published books that are available to inform the lawyer's mind. No doubt the sample is biased by the idiosyncracies of the editors' tastes and of the reviewers' receptivity. But these biases are more likely to enhance than to diminish the significance of the selection.

I

In order to bring my observations within practicable limits, I have focused my attention on only one of these annual volumes — the fat collection of 1981, which reviewed sixty-three different volumes. For similar reasons, I have not read each of the sixty-three books reviewed, but have judged their contents and approaches largely from what their reviewers have said about them, with only occasional glances at the originals. To add seasoning, I have also looked at the thirteen volumes that have been awarded prizes or honorable mentions by the Coif selection committee in the triennial awards from 1964 to 1979.

The most striking aspect of the selection of books reviewed was

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that a majority were neither expositions of rules of law nor critiques of these rules. Nearly one fifth (twelve out of sixty-three by my count) were historical accounts of the events and institutions with which the law deals. Two of these were studies of criminal behavior in thirteenth- and fourteenth-century England. Five were histories of legal developments in the nineteenth and twentieth centuries, with a surprising variety of subjects such as the pre-Civil War federal courts, the post-Civil War Freedmen's Bureau, the judicial role of the House of Lords, the activities of prosecutors, and the conduct of institutions of confinement, including both prisons and mental hospitals. Another handful were histories of contemporary phenomena, from the International Red Cross to the Mafia, spanning the regulation of nuclear power and blacks' struggle for equality. One of the Coif awards went to a distinguished book in this category — Dawson's *Oracles of the Law*. Although some of these accounts contain an imperfectly hidden agenda, they are refreshing in their presentation of events without dictating the conclusions about contemporary law that the reader ought to draw from them.

A much larger group of nonlaw books analyzed legal processes from social science viewpoints. Nine were expressly psychological. Two works subjected eyewitness testimony to the teachings of experimental psychology. Social psychology and mental disease claimed another half-dozen volumes, with special reference to the forensic uses and abuses of these sciences in determining fitness for trial, eligibility for criminal penalties, and solution of family conflicts. Three economic studies examined problems of energy, bureaucracy, and public finance.

Sociologists have so thoroughly naturalized themselves in the legal forest that one has trouble deciding whether to classify many of their current works as "legal" or "sociological." The merger is signified by a flock of legal studies that employ techniques borrowed from the social sciences to produce facts rather than arguments. The most exotic of these were a pair of studies of the techniques of dispute resolution in remote areas such as East Africa, the Middle East, and Latin America. Closely related to these was a study of the lingering effects in colonies and former colonies of the legal systems introduced by colonizing powers. Less exotic studies produced revealing observations on legal services for the poor and case selection in the Supreme Court.

The ultimate intellectual challenge — determining the values that a legal system should subserve — was accepted by four works reviewed in the 1981 anthology. Two were boldly entitled *A Theory of Criminal Justice*; a third, provocatively disguised as *Mountains Without Handrails*, pondered the value of preserving the most beautiful works of nature; a fourth disdained all restrictions of subject

matter by speculating on *A Theory of the Good and the Right*. In two decades of Coif awards, two works of this type were honored — Rawls's *A Theory of Justice* and Dworkin's *Taking Rights Seriously*.

With less than half of the 1981 anthology left, we approach the works that deal primarily with specific rules of law. Three of these were historical, tracing the recent history of tort law and of contract law in the common-law system, and of political crime in Europe. They represent an approach that has led to some of the most distinguished legal writing of recent decades. Lawrence Friedman and Willard Hurst won Coif prizes with probes in this vein, and Hurst has authored at least half a dozen other works that could easily have won the same accolade.

II

Finally, I come down to that minority of books that seem to deal primarily with law in force in the United States. Laying aside seven casebooks on constitutional law, there were about a dozen volumes in this area. Not surprisingly, some of them clustered around centers of current controversy. Inequality inspired volumes on *Race, Racism, and American Law*, *Apartheid in America*, and *Equality and the Rights of Women*. School problems motivated *Legislated Learning and Education by Choice*. Judicial activism seems to have triggered *The Judge* and *Judicial Review and the National Political Process*. The vagaries of tort law stimulated *A Nation of Guinea Pigs* and *The Duty to Act*. Only one, Macneil's *New Social Contract*, approached a quiet area of scholarly concern.

What struck me most forcefully about the books was a difference in approaches. On the one hand, an author may attempt primarily to describe what the law is, including a prognosis of its tendencies and a disclosure of the author's preferences. On the other, the author may put his primary emphasis on what the law ought to be — defending the existing law if it is right, and attacking it if it is wrong. In this group of a dozen books, only one (Macneil's) seemed to be an interpretive description of the law, while the others seemed more like briefs of argument for or against the existing law.

This division was a little surprising, in view of the veneration that has traditionally been accorded to the "treatise" approach. This approach characterized at least three items on the Coif list — Currie's *Essays on the Conflict of Laws*, Gilmore's *Security Interests in Personal Property*, and Palmer's *The Law of Restitution*. These books are rich in personal evaluations, but the personal opinions are generally distinguishable from descriptions of the law, and are balanced by recognition of opposing viewpoints. In contrast, nearly all of the books in the group under discussion devoted themselves almost entirely to advocating particular rules.

I find it reassuring that legal writers are not only concerned with what the law ought to be, but are prepared to direct their writing explicitly toward advocating the better law. However, I was disappointed by the predominant quality and content of the advocacy. In most cases, I did not feel enlightened by the arguments made — even where I sympathized with the conclusions — but rather turned off by the hammer blows of persuasion, which reminded me of TV commercials.

There were at least two aspects of these works that made them unpersuasive. One was the brief-of-argument mode. In a brief, one mentions counterviews only to demolish them. One glides as undetectably as possible from the settled law to the position advocated, trying to make the position advocated seem like a mere application, or an inevitable corollary, of the settled law. When I sit as a moot-court judge, I have no objection to this type of persuasion because I can rely on the opposing brief to expose the non sequiturs. When I read an argumentative book, without an opposing brief at hand, I am forced to do my own rebutting. Before going further I want to see the contrary arguments; if the author does not supply them, I stop reading. The brief-of-argument approach is particularly frustrating when, as in Lawrence Tribe's *Constitutional Law*, a book that calls itself a "treatise" slips silently from truths perceived by judges to truths perceived by the author.

This aspect of the books reviewed reminded me of a thesis advanced early in the present century by a British writer named Baty under the title, *Polarized Law*. Baty urged that legal literature would be more interesting if writers would choose an objective to which their analysis would be subordinate. If one turns to the writing of Baty's time, with its exaggerated reference to judicial wisdom, one can sympathize with his viewpoint. (It is an unfortunate coincidence that Baty's best known polemic was directed against vicarious liability — a principle that has only increased its breadth and depth in the decades since he attacked it.)

A second source of disappointment was the infrequency with which the teachings of history, psychology, economics, sociology, or philosophy were brought to bear on the choice of legal rules. The wealth of social scientists' observations about law — suggested by the broad selection of books from these areas reviewed in the 1981 collection — seems to have had but slight influence on most lawyers' thinking about what laws should be.

Admittedly, it is difficult to find links between social facts and legal decisions, but it has been done. In the collection under present consideration, Wolgast's *Equality and the Rights of Women* is a good example of argument from history, physiology, and culture. Among the Coif awards, Packer's *Limits of the Criminal Sanction* and Eisen-

berg's *Structure of the Corporation* are illustrative. But this approach seems to be rare.

I take comfort in the impression — unsubstantiated by quantitative data — that less polarized and more scientific writing will be found more frequently in law reviews. Law reviews are often hostile to disguised briefs of argument; book publishers, on the other hand, may be partial to books that are contentious enough to win attention. Perhaps lawyers would be better served by a review of law reviews than by a review of books.

III

These reflections frame the dilemma facing a legal writer. He fills no need if he merely summarizes statutes and cases; digests, loose-leaf services, *Lexis*, and *Westlaw* have taken over that job. Occasionally the need arises for a synthesis of theory in a new or underdeveloped area. Ken Davis's work on *Administrative Law* and George Palmer's on *The Law of Restitution* have filled needs of this kind. But in most areas the analytic and taxonomic task has been performed long since by writers like Story, Williston, Scott, and Prosser.

Consequently, the polarized writers are quite right in deciding that they should be advocates. They should not be reproached merely because they advance positions that readers cannot accept. As Christopher Morley has said, "[t]he real purpose of books is to trap the mind into doing its own thinking."

The writer's dilemma is to take a position sufficiently challenging to excite the reader's mind, but not so dogmatic as to stun and anesthetize it. Perceptions of social facts are the prime mind-openers. Differences in how we feel about affirmative action, exclusion of evidence, or products liability are likely to depend on how we perceive the prevalent behavior of white employers and black employees, how we perceive the predominant activities of police and of the people whom police arrest, and how we perceive the practices of pharmaceutical manufacturers and Food and Drug Administration officials concerning new drugs. Advocates will do more to excite the minds of readers if they disclose and discuss the supposed social facts that underlie their preferences than if they assume a polar objective without revealing how they found it.

Fortunately, social scientists' and philosophers' explorations of the world of law are producing more and more grist for legal mills. Although the linkages are not made as often as we would wish, they are appearing. They tend to appear earlier in law reviews than in books. But eventually they gain the authority conveyed by a hard cover, and a card in the library catalogue. As they do, we can be

assured that they will not go unremarked in the *Michigan Law Review's* annual review of books.