
This is a delightful, small-page volume, principally made up of the Storrs lectures delivered by Professor Radin last year at the Yale Law School. The book is thought-provoking, wise, erudite—and difficult reading. Also, it requires a dictionary at one's elbow.

In the first chapter, Professor Radin contrasts Coke's "Reason is the life of the law" with the late Mr. Justice Holmes's often quoted "The Life of the law has not been logic: it has been experience." The lecturer seems to be somewhat unfriendly to Coke, whose "historical mistakes" are, he repeats, "the common law of modern England," and, he asserts:

"The issue seems to be joined sharply enough between experience and reason which is, of course, logic." This is not necessarily so, however. While "logic" in its derivation means "reason," one need not reason solely from logical premises, but may rationalize as well from experience. If one is to use experience as an aid to reason, all will agree with the author that the experience to be utilized is not merely that of lawyers but "of the usual run of mankind." The observation is rather obvious, also, that law cannot be as completely logical as mathematics, since the former deals with words, which are of uncertain, and as Mr. Justice Holmes admonished, of varying meaning; whereas "pure mathematics" needs no interpretation. Would it were possible to say more generally what Judge Learned Hand observed in the trade-mark case of Coty v. LeBlume Import Co.: "A word means what people understand it to say and there is an end of it." Again, one might wish the author had stated with more definiteness what he means by "law." The law or "law," in this country, is not merely part of the common law of England as it existed at a certain time and which may be applicable to our situation, but includes also equity and rules of conduct derived from statutes, ordinances, and orders of any lawful authority, including administrative rulings. All such lawful requirements comprised in "law" are statements, in brief compass, of experience.

In the second dissertation, the author finds infirmity in the law because law is necessarily concerned with past transactions which it must endeavor to reconstruct. He says this task is "to do the impossible thing." The reasoning here and the supporting quotations of Aristotle and Agathon:

"For this alone is lacking even to God
To make undone what once has been done"
do not justify this defeatism. Conceding the irrevocability of the past is not to say that the past may not be helpful, as experience, for solving present problems and those to come. Mr. Radin refers to our "arbitrary and irrational law of evidence," but draws comfort "from the fact that foreign systems do not have these rules and still suffer from the same defects." Chief Justice Marshall and Justice Story apparently need defenders in these days. The author finds fault with their statement that "hearsay evidence is inherently bad evidence." But hearsay evidence (with certain exceptions) is inherently bad because cross-examination as to it, which, if allowed, might

1 P. 44.
2 292 Fed. 264, 266 (D.C. N.Y. 1923).
3 Hastings v. Columbus, 42 Ohio St. 585 (1885).
4 P. 62.
6 P. 58.
7 P. 61.
weaken or destroy the force of such testimony, is not available. True, as the author says, it might only strengthen it. But the possibility of breaking it down should not be eliminated.

In the third chapter, the lecturer gives some cogent reasons for preferring arbitration to litigation, although as he says, arbitration is appeasement or compromise, and it is not only Kant and the Stoics who believe that any compromise where principle is concerned is a wrong. But compromise by arbitration invokes the factor of class consciousness, whereas litigation, he thinks, concerns only the litigant. Pre-trial procedure, which has been successfully employed in the District Court of the District of Columbia and elsewhere, is a fusion of compromise and litigation and is not referred to. In this chapter, we must conclude that when the word “law” is used, Mr. Radin means law in the more inclusive sense, since statutory bankruptcy, the securities acts, the labor relations acts, workmen’s compensation, and divorce legislation are referred to as instances of the law making use of experience and affecting the future as well as the past. He might have mentioned that frequently now the violation of criminal statutes or ordinances conclusively results also in civil liability. In finding fault with the harshness of the rule of contributory negligence, no matter how slight, defeating recovery, the commentator should have included reference to the statutes of a number of states and the Federal Employers’ Liability Act to the effect that contributory negligence is not a complete defense but that the damages recoverable must be diminished in proportion to the amount of negligence attributable to the person injured.

In the fourth discourse, dealing with the criminal law, Mr. Radin finds the lawyer and judge at their worst, because lacking the knowledge and experience necessary to deal helpfully with the criminal; and so the future of the offender and his usefulness in society are not sufficiently taken into account. The lecturer thinks the only justifiable lawyers’ participation in criminal procedure is in prevention of punishment of persons who are not guilty, but might be so adjudged by reason of being in a low economic group, entertaining unpopular views, or because of abrogation of “nulla poena sine lege”—now fundamental in all but the dictator states—and substituting the dangerous cult of punishment “for reasons of state.” (It is rather interesting to be informed that the infamy in history of the Star Chamber is only partially deserved and that it was in no sense a secret tribunal, but a place in which the small man could be heard against the great without wealth and social position having a preponderant influence.)

In the fifth discussion, the author treats of the nature of justice which, he asserts, has certain common denominators which all will agree are essential elements; but in the end, he decides, justice must be “a process of moral valuation tinged with a kind of humane emotion.” Just as Pope observed, “The proper study of mankind is man,” so the author sums up with the aphorism, “Humanity is, after all, the business of the law.”

Perhaps it is due to this reviewer’s principal concern for many years with workaday, run-of-mine law; but understanding a disquisition so philosophical and abstract was found, even on a second reading, extremely difficult. If the Yale Law School students to whom the lectures were addressed grasped their meaning in a single hearing, the level of ability at New Haven is now far above what it was for law students generally,

say forty years ago. I am afraid ordinary lawyers, even those who throw in a little teaching on a particular subject, are like the judge who said of Romeo and Juliet, "it was a mere tissue of improbabilities." We are myopic because of the trees of facts when invited to scan the abstract flowering in philosophical forests. The late Justice Holmes said judges know how to decide cases before they know why. We, like they, are, I suppose, fairly able to reach conclusions, but somewhat fearful of abstract reasoning. Lord Russell of Killowen recently admonished one of the counsel before him thus: "We sit to try cases and not to determine academic points of law." It will be edifying but hard mental exercise for judges and lawyers to read these profound and scholarly lectures. I wish the author had used chapter headings and had followed somewhat the advice given in courses on argumentation: first to say what you are about to show, then to say you are showing it, and finally to say what has been shown. Such rubrics would greatly assist humble lawyers "A-sending of their writs abowt, And droring in the fees."

The author has a rich vocabulary and assumes a knowledge which his listeners and readers do not possess. He apparently forgets he was at one time a teacher of Latin, but that those who read his volume know "little Latin and less Greek." It is complimentary to the reader for the instructor to assume he will recognize all the allusions; but, in fact, he will not. I tried, at a recent legal conference in which distinguished teachers of law, judges, and practitioners were taking part, an "Information Please" test of how many understood the reference to Anatole France's judge or the more specialized pronouncement of Mr. Justice Maule that the law is not a respecter of persons. Practically none knew Mr. Justice Maule's ironic sentencing of the impecunious bigamist, or Anatole France's, "The law in its majestic equality forbids both the rich and poor to sleep under bridges." If I had asked some of my students about Anatole France, they might have queried, "Is that in the occupied or unoccupied territory?"

While there is an excellent index and source notes are given so further reading would make the references comprehensible, the reader is not likely to have the time or inclination to search out and peruse the originals, and clearly students could not do this when listening to the lectures.

Certain statements made by the lecturer may be questioned. Irate practitioners who have had disagreeable contacts with the National Labor Relations Board will insist that the essayist is not reasoning from experience when he doubts "whether any purely academic research has been more effectively and scientifically pursued than the investigations carried on by" this board. So, too, the lawyer reader who has been thwarted in efforts to hold labor unions responsible for the consequences of unlawful acts will completely differ with the statement: "So far as labor is organized in quasi-corporate form, in trade unions, it can be dealt with as other corporations are dealt with." Also the author is not quite accurate in saying that in bankruptcy "all claims of the United States are paid in full, first." By Section 64 of the Bankruptcy Act, unpaid wages are entitled to priority over claims of the United States. The statement that there are excellent reasons in criminal law for the rules against self-incrimination and against the use of the uncorroborated testimony of an accomplice, but that one of these is not that by omitting such testimony we are more likely to get at a correct pic-

12 P. 81. 13 P. 50. 14 P. 130. 15 P. 82.

16 See 8 Univ. Chi. L. Rev. 600 (1941) and 54 Harv. L. Rev. 706 (1941).
ture, and, on the contrary, it is conceded that for that purpose they might be helpful indeed, is difficult to understand and seems to be incorrect. The basis for excluding such testimony is that it is usually unworthy of belief.

In concluding that justice is what the judges think, the unfavorable animadversion on English judges of the early nineteenth century (to the effect that the sense of justice in the mind of such a judge "would make him feel that the stopping of fox-earths was worse than the destruction of a farmer's crops, and that it was just that a small group of propertied men should be permitted to arrange their marital difficulties by divorce but that men without property should not") will not be persuasive with those who are familiar with the history of the spring-gun cases and who recall the opposition of Senators Norris and Black to the confirmation of Mr. Chief Justice Hughes and Mr. Justice Stone on the ground that their clients had been the rich and powerful. A man of high character, when he becomes judge, forgets his former employments and associations and recognizes but one client, the public.

Perhaps it is ungracious even to mention such small matters in view of the pleasure and profit which are to be derived from a careful reading of a little book so stimulating and informative.

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This pamphlet by Professor Hermens of Notre Dame is a plausible attack upon proportional representation. It is a dangerous attack from the standpoint of its proponents because it attributes to P. R. the responsibility for enabling Hitler and Mussolini to come to power. In the present state of public opinion, the mere suggestion that this is true is enough to alienate the affections of many from P. R. without bothering to consider the evidence.

A fundamental criticism of the importance and fairness of the contribution of this pamphlet to the serious consideration of P. R. in the United States may be made on the ground that it practically ignores the immediate, vital issue. The author admits: "In the United States P. R. is mainly advocated for local government." Yet he devotes approximately thirty pages to a consideration of European experience with P. R. on a national scale and the dangers of P. R. in national elections in the United States; only eight pages are devoted to a totally inadequate consideration of P. R. experience and its application on the municipal level in the United States.

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Proportional representation is a method of voting in which the preferential ballot is used, with the voter indicating his choices in order of preference, 1, 2, 3, etc., instead of marking crosses. It is designed for legislative bodies and results in each political group getting representation in proportion to its voting strength. In many European countries the "list system" is used, while in the United States the Hare system with the single transferable vote is the more popular variant. Proportional representation is generally referred to for convenience as P. R. and this policy will be followed in this review.

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