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Book Review: Law and Social Change, by Jacob S. Ziegel (ed)

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Book Reviews

LAW AND SOCIAL CHANGE, Edited by Jacob S. Ziegel, Toronto: Osgoode Hall Law School. 1973. Pp. 128 (Hardbound: $7.50; Paperback: $4.00).

It is almost three years since Osgoode Hall Law School initiated what has become a noteworthy programme of annual lectures designed to bring to a wide public, both inside and outside the university, the views of individuals who have contributed through legal practice and scholarly research to the exploration of the interface between law and society. It is not surprising, therefore, that the first lectures, in the autumn and winter of 1971-1972, should have tackled the engrossing subject of law and social change, which is the title of a 1973 Osgoode publication incorporating the texts of five lectures and three commentaries. The lectures do not systematically attempt to cover the whole range of possible questions and they vary considerably in length, content and approach, as indicated by their titles: Progress and Professionalism: The Canadian Legal Profession in Transition, by H. W. Arthurs; General Theory of Law and Social Change, by Lawrence M. Friedman; The Supreme Court of Canada and Canadian Federalism, by Paul C. Weiler; The Role of the Public Inquiry in our Constitutional System, by Gerald LeDain; and A Living Society is a Quarrelling Society, by Nils Christie. While each article may be said to deal with some particular aspect of the theme, two are of particular interest to a legally-trained social scientist; namely, the two contributions from Arthurs and Friedman, both of which take for their leitmotiv the state of the legal profession.

H. W. Arthurs is Dean of Osgoode Hall Law School, the nation's oldest and largest common law school, and thus has a unique vantage point from which to survey the current state of the profession in Canada. What he offers is a trenchant diagnosis of the patient's ills and a sceptical prognosis for the future. Borrowing Charles Reich's analysis of levels of consciousness, he looks at the profession's values as they are expressed by several subgroups: students, professors, and lawyers. As Arthurs points out, these subgroups are also differentiated according to age, education and experience although they all, to some degree or another, still accept the traditional institutional values of the legal system.

At the first level of consciousness one finds the expert practitioners, (but few professors), concerned with and devoted to taxonomy, and acting as the very prototype of the lawyer's lawyer. At the second level of Arthurs' typology, we find those few lawyers (and many professors) who see law as an aspect of public policy, joining in an uneasy alliance with those who contend that only sound methodology can sustain an ideological stance. Finally, at the third level, are those many students, few professors and almost

no lawyers who see law as playing an empathetic role based on, and fulfilling, interpersonal relationships.

Arthurs concludes that these levels of consciousness have produced a continual identity crisis within the profession which is exciting but also sufficiently enervating to have robbed the profession of intellectual depth, sureness and maturity. But he goes further than a descriptive taxonomy of the contemporary situation. He asserts that these differing levels of consciousness are the product of the profession's first encounter with systematic theory — without which a profession cannot call itself learned but the acquisition of which depends on law professors. He also suggests that the profession could more easily have come to terms with or absorbed the shock waves of this encounter if it were not so young, if there had been a slower evolutionary process of gradual development, adaptation and synthesis. But, as he notes, our law schools as centres of full time instruction and research are very young, our profession is not yet truly professionalized and our students are no longer passive receivers of old truths.

Arthurs has thus accurately defined the dilemma: without devising or coming to terms with a general unifying theory of law, the profession will remain divided; but divided, it can hardly generate a theory. Is there a way out of this circle? Arthurs wisely declines to speculate. I would suggest that the profession may find an exit point when and as it recognizes and accepts its diverse roles in society, since it is these roles which have given rise to the differing levels of consciousness within the profession and which have influenced — far more strongly than lawyers might believe — the profession's internal "legal" values or norms, as a collective group. There *is* an observable distinction between the level of consciousness of an individual lawyer and that of the professional group. Why not recognize that the distinction may not only be valid but also necessary in a complex, changing, differentiated society? By way of analogy, biology asserts that the greater the individual variation among members of a species, the better the species as a whole will meet the challenge of its environment, and survive to reproduce. If that is the case, then it may be less useful to resolve intra-species, or intra-lawyer differences than it may be imperative to speak to other 'species' in the societal environment, whether they be doctors or Indian chiefs. That, I think, will lead to an open-ended debate about law 'in' society, law 'and' society, law as product of social interests and law as molder of social values. But I have no doubt that lawyers, fortified by discussion of internal norms, can tackle those salient questions in open public forum, as long as there are several levels of consciousness, and not merely one.

If Arthurs has given us a typology of the profession from the insider looking out, Friedman adjures us to look from the outside in — to consider how and why the American lawyer has become a shaker and a changer *par excellence* in a political and social culture that is, after all, more like than unlike our own. Friedman begins his analysis with a statement which indicates how far we have come; namely, that the subject of law and social change is today a valid and important theme whereas as recently as thirty years ago it stood at the fringe of academic interest in law. This interest emerged for lawyers, but also for social scientists, for it was about this time

that the social scientist began to see law as a legitimate and fruitful field for study and research, recognizing its central importance in Western and non-Western institutions and cultures. Friedman gives two reasons for this development: first, the fact that there *is* social change on a vast scale and, equally significant, that individuals are aware of change; and second, the existence of a widely accepted conception of law as a social process.

These modern views of social change and law are a direct outgrowth of the two great revolutions of nineteenth century Europe: the industrial revolution of Britain and the political revolution of France. The dynamism inherent in both affected both Europe and the world, the latter mainly through the political and economic instruments of colonial rule. Thus law and social change is a subject of universal concern and enquiry, the more so because law is perceived by modern governments as one of the most powerful instruments with which to direct, initiate or restrict change.

But Friedman is talking about the contemporary American scene and indeed that is probably the most significant theatre for an examination of the topic. The United States is the legatee of the nineteenth century. It provided hospitable soil for the revolutions in ideas and institutions; it is the home of diverse ethnic and racial groups and the testing ground for experiments in social engineering and power distribution. And, if it is hardly accurate to suggest that "what California is today, the rest will be tomorrow", it *is* true that the United States warrants our keen attention. What Friedman gives us is a most provocative and stimulating account of how lawyers act as self-proclaimed makers of change. To do so, he asserts a social theory of law to which the contemporary generation of lawyers is firmly wedded: "a theory that law, whatever else it may be, is at least a product of general social forces, moving along with them and interacting with society at every point." (Page 20) But not all legal change is social change. In this category falls much of the legal system's housekeeping activity, such as statutory revision and codification, and ratification or "law reform", which simply acknowledges, formally, a societal change which has already taken place.

In contradistinction, true social change through law may be described as change which originates outside the legal system but which moves through it to a point of impact outside the legal system; or, more rarely, creative change which originates inside the legal system and has an impact outside it. It is this type of change, where the point of impact is outside the system, in society, that excites Friedman, and it is here that lawyers are much in evidence, in numbers and in influence. It was not always so. The lawyers of the old breed were tools of social change, not causes of it, men with skills for sale, men whose professional training did not, on that account alone make them social critics or reformers. But a new breed of lawyer is now much in evidence as the "investigating generalist" and the "fire-eating litigator." They are, by and large, committed to social planning and more often to social disruption — these constituting the positive and negative aspects of social change. In their commitment to this task, the new lawyers have seized on the lawsuit as the form best suited to their temperaments and their goals, litigation being an old and well-tried technique for social change in America. The examples are numerous: the reformation of the rights of

criminal defendants, the battering down of racial and sexual discrimination, the redefinition of the fourteenth amendment.

But Friedman goes further than this analysis. He asks whether this brand of social change is, or should be, an export commodity. Fully appreciative of the difficulties of supplying an answer, he outlines the social conditions under which lawyers might breed social change. In other words, he provides a checklist, based on American experience, of those social preconditions which may constitute a necessary and even sufficient soil for the growth of this new technique. Obviously one needs the products of law schools — "a steady supply of bright, turned-on, active, willing, workers" — as well as persons willing to engage in these forms of litigation, and a social soil which combines a widespread scepticism about the status quo, a suspicion that all is not right, and a willingness to listen to muckrakers. But beyond this marriage of public malaise and individual discontent, Friedman postulates a set of conditions for the health and welfare of the litigator who is the linchpin of the attack on the social Bastille: first, a ready supply of money from those who want change; second, a genuine social movement (and there are many such "causes" in a complex and disgruntled society); third, an activist bar which permits social action and does not and cannot punish activists; fourth, an activist bench, willing to use its power; and fifth, the acquiescence of the élite in the results of litigation, which implies that they maintain at least a vestigial belief in legal institutons, and the tendency of those institutions to do "the right thing".

Finally, Friedman tentatively compares the British and Canadian cultures with the American, searching to discover whether their legal systems and lawyers now constitute a social soil ready for the implantation of some version of the American style of law as maker of social change. He concludes that indeed this style is likely to find echoes, if not imitations, abroad. He does not doubt that society must move in a progressive direction or else be doomed, and that social change is inevitable. The only variable, then, is the role of lawyers and the law.

What might the Canadian version be? Jeffrey Jowell in his comment tackles this head on by asserting that avant-garde lawyering is neither inevitable nor desirable in Canada. He suggests, in brief, that legal institutions are not the obvious or most effective way to achieve social change, and that indeed the political system is, potentially, more sensitive to social injustice and capable of more effective positive change than its American counterpart. But Jowell is also quick to point out that while the broad social culture may be more conciliatory in nature, the Canadian legal culture could stand some searching re-examination. He suggests, for example, that existing legal remedies may be deficient, in form and in effect, and hints that we would not suffer if we possessed a more activist bench and bar.

To place Arthurs' diagnosis of the legal profession in the context of Friedman's theory is a challenge which I hope others will take up, and should take up. For my part, I take Arthurs' description of the collision of Canadian legal values as a confirmation of the fact that the seedbed for the "new wave" in lawyering may by now be well watered and ready for planting, notwith-

standing a social and political culture which Canadians too contentedly believe is readily distinguishable from that of the United States. In the first place, the profession may be, as Arthurs asserts, in a state of clinical shock after its first real encounter with systematic theory. If that is so, then it cannot, nor should not, resist the persistent leakage of ideas and techniques from the United States. In the second place, do Canadian lawyers really want to turn their backs on the inevitable challenge of developing an indigenous response to the universal thrust of social change? I think some do: they reemphasize and sharpen the tools of a conservative craftsmanship. But this cannot satisfy a growing number of individuals within and without the profession who do see law as a social instrument. Indeed, it is not unlikely that Canada's Ralph Nader is about to graduate from some Canadian law school this spring.

To put forward such a view is to invite discussion on the possibility or necessity of constructing a viable general theory of law, within the context of a science of society. That will not be easy, for I think it accurate to state that there is no sociology of law, no anthropology of law, no political science of law — at least not yet. But there are fruitful attempts to describe how and why lawyers function as a group and as members of cultures, societies and states. As for "law", that bundle of practices and ideals, cause and effect, which cannot be caught in any simplistic definition or network of empirical data, we must be prepared to undertake a long voyage, like that of Darwin on the "Beagle", observing, describing, testing, hypothesizing, rejecting, refining. Law may well be the unique challenge to social science: it is a happy hunting ground for the positivist as he examines what actually happens in court, and a rich source for the idealist contemplating what is just about justice. I do not think that other "learned" professions can greatly assist us. But I hold firmly to the opinion that for those of us who think about law and social change the first step must surely be a more concerted effort to expand the range and elevate the level of discourse between lawyers and social scientists. Perhaps we will only be emboldened to ask simple questions about complex phenomena, but we might also better understand if and how the Canadian legal profession can develop an indigenous variation of Friedman's general theory.

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