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Book Review: Jurisprudence: Readings and Cases, by Mark M. MacGuigan

JURISPRUDENCE: READINGS AND CASES. MARK R. MACGUIGAN.
University of Toronto Press. 1966. pp. 666 (\$20.00)

This book is a revised and slightly enlarged edition of a multi-lithed edition that was published in 1963. The new material is composed partly of extra cases (there are now 34 reproduced as opposed to 28) and a few more extracts rather than longer extracts. Some of the longer extracts have been shortened to make way for new material. The book contains five chapters and an appendix.

The first chapter is an introduction. Here the most important case of the four reproduced is the case constructed by Professor Fuller of Harvard, "The Case of the Speluncean Explorers". The readings in this section include Holmes, "The Path of the Law" (and other shorter extracts). The second chapter, "Positivism" begins with extracts from four cases: *Jacobs v. L.C.C.*; *Scruttons Ltd. v. Midland Silicones*; *Magor and St. Mellons R.D.C. v. Newport Corporation*; and *British Movietoneux Ltd. v. London and District Cinemas Ltd.* The readings include the expected passages from Hobbes and Austin and also extracts from Bentham ("The Principles of Morals and Legislation" and "Principles of the Civil Code"), Gray, Kelsen, and Hart. There is also an interesting short extract from Rawls, "Justice as Fairness", and from Ross, "On Law and Justice". Chapter three, Natural Law Thought contains parts of the judgment in *D.P.P. v. Shaw*; *Lochner v. N.Y.*; and seven other cases. The readings contain extracts not only from Aquinas and the modern Catholic natural lawyers, but also from Fuller. There is also a very interesting extract from a work by Margaret Mead, "Some Anthropological Considerations Concerning Natural Law". Chapter four, Sociological Jurisprudence includes parts of seven cases, including *Donoghue v. Stevenson*, *Fender v. Mildmay*, and three cases on the meaning of "good moral character" in the U.S. Nationality Act. The readings include Savigny, Dewey, Pound and extracts from recent works on sociological research. Chapter five, The Judicial Process, is concerned with problems of precedent and the judicial function. The readings in this chapter contain extracts from Dewey, Goodhart, Llewellyn, Cardozo, Cohen, and Frank, and an article on jurimetrics. The Appendix contains a note by the editor, an extract from McWhinney, "Legal Theory and Philosophy of Law in Canada" and a speech by

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Freedman J.A. (of the Manitoba Court of Appeal), on "Judges and the Law". There are also about 25 "Notes" varying in length from a paragraph to a page. They contain additional readings, cases and sometimes problems as well as some comment by the editor.

The organization of a book such as this is inevitably a matter of individual taste. Any book has to have some form and, within a broad area, any arrangement is going to be generally satisfactory. There is, however, something about the neat division into the four headings of Positivism, Natural Law, Sociological Jurisprudence, and Judicial Process that seems unhappy. The essential division of writers would rather seem to be into those who are concerned with content and those who are not. Thus those who are now classified as sociological jurists, for example, can be regarded as being concerned with examining the effect of law in society and are thus vitally concerned with content. Those who are now included in Chapter five "The Judicial Process", are, in general, less concerned with content than with the problems of analysing the operation of the structure and components of the legal system. This criticism may become clearer if we consider the problem of classifying Fuller. Fuller has almost nothing in common with the traditional Catholic Natural Law School. It is true that he is concerned with morality, but not as an absolutist. There are for him no necessary moral absolutes except those that are required by the nature of man as he is. Support for this may be found in the judgment of *Foster J.* in the "Case of the Contract Signed on Book Day". (Fuller: *Problems of Jurisprudence*, p. 71.) This is, of course, subject to the problem of identifying *Foster J.* and Fuller. But if a positivist is one who is preoccupied with the structure of law then Fuller is not a positivist. He is a Natural Lawyer only if that classification includes those who are concerned with the content of the law. The division then can be made by asking what is each jurist or writer trying to do. Is he trying to identify the legal structure in any society? Is he trying to analyse the content of laws and to see how that content satisfies any test he may devise for it? Though this division will not solve all problems of classification, it does seem more meaningful than the traditional classification.¹

The real complaint then about the classification adopted in the book is that it is archaic. This, however, is by no means a serious defect. Anybody who agrees that there is a need for a new classification has only to rearrange the materials to suit his convenience. The much more important question is whether the editor has included all that he should have. The inclusion of as many cases as there are has great benefits for any teacher. Jurisprudence becomes much more alive when it is presented in the form of concrete problems. There are two cases that I would have liked to have seen included, both constructed by Professor Fuller. The first is the "Case of the Contract

¹ The adoption of the suggested classification may avoid the problem the editor faced in deciding, for example, where to put the two articles of the Hart-Fuller dispute: it represents the real dispute between the two divisions.

Signed on Book Day" (which would perhaps be accommodated at the end of the chapter on Natural Law) and the second is the "Problem of the Grudge Informer". (Fuller: "The Morality of Law", p. 187.) This case could usefully be put at the very end of the book as a review of any jurisprudence course. Fuller's third case the "Case of the Interrupted Whambler" (Fuller: Problems of Jurisprudence, p. 628), has no place in this book which does not present any materials on the analysis of legal conceptions. The constructed case is much better able to raise the really knotty problems of jurisprudence, and these two might well have been permitted to accompany their more illustrious brother: "The Case of the Speluncean Explorers".

There are also some minor omissions that might be mentioned. The third chapter, Natural Law Thought, contains in just over three pages, a short extract from Blackstone's Commentaries. (Section 2 of the Introduction.) The extract reproduces about seven pages of the 23 in the whole section. One of the most interesting passages in Blackstone is his statement that there is no moral obligation to obey laws that merely enact *mala prohibita*, (pp. 57, 58 of Editions 1 to 5). The passage loses none of its interest in later editions when Blackstone altered it to try and escape the criticism heaped upon it by Bentham, among others. (See, for example, p. 58, of Blackstone's text, in Blackstone, Commentaries on the Laws of England, William Draper Lewis (ed.), 1897, Philadelphia, Rees, Walsh and Company.) It almost seems a pity that all of this section of The Commentaries could not be included, but then, of course, it would be essential to include something from Bentham's wonderfully vitriolic "A Fragment on Government". It might also be observed in passing, that there is much of Bentham (particularly in the "Fragment"), more illustrative of his positivism, and more properly classifiable as such, than the extracts that have been included.

Generally speaking, the editor has managed to include much of the recent writings on jurisprudence. There are, however, one or two points where I feel that some of the more interesting modern material is insufficiently represented. For example, I think that "The Concept of Law", by Professor H. L. A. Hart, warranted more than four pages and a note by the editor. Hart's development of the Rule of Recognition places him squarely in the same tradition as Austin and Kelsen (and marks him as one primarily concerned with the structure of law.) I am not sure that Professor MacGuigan was wrong to have omitted the Hart-Devlin controversy. (He does refer to it in a note on p. 251 after *Shaw v. D.P.P.*) This controversy does raise some interesting points, but would probably take up more space than would be justified. Certainly a short reference is better than a very short extract which only whets the appetite.

One omission that cannot be regarded as serious, but which might be rectified in any subsequent edition, is the failure to provide references to extracts when they appear in the body of the book. At the very beginning there is a complete list of acknowledgements

which contains references to all the readings, but this is not quite adequate. It is often necessary to refer to passages just preceding or just succeeding the quoted passages and then it is extremely helpful to have references to the pages at which the quoted passage starts. This is particularly the case with extracts from lengthy books or articles. It is especially useful with modern authors for then the edition of the work reproduced will frequently be the same as that possessed by the reader. Similarly it would be extremely useful to know not only where a quoted passage is to be found but also if the quotation is continuous and hence where each paragraph quoted (if the paragraphs are not continuous), may be found.

Only two misprints that should have been caught by the proof-reader were noticed and that was *Kelson* for *Kelsen*, on page x of the acknowledgements, and *St. Mellens* for *St. Mellons* on page xiii.

This book easily meets the most critical test. It is as complete as could reasonably be desired, given the space limitations imposed by the need to be priced within the resources of students. The extracts, by and large, are ample and there is sufficient variety to give the subject depth. It should be extremely useful to any teacher of jurisprudence and well worth its purchase price to students. Perhaps it may be permissible to express the hope that in any subsequent edition we may see more comments by the editor, for, more than anything else, these provide the structure and coherence which no arbitrary classification can ever achieve.

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