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Herbert D. Laube

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THE ROMANCE OF MYTHS, LEGAL AND NON-LEGAL

HERBERT D. LAUBE

"The Quest for Law" is an enticing title to give to a book which deals with the origin, growth, and function of law in human society.¹ The lure of its title gives promise to the reader that the romance of adventure lies before him. The glowing praise of this book by professional men in anthropology, in law, in political science, and in sociology heightens the anticipation of that promise. A quest through thousands of years of human experience² ought not to leave the adventurer at "the end of the legal rainbow" so disillusioned as does this volume. Yet the publishers hail *The Quest for Law* as "the most authoritative work in its field."

The author of *The Quest for Law* is a practicing attorney. He is a graduate of the College of the City of New York and of Columbia Law School. He has served as senior attorney for the Petroleum Labor Policy Board, as a trial examiner for the National Labor Relations Board, and as assistant solicitor in the Department of Interior. He belongs to the "myth school" of thought. To him, the myth of myths seems to be "Justice According to Law."³ Here is one of the fairy tales the author has to tell.

"The shortcomings of the administration of justice are implicit in the very ideal of 'justice according to law.' There would be no exaltation of legality if it had a less tenuous hold. The 'rule of law' would not seem to be collapsing if its foundations had been stronger. In the quest for justice according to law humanity has been seeking desperately to lift itself by its bootstraps. * * * The waging of the judicial duel has never brought anything but despair.⁴

"It is wrong to speak of the collapse of 'law' in the present world. What is collapsing is the dogma of 'justice according to law.' Law exists in its most unmistakable form when there are no limitations upon power. Jurisprudentially the edict of the tyrant, absolute monarch, or dictator is law. It is only in the democratic imagination that law is synonymous with the limitation of power.⁵ * * *

"There have been new forms of law, new legal orders. But the 'purpose' they served was only to establish new relations of power and dominance. They recorded only the triumph of another class.⁶

"Only yesterday the orthodox legal historian, whose mind is dominated by the Anglo-centric conception of history and the cult of the common

¹THE QUEST FOR LAW. WILLIAM SEAGLE. New York: Alfred A. Knopf. 1941. Pp. xv, 439, xvii.

²P. 3.

³Conclusion, p. 370.

⁴P. 372.

⁵P. 373.

⁶P. 374.

law, would have summed up confidently by declaring in a classic phrase, commonly betokening the goal of the law's evolution, that men were assured at least of 'justice according to law.'⁷

The democratic imagination has produced our myth of law. The real law is absolute law, the edict of the tyrant. Life under law in America has been merely a delusion. If the reader were to read the concluding chapter before reading the book in the conventional manner, he would be aware that the author's learning and the fatuous lure of language were only to lead him to disillusionment. The bias of the book has been too frequently exemplified in recent legal literature. The reader will probably lay down this book with the conviction that the lawyer is a parasite and the law is a snare, so far as an attorney is able to induce that conviction by his myth-making art. Let the author speak for himself.

"The dullness of particular rules of law is less apparent perhaps than their futility."⁸ The impossibility of coping with rules of law has driven some writers to the extreme of almost ignoring them altogether.⁹ Archaic societies were more fortunate than we are because there was still no professional class of jurists and lawyers to help judges play with words, as children play with toys.¹⁰ With the triumph of free capitalism in the nineteenth century, the lawyer emerged as a servant and protector of private interests to an extent never true before. In the heyday of free competition, it seemed almost as if the client existed for the sake of the lawyer.¹¹ The nobility of advocacy has been tarnished by the low estate to which the whole profession has fallen.¹² The persuasive "explanation" of common law pleading is the desire of the early lawyers to promote litigation and to make something of a mystery of their craft.¹³ In mature legal systems, to counteract the influence of the professional legal class, stress is placed upon lay participation to escape some of the effects of a highly complex judicial duel.¹⁴ "Jurists match precedents as boys match pennies."¹⁵

"As a matter of fact, the glorification of the rule of law is only an attempt on the part of those initiated in the legal mysteries to conceal from the vulgar the lamentable fact that particular rules of law are fluid, changing and unsettled."¹⁶ In this pronouncement, the author achieves the depths of his

⁷P. 371.

⁸P. x.

⁹P. xi.

¹⁰P. 117.

¹¹P. 147.

¹²P. 148.

¹³P. 174.

¹⁴P. 178.

¹⁵P. 179.

¹⁶P. 220.

platitudinous adventure in mythological muckraking. Compare with it, the classic excellence of Pound's finer perspective: "Law must be stable and yet it cannot stand still."¹⁷ The author's tirade continues: The spirit of legalism has but a feeble existence in the absence of the judicial duel. The criminal law is merely an efficient instrument of class domination which became imperative with the progress of forms of capitalistic enterprise.¹⁸ Tradesmen and shopkeepers are not particularly bloodthirsty when they are prosperous; when they desired legal security for themselves they had to assure it to all classes.¹⁹ Great emphasis is placed upon the doctrine of intent in modern criminal law with good reason. "The equalitarian criminal law, having become judicialized to a far greater degree than ever before, it is necessary for the dominant class to have some avenue of escape in certain circumstances, and this is provided in the element of intention. The millionaire drunken driver who kills the pedestrian has to be able to show that it was just an accident—that is, that his intention was innocent. But crimes against persons outrage everybody, and it is difficult to escape by such a plea."²⁰

"The most significant and revealing feature of the classic penal codes will easily escape the casual reader. * * * The overshadowing penalty is imprisonment. * * * Only in the period of Enlightenment did it emerge as the primary penalty. It seemed more 'humane,' although it was actually a frightfully cruel penalty. * * * But above all it reflected well the basic value and concepts of the triumphant bourgeois economic system. The maxim *Nulla poena sine lege* was only another way of saying that every penalty must have its fixed price."²¹ Since the penalty of the classic penal code is a price, the bargaining process in the judicial duel became a dominant feature. "But the genius of the modern criminal law is the public prosecutor. The civil law is judge-made, the criminal law is prosecutor-made. * * * To him the criminal law is only a well-stocked arsenal of lethal weapons" for use against the enemies of the state. Some of these are classified as "radicals," "troublemakers," and "labor agitators"; against these the prosecutor has his "blunderbusses." "These consist of vague crimes as 'disorderly conduct,' 'crimes against public morals,' and the like, and they are guaranteed to lay low almost anybody."²²

¹⁷POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 1.

¹⁸P. 231.

¹⁹P. 240.

²⁰P. 241.

"There is seldom any difficulty in finding a purpose or end of an act. From time immemorial the law courts have taken into consideration the 'intent' of criminals and others, and on the whole successfully * * * ." HOMANS AND CURTIS, AN INTRODUCTION TO PARETO, HIS SOCIOLOGY (1934) 70.

²¹P. 243.

²²P. 247.

"The legal obligation rested upon a 'bond of law.' Law really to flourish required a *vinculum*. * * * Here is indeed rich opportunity for disputes, and disputes are the very life of the law. * * * To be sure, if most promises were broken, economic life could not go on, but the law can feed mightily and lawyers wax fat on even a small percentage of shattered promises."²³ The natural law economists wanted promises enforced because they wanted the market to be free. The jurist kept pace with the economist, and the mechanism of the market gave juristic persons the fine opportunity that liberty of contract afforded. Inevitably, there reigned supreme in the nineteenth century the "maximum of individual self-assertion" through the philosophical shortcomings of the metaphysical jurists under the felicitous caption of "will jurisprudence."²⁴ Through contract worship came the perpetuation of American slavery. "There was no god but Contract, and Sir Henry Maine was its prophet."²⁵ It cast its shadow upon economics, law, and politics. The reign of law has been achieved in the United States, "the land of the free, the classic haven of repressive contract."²⁶

The author's bias, as well as the defect of his judgment, is most finely revealed in his discussion of the socialization of private law in the last quarter of a century. The "dark suspicion" which he attributes to Maine is probably the product of his wishful imagination. To call "the movement for socialization of private law" a compromise with socialism is too crude for criticism. To identify socialistic doctrine with the socialization of law is sheer verbalism, which is generally indulged in only by economic bourbons. It is excellent propaganda; but strangely enough, it gives basis to the popular antipathy for socialism that has been an obstructive factor in the socialization of law.

"Even Maine had a dark suspicion that the triumph of contract might last for less than eternity. He had said, it must be recalled, that the movement of progressive societies had *hitherto* been a movement from status to contract. Did he himself envisage a cyclical movement, and are those who have been his critics unjust? As a matter of fact Maine might have been much bolder. A complete destruction of contract, a return to relations reminiscent of status upon a higher plane, would have required an acceptance of socialism.²⁷ But few, jurists, judges, legislators, or

²³P. 265.

²⁴P. 266.

²⁵P. 267.

²⁶P. 274.

The author comments on Pound's "minor classic" on the "Liberty of Contract," which appeared in the *YALE LAW JOURNAL*. "Yet despite its celebrity this article is perhaps the most unrealistic analysis of a constitutional decision ever to have been written, for the 'error' of the judges is discussed entirely in terms of ideological preconceptions such as higher-law doctrine, common-law tradition, etc." P. 417, n. 30.

²⁷"The socialist finds the *causes* of the ills of society only in those variables in that state of mutual dependency which he wishes to change—that is 'capitalism.'" *HOMANS AND CURTIS, AN INTRODUCTION TO PARETO, HIS SOCIOLOGY* (1934) 34.

cabinet ministers are given to socialism. Thus the movement which has somewhat undermined contract has been the movement known as 'the movement for the socialization of private law,' which is to say that at most the legislators have only compromised with socialism, and curtailed only the worst excesses of freedom of contract."²⁸

Codification was the new and strange delusion which beset the age of Enlightenment.²⁹ The power of the author to be on both sides of a question at once is well exemplified in his use of emotive language. By some Paretian refuge one could probably justify calling a delusion an historical necessity. To achieve any unification of law through codification is a realistic triumph that could scarcely be said to have its origin solely in delusion, however disappointed some of the expectations of codification may have been. To categorize so uncritically is to be perverse. Of course, it must be admitted, language is quite befogging at times. That does not justify the liberty some writers exercise in its use.

"This delusion, in brief, was that the problems of the administration of justice current at the time could all be solved simply by reducing the law to a set of rules set forth in a code. The subsequent course of legal history has shown this delusion to be singularly pathetic. It has, indeed, been productive of more ironies and comic incidents than any of the other delusions of philosophers, statesmen, and jurists. But although the merits of codification have been debated ever since the Enlightenment, the debate has always been idle, for codification in Europe was virtually a historical necessity."³⁰

Of course, to the author, the jurists and judges were chiefly responsible for destroying faith in law as codified; they were assisted by the commentators.

"Humanity learns but slowly. The modern codes have not prevented the perpetual refinement of the conditions of the judicial duel any more than did the ancient. Indeed, we are worse off, since we have not only judges, but an unmatched plethora of lawyers, law professors, and text-book-writers. The codes might well never have been written so far as the attempt to escape from the men of law is concerned."³¹

The state of arrested development in which the law finds itself is due to the fact that judges have fixed the conditions of the judicial duel.³² It is easy for the hard-boiled lawyer to "convince himself that there is some judicial formula that excludes the dictates of common sense and common humanity." May not this produce a revolution? No.

²⁸P. 272.

²⁹P. 277.

³⁰P. 277.

³¹P. 298.

³²P. 317.

"It might be supposed that the tremendous strain to which judicial review has been subjected would cause its rapid collapse. But while the injection of legality into the solution of political questions has created a perpetual state of tension, it has also provided means for easing the strain, and preventing the breaking-point from being reached. The advantage of a court in disposing of social and economic issues is that in the judicial forum the conflict of classes is supposed to be reconciled under the highest ideals of objectivity."³³

What is it that makes it possible for the judges to stand an incredible amount of abuse and villification? It is "the halo" which surrounds them. This is probably one of the non-legal myths of the author. At least, it reveals the unreliability of his imagination. The Supreme Court is "an integral part of the most adroit political system ever devised to frustrate the popular will."³⁴ The system has enabled them "to make themselves dictators of American political life."³⁵ The author contributes little on this score to what Beard said a generation ago.³⁶ Indeed, the surprise is that Franklin D. Roosevelt, the Supreme Court "buster," should have received so little attention in the review of this vital national problem. Perhaps, it was because in the light of his constructive contributions, to a New Dealer, this episode reflects little credit upon the quality of his statescraft. Quite clearly, Roosevelt had a glorious opportunity to initiate the reform of judicial review which the author advocates. Then "nine old men" would no longer have "judicial delusions of grandeur." But even the author's faith in the reform is a fence-straddling faith: "But such a transformed system, like any system of perfect censorship, would really have little reason for existence; it would amount in effect to an abdication of function."³⁷

The author favors strongly the administrative process, to which Workmen's Compensation gave an impulse nearly more than a quarter of a century ago.³⁸ "From its very birth, administrative law has been regarded by lawyers as an illegitimate child."³⁹ Administrative agencies have almost completely destroyed the litigious equation. In this new realm, the lawyer moves in an alien world. The legal orgy still prevails, however, in a murder trial and even in an action for breach of contract.⁴⁰

Systematization is a sign of the maturity of the law. Then there follows speculation upon the nature of law, its cultural values and its characteristics,

³³P. 323.

³⁴P. 324.

³⁵P. 325.

³⁶P. 415, n. 14.

³⁷P. 325.

³⁸P. 326.

³⁹P. 330.

⁴⁰P. 340.

as well as a groping for its "spirit."⁴¹ The "civil law" and the "common law" divide the modern world into two cults. The worshippers of each constitute its cult. The cult myth is clearly of Paretian quality. Doubtless, if the author had presented this myth in its pristine aspects, the law of inheritance would become merely the obstinate persistence of that same mental fixation which resulted in the burial of the dead man's property with its owner in primitive times. The deceased's "estate" would be merely the endurance of the crude sentiment of "collectivity" which the unenlightened cult of private property still champions. The object of the author's attack seems to be to expose the intellectual serfdom of all cults.

"The cult of the legal system is intended, of course, not only to provide spiritual consolation and edification for the jurist, who so often is compelled to deal with the commonplace, but to conceal injustices and to help in the obfuscation of the layman, who may possibly understand a given legal rule but surrenders completely when he is told that no legal rule can be understood apart from the traditions and 'spirit' of an 'organic' legal 'system' of which it is only an insignificant part. The very terms 'common law' and 'civil law' assist the prevailing obscurantism."⁴²

The author reveals that the cultists of one system rarely read the works of another system. He thinks that it might be a source of discomfiture to them.⁴³ Contrast with this irritating vanity, the balanced excellence of Pound's historical perspective:

"History of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside the law."

Yet the author nominates for membership to the common law cult two masters, Sir Frederick Pollock and Dean Roscoe Pound.

The linguistic deficiencies of the author are manifest when he says that the cult is "intended to provide spiritual consolation" and "to conceal injustices." To whom does the author's roving imagination attribute that mythical intent? To the deliberate design of Pound and of Pollock? The reader's curiosity is stimulated when he learns that, "The disciples of Pollock and Pound sometimes exceed both in poetical extravagance and fancy." But the lines following this oracular revelation will fairly assure the reader that the author is merely suffering from Marxian myopia, despite his legal learning.

⁴¹P. 152.

"There are devotees of the cult of the common law who regard Parliament, which is a representative assembly, as a nearly unique creation of British national genius." P. 398, n. 67.

⁴²P. 153.

⁴³P. 155. Cf. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938) 94.

"Even earlier the 'spirit' of the Roman law had been apostrophized by the great German jurist, Rudolf von Jhering, who also has had many followers, although, unlike Pollock and Pound, as his work progressed through its various volumes, he realized the futility of his undertaking and abandoned it. He not only insisted upon the importance of considering the purpose of legal institutions rather than their logical symmetry but satirized mordantly what he called "The Heaven of Juristic Concepts." The chief representative of the Germanists has been another German jurist, the illustrious Otto von Gierke, who has waged unending war on all the wicked Romanists and has sought to penetrate the mysteries of the Germanic legal 'spirit' in all its dark and romantic manifestations."⁴⁴

As a disciple of the economic interpretation of history,⁴⁵ classically expounded as a Marxian struggle of classes, it would be interesting to have the author reveal what it was that gave to the United States the "spirit" which converted thirteen colonies into a representative democracy, which perhaps is the most unique social fact of modern history. If the "spirit" of our law from Magna Carta to the middle of the twentieth century is but a myth in all its romantic manifestations, the author should explain why this nation has developed a social solidarity not yet undermined through law by its economic royalists. If the common law which has flourished has not safeguarded the liberties of our people, but is merely an economic struggle in which the dominant class dictates the law, how does it happen that in the last few years this nation has been the haven of European refugees, in a period of unemployment, when they merely added to the number of alien competitors of the unemployed class in their centuries-old fight against a few economic bourbons? What "spirit" was this? How did it happen that that "spirit" did not find expression in the law of this nation? It, too, must be a Paretian myth, a delusion from which our people have been suffering.

In republican Athens and Rome, the only scheme for mitigating the arbitrariness of the criminal law was a procedural device of popular appeal or trial.⁴⁶ In the United States, the quintessence of judicial review was merely a legal disguise for a political process in legal form.⁴⁷ The cult of the common law developed it.⁴⁸ Then came the myth: "A nobility of the robe was established on the foundations of popular sovereignty," and the "government of laws"

⁴⁴P. 156.

⁴⁵"Smith set in motion the economic interpretation of the American constitution. * * * The result of this constitution worship was a highly uncritical and static constitutional logomachy. * * * Smith was the first to demonstrate that the constitution was actually a 'reactionary document.'" Seagle, *Smith, James Allen*, 14 ENCYC. SOC. SCI. 116 (1934).

⁴⁶P. 240.

⁴⁷P. 301.

⁴⁸P. 304.

became a "government of lawyers." "The government of the United States became a primitive gerontocracy—a government of nine old men. The old men of the Supreme Court have become the guardians of a mysterious essence known as 'constitutionality,' which is the wayside bloom of legality."⁴⁹ Today that is the Paretian plight in which we find ourselves.

If the reader were to sample the five page conclusion of this volume, he probably would not venture further. Even mythology may nauseate one.⁵⁰ A favorite but staling trick of the author is to attempt to renovate a well-established principle of law into a shocking novelty. Jhering, Holmes, and Pound gave currency to the realistic approach to law as advocates of the principle: "The life of the law lies in its application." The ill-conceived cleverness of the author converts the observation into "The litigious equation is the life of law." The idea is scarcely novel. The Germanic belligerency of Jhering gave vigorous expression to that idea seventy years ago.⁵¹ Note the classic brevity of the author's language: "The judicial duel becomes the measure of the constitution."⁵² No semanticist is likely to classify these creations as symbols of art, however, unless his judgment is largely dependent upon the emotive quality of language. At the author's hand, the nationalism of John Marshall becomes almost negative;⁵³ but he finds him "peculiarly qualified" for the devious role of statescraft which judicial review entailed.⁵⁴ The author engages briefly in the popular sport of rescuing Roger Brooke Taney from the realm of myth.⁵⁵ The sole question which will confront most readers of this volume is whether the author doesn't create more myths than he destroys.

Any critic could find much to praise in *The Quest for Law*. The table of contents reveals a range of vision that commends the book. The execution of it must have involved considerable time and notable industry. Fifty pages of notes⁵⁶ disclose a wealth of material in the social sciences, ranging from ancient times to Thurman Arnold. Doubtless, as one professor says, it is "the distillation of years of study and research," but the excellence of no book

⁴⁹P. 314.

⁵⁰Even scholarship may become a barren myth. "The divergence between law and morality is naturally most marked when the law actually encourages immorality." P. 8. The author's "learned" footnote on this observation is "One of the few jurists who admit this lamentable fact is Sir William Markby. 'It is hence obvious,' he writes, 'that a moral and legal right are so far from being identical that they may easily be opposed to one another' (ELEMENTS OF LAW, 4th ed., § 12)." P. 375, n. 19.

⁵¹THE STRUGGLE FOR LAW (Tr. from 5th German ed., 1879, 1915) xii, xliii.

⁵²P. 302.

⁵³P. 311.

⁵⁴P. 310.

⁵⁵P. 312.

⁵⁶Pp. 375-426.

can depend solely upon those two criteria. The reader of this book will realize that "It is easy to scoff and be superior and cynical." As propaganda, one might rate *The Quest for Law* rather highly; as legal literature, the level of its discourse too often plumbs the depths of that banality which exalted the myth of the "nine old men." The oldest among the nine old men, it must be remembered, were Oliver Wendell Holmes and Louis D. Brandeis. Its ill-digested learning will probably condemn *The Quest for Law* to a place in legal literature little above "Woe Unto You, Lawyers!".