BOOK REVIEWS

JURISPRUDENCE : READINGS AND CASES. By Mark R. MacGuigan. University of Toronto Press. 1966. Pp. xx, 666. $20.00.

This is a second edition of a collection that first appeared in multilithed form in 1963. The editor was a member of the Faculty of Law of Osgoode Hall Law School, now Dean of the Faculty of Law at Windsor. He has also published teaching materials on creditors' rights as well as articles in periodicals on various subjects.

There are five chapters in this book, consisting of an introduction, followed by chapters on positivism, natural-law thought, sociological jurisprudence, and the judicial process ("which deals extensively with legal realism"). Each chapter opens with an introductory "note" by the author, and is followed first by a series of court opinions and then a selection of relevant readings from jurisprudential literature. According to the editor, each series of cases has been "disposed of according to a particular jurisprudential insight," and the readings which follow "present the same insight from a more abstract and general point of view." Cases and readings comprise more than ninety-five percent of the book. The editor's introductory "notes" are brief, and only occasionally has he appended analytical comments or questions at the end of selected cases and readings. The book closes with an interesting appendix on "jurisprudence in Canada."

A student could learn a great deal from the primary source materials brought together here. Many of the standard things are included, *e.g.*, Bentham, Austin, Aquinas, Blackstone, Savigny, von Ihering, Holmes, Pound and Cardozo. There is a contemporary flavour as well, *e.g.*, Kelsen, Llewellyn, Hart and Fuller. And disciplines outside the law come in for a place, *e.g.*, James, Rawls and Mead. There are even readings on the utility of "cybernetics" and "jurimetrics" for jurisprudence. The cases, too, include much good material for thought and discussion, though their use entails the risk that students will confuse questions of substantive law with questions of jurisprudence. The editor's mode of presentation is, to me, an unsatisfactory feature of this book. I refer to his organization of the materials in accordance with "schools of jurisprudence," and to his discussions in the introductory notes to each chapter.

The editor says in the *Preface* that : "The question of the proper division of jurisprudence is not so much a matter of logic or science as of convenience." But surely the division of teaching materials is not *merely* a matter of convenience. Good organization can and should facilitate the *aims* of a jurisprudence course. Bad organization can and often will hamper or even

mislead the student. The "schools" scheme of organization is objectionable for several reasons which have little to do with considerations of "convenience." First, in my experience, the scheme tends to encourage the student to focus on the wrong things—on *schools*, and on the differences between them, rather than on general problems concerning *legal systems*. In the book at hand, the editor's own commentary will reinforce this tendency. Thus, in the *Preface*, he says he wants to cover the "field of jurisprudence," and he concerns himself in a number of places both with general differences between schools and with problems of pigeonholing specific thinkers in school *A* rather than in school *B* or school *C*. Some of these efforts may amuse the experienced reader. For example, after carrying on to the effect that only the "natural lawyer" and not the "positivist" can consistently address himself to problems of civil disobedience, the editor concludes, with an air of regret : "Yet it would seem that to the more sophisticated positivist today, fidelity to law has also become a jurisprudential issue" (p. 242). There always seems to be someone around who won't cooperate fully with one's categories.

Second, a table of contents can be a useful teaching device. A student can often improve his overall grasp of a subject if he turns to the table of contents and there sees in outline what the main problems are and how the editor has related them to each other in terms of subordination and sequence. This book is not problem-oriented but schools-oriented. Accordingly, the table of contents does not offer a useful "big picture." It follows from this, too, that the editor has foregone many of the advantages to the beginning student which flow from consciously ordering one topic ahead of another. For example, in a problem-oriented book, the problem of identifying and describing the main structural features of a legal system can and should be taken up ahead of the problem of differentiating and characterizing the various forces that influence change in a legal system, for the former is valuable background for understanding the latter. Though the editor speaks of sequential development in his *Preface*, it is difficult to see how this is accomplished in his own scheme. There seems to be little reason to put the positivists ahead of the natural lawyers, or, the sociological jurists ahead of the legal realists, and so on.

Fourth, some of the main problems of jurisprudence are not ones on which all "schools" have spoken, let alone with differing voices. An example is that of differentiating, and providing an overview of, the main social functions of a legal system. A "schools" scheme or organization presumably makes most sense when it juxtaposes conflicting viewpoints on the same general problems. Yet on this problem both the so called "positivists" and the "natural lawyers" have had little to say. Thus an editor opting for presentation in terms of schools might be expected to neglect this topic, which is what the present editor does.

Fifth, many legitimate jurisprudential topics are ones on which the traditional writing of the various "schools" has insufficiently specific *bearing* to be of real value. To cite two such topics : Professor Fuller has studied the "forms and limits" of adjudication, and Professor Hart the mental conditions of legal responsibility. It is not that general legal theorizing of the "schools" variety has nothing to say at all on such matters; rather, what has been written on them "from the other end," so to speak, is far more significant because it was conceived in response to specific problems at hand rather than as incidental aspects of more general jurisprudential theories or "systems." Also, when thus conceived, such work can seldom be readily pigeonholed into one of the schools. If the only materials that are to be included in a jurisprudence book are ones which *readily* fit into a pre-existing set of "schools" categories, then, inevitably, much of interest must fall by the wayside.

Sixth, an editor who takes schools seriously is likely to be tempted to misstate or to over-draw contrasts between the views of particular thinkers in order to make his categories all the more firm for the beginning student. There are striking examples of this in the present book. For instance, the editor says that "The positivist is concerned by hypothesis with the validity and legality of law, not with its efficacy or justice" (p. 241-42) and that for the positivist, law is "wholly independent of morals. This is, for instance, a primary tenet of both Bentham and Austin. For them, law cannot ever create morals nor morals ever judge law" (p. 70). At least Bentham would vigorously reject this characterization. He spent much of his life judging law by moral standards and making proposals for reform. Yet the characterization, false though it is, neatly sets one "camp" off from another.

Seventh, it is possible to argue that, as applied to present day realities, any division of jurisprudence into schools is highly misleading, *at least* insofar as this division suggests that there are some thinkers interested *exclusively* in analytical work, some *exclusively* in sociological work, some *exclusively* in natural law, and so on. It is much nearer the mark to say that contemporary jurisprudents are interested in a wide variety of types of inquiries and are not exclusively pre-occupied with any single one. Thus, it might be said that we have analytical-sociological jurists, positivistic-natural lawyers, and the like, all of which must flummox the schools schemer.

Finally, and eighth, to adopt a plan of organization based on "schools of thought" is to tempt students to "take sides," at least on some issues. And why not? The editor himself adopts a general position which he candidly reveals in the *Preface* (p. viii). But there is a difference. The editor's own views are undoubtedly ones he himself has worked out on his own over the years. The student, however, has not so long, and is not likely to be so dedicated. Rather than think these things through as best he can on his own,

carefully evaluating the materials put before him against his own developing standards of judgment, he may simply "take sides."

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PRINCIPLES OF PUBLIC INTERNATIONAL LAW. By Ian Brownlie. London : Oxford University Press. 1966. Pp. xxxi, 646. £3 3s. : $10.50.

The death of Sir Hersch Lauterpacht seems to have marked the demise of *Oppenheim* as a continuing publication, and new younger writers are producing "English" expositions of international law. After O'Connell's two-volume work, we have Dr. Brownlie's *Principles of Public International Law* which, in view of his *International Law and the Use of Force by States*, is concerned solely with the law of peace, save for isolated comments concerning the lack of any right to resort to force under the law of the United Nations.

With a work of this kind, the reviewer's task is, for the main part, limited to drawing attention to special aspects of the book, especially those in which the author appears to be breaking new ground or putting forward as established law ideas which, to many at least, have not yet reached the stage of *lex lata.*

There are two prime attractions of Dr. Brownlie's work. In the first place, it reads fluently and with a rhythm that disguises its nature as a textbook. Secondly, it is fully cognizant of the impact of the new states and some of the "revolutionary" principles of international law they have imposed upon the United Nations. The reviewer feels, however, that the learned author at times goes too far in his exposition of and support for these ideas. Thus, "there is probably also a collective duty of member states [of the United Nations] to take responsible action to create reasonable living standards for their own people and for those of other states" (p. 227). "Many economists consider that an extensive public sector, as a concomitant of a modicum of planning, is a necessary way forward for underdeveloped economies which face problems of poverty, health, nutrition, and education of a magnitude equal to that of a national emergency only created for some Western countries by war or threat of war. Legal exponents of *laissez-faire* theories would disagree" (p. 280). With regard to compensation for expropriated alien property, "it is not possible to postulate an independent minimum standard which in effect supports a particular philosophy of economic life at the expense of the host state" (p. 428). "The present position is that self-determination is a legal principle and that United Nations

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