

Reviewed by Myres S. McDougal ‡

PRESIDENT Hutchins' book contains a diagnosis, definitely prescribed remedies, and a religion to make the remedies palatable. "The most striking fact about the higher learning in America," President Hutchins finds, "is the confusion that besets it." There is no "ordering principle;" it is going off in all directions at once; it is, in brief, chaos. The causes of this confusion, rooted deep in the state of the nation, are many and interrelated. First is the vulgar love of money. This makes educational policy whatever anybody—student, donor, or legislator—is willing to pay to make it. Next, and more important, is a misconception of democracy. This leads to two erroneous notions: that "everybody is entitled to the same amount and the same kind of education" and that every citizen, editor, alumnus, or trustee can qualify as an educational expert. A final major cause is our modern idea of progress. Impressed by expansion of our scientific knowledge and improvement in our technology, we have renounced our intellectual heritage, broken completely with the past, and ended "with an anti-intellectualism which denies, in effect, that a man is a rational animal." So much dependence of the higher learning upon external conditions—the diagnosis continues—afflicts us with a strange circularity. "The state of the nation depends on the state of education; but the state of education depends on the state of the nation." Witness the three bewildering dilemmas of professionalism, isolation, and anti-intellectualism. The only excuse a university can have for existence is to provide a haven where truth may be pursued for its own sake; yet public opinion demands a vocationalism that stops at no triviality. Cooperation is badly needed between teachers concerned with different trades and teachers pursuing truth; yet there is no common frame of reference; cooperation might even increase the confusion. The public and the professions are anti-intellectual in temper; yet somehow people must be forced to accept intellectual training. How are these dilemmas and all this confusion to be resolved?

The remedies proposed by President Hutchins are drastic. He demands an evangelistic movement to remake both general education and the higher learning. His general education would begin with the junior year in high school and end with the sophomore year in college. From it he would exclude body building, character building, the social graces, and tricks of trades. For these he would substitute a curriculum of "a deeper, wider utility;" it would seek "the good for which all other goods are only means," the cultivation of the intellectual virtues. The truth is everywhere and at all times the same. An intellect properly disciplined can operate equally well in all fields. Hence the center of his new curriculum must be "the classics," books contemporary in any age, "permanent studies" that draw out the elements of our common nature and link man to the best thought of the past. For an understanding of such studies, Grammar, Rhetoric, Logic, and Mathematics—as the ancients knew them—become indispensable and must be taught. Technology is not to be excluded but would find a place only to the extent necessary for the communication of principles. Without such a general education, the author insists, we can never get a university. Upon its

‡ Associate Professor of Law, Yale School of Law.

basic core of common knowledge and cultivation of the intellectual virtues we might be able to erect a more intelligible higher learning.

In President Hutchins' higher learning remedies and religion become hopelessly intertwined. "All that can be learned in a university," he states, "is the general principles, the fundamental propositions, the theory of any discipline." Students must, and can, be taught to think about fundamental problems. Three categories exhaust "the proper subject matter" for higher learning—metaphysics, the social sciences, and natural science. By natural science the author means "the study of nature;" he would include enough recent observations to illustrate principles. His social sciences embrace ethics, politics, economics, and "such historical and empirical materials as may be needed" to aid in the "guidance of human action." But the gathering of data, important as it is, has no place in his university proper; such work must, if we are to avoid confusion, be carried on by institutes, separate from, though established near and controlled by, the university. What function metaphysics? It is to pervade the whole. The "common aim of all parts" of the university, its "unifying principle," is, as indicated above, to be the pursuit of truth for truth's own sake. Yet such pursuit alone cannot insure unity. Some basic, ordering, proportioning discipline, some "science of first principles," must direct our activities. "Real unity," the author urges, "can be achieved only by a hierarchy of truths which show us which are fundamental and which subsidiary, which significant and which not." In medieval times this hierarchy was established by theology; but today we are a faithless generation, taking no stock in revealed truth. It is futile for us to look to theology. We can only turn, as did the Greeks, to metaphysics. "It is in the light of metaphysics that the social sciences, dealing with man and man, and the physical sciences dealing with man and nature, take shape and illuminate one another. In metaphysics we are seeking the causes of things that are. It is the highest science, the first science, and as first, universal. It considers being as being, both what it is and the attributes which belong to it as being." To get a unified university we moderns must, then, "revitalize metaphysics and restore it to its place in the higher learning." This achieved, we might even be able to change the character of our civilization and, ultimately, to establish rational order in the modern world. Yet for the accomplishment of these miracles no "specific"—only the "most rational"—metaphysical system is indispensable.

What is to happen to our professional schools? As such—that is, as "trade" schools—*delendae sunt*. In his reformed higher learning President Hutchins escapes the dilemma of vocationalism; he makes no distinction between professional and non-professional disciplines. For the "gestures of varying degrees of wildness" now made by those attempting to teach the professions he would substitute study under his three major faculties of metaphysics, the social sciences, and natural science. Technical institutes can be established in connection with the university to supply any required background of special knowledge and training in special techniques. Today the prospective lawyer, for example, is diverted by attempts to teach him the art of practice from what he might possibly learn in law school—"the theory, the fundamental propositions, the general principles of the law." The curriculum he studies "is confined to those subjects which experience, tradition, or the

state examinations have sanctified." He is taught, in brief, by the cook-book method. Yet, paradoxically, he might be better prepared even for practice if he were trained to think in the subject matter of his discipline; "a grasp of theory might enable him to meet practical situations which were overlooked or not foreseen by his instructors." Hence, in the new higher learning the prospective lawyer will take his metaphysics along with the prospective clergyman or doctor. This is to prepare him to master the subject that must be central in his new curriculum: jurisprudence. Without metaphysics, "ethics, politics, and economics are meaningless;" and jurisprudence "consists of ethics and politics and the philosophy of law based on them." Yet jurisprudence is not to be the whole of legal study. To it must be added "empirical and historical knowledge of society, the history of law and legal institutions, economics and economic history." The tricks of his trade the law student can learn in one of the attached institutes.

Critics have found much mystery in this book. The key is, I think, the author's high idealism. His heroic purpose is to free universities from the pressure groups that now dominate them and so, eventually, to free us all, teachers and taught, from all kinds of contemporary dogmas. Yet he cannot ignore, he would even take advantage of, the commonplace truth that man must have a faith. "We are," he says, "as a matter of fact, living by the haphazard, accidental, shifting shreds of a theology and metaphysics to which we cling because we must cling to something." Let us, then, recognize our need and get the most rational faith we can. Today the whole world needs, as never before, a symbol that "represents an abiding faith in the highest powers of mankind." Temporarily, too—I am interpolating here—we must persuade the common man that the whole business of education is so occult that he cannot hope to understand it; patients must be rendered unconscious before major surgery. For the achievement of these paradoxical aims metaphysics would appear, on first glance at least, to have been designed by nature. To begin with, it can be described as the logic of logics, the super-instrument whereby man's reason can be screwed up to the nth degree of performance. What base for faith could be more "rational?" Better still, after several hundred years of controversy nobody knows what metaphysics is. What could be more occult? A skeptic can always be confounded by the suggestion that he is, without knowing it, some particularly vicious kind of metaphysician. The logical implications of our only language and the fact that we must all, in our ignorance of the "universe," rely on some kind of faith, make "proof" easy.¹ Furthermore, under the label of metaphysics faculty and students can be forced to a more critical study of all of man's verbalizing and symbolizing activities. Such study, by sharpening our conceptual tools and pointing to new problems, might even aid empirical discovery; certainly it could be made to dramatize the limitations of arm-chair speculation. Can there be any wonder—in the light of all these aims—that the author must write with such studied ambiguity? Yet I think, as numer-

1. The author (p. 103, n. 5) cites a dilemma from Aristotle: "You say one must philosophize. Then you must philosophize. You say one must not philosophize. Then (to prove your contention) you must philosophize. In any case you must philosophize." From this quotation I gather that the author equates philosophy and metaphysics, and both with any kind of verbalizing.

ous other critics have thought, that there are dangers in over-emphasis on this timeless, denatured religion President Hutchins is urging to make his remedies palatable.

The obvious danger is that credulous converts may assume that metaphysics is not merely a religion but some esoteric instrument of discovery, independent of and in competition with scientific method. President Hutchins does, as has been seen, use the ancient words over which philosophers have fought for so long. Even teachers may be inclined to take his words literally; the glee that greeted his first supposed desertion from the ranks of the "realists" is well known. Logic offers no way to refute a mystic; one can, however, ask for more details of the vision. Perhaps, because of the author's ambiguities, a reviewer may be granted a few ancient questions. How can general principles, fundamental propositions, and theory be divorced from practical problems? What is this truth that is everywhere and at all times the same? Just what peculiar technique for its discovery does metaphysics offer? How does metaphysics ferret out the "causes of things that are," "being as being," and the "attributes of being?" If the propositions of this, "first," "highest," and "universal" science partake of the tautology of logic, how does the metaphysician hope—without the aid of the empiricist—to increase man's control over his environment? If its propositions are not tautologies but tentative hypotheses about the physical world, how is the metaphysician different from, what are his advantages over, the empiricist? What other kinds of propositions, if any, are there? What their source, their test, their function? How, in detail, does metaphysics establish and maintain its vaunted hierarchy? What kind of unity does it produce? Does this "unity" have any consequences other than verbal? Why is "unity" a more practicable or desirable ideal than "diversity"? Why should scholars forsake their scientific tools to worship at the shrine of one of two polar words? For President Hutchins, of course, these questions are as irrelevant as they are rhetorical. He states specifically that "thinking cannot proceed divorced from facts and from experience;" and throughout his general education and his higher learning, as the summaries above should indicate, he saves room for enough facts to "illustrate" principles. In fact, the metaphysics he advocates—no "specific," only "the most rational" system—could even be expanded, as one of his recent defenders has insisted, to take in the most anti-metaphysical of philosophies. "Opponents of metaphysics," this defender writes, "attack as metaphysics precisely what Mr. Hutchins means by a lack of metaphysics."²

A second danger is that metaphysics can be, and often is, made to serve the purposes not of a liberating but of an enslaving faith. "To be grandly vague," a critic of fascism writes, "is the shortest route to power; for a meaningless noise is that which divides us least."³ Dean Clark has pointed to the striking similarities in the language of President Hutchins and that

2. McKeon, *Education and the Disciplines* (1937) 47 INT. J. ETHICS 370, 378. Empirical confirmation of this can be found in the fact that the title page of Professor Carnap's latest book bears the inscription "Professor of Philosophy in the University of Chicago." CARNAP, *THE LOGICAL SYNTAX OF LANGUAGE* (1937).

3. Herman Finer, quoted in SMITH, *THE PROMISE OF AMERICAN POLITICS* (1936) 87.

of the German minister of education.⁴ Unity alone is a symbol too barren to attract followers; metaphysics, if not an instrument of discovery, cannot create new social ideals; the rational sciences of politics and ethics have never produced anything but commonplace talk about "individual happiness," "the good life," and "the common good." Certainly it would appear that metaphysics, if it is to have any effect in determining human behavior, must be made to implement some social ideal taken from without its own great arabesque of words. But what is to determine this choice of an ideal from without? What is to confine it to "liberal" ideals? The fact is, as we all know, that each of the multitudinous and conflicting "isms" today clamoring for our loyalty seeks, and often obtains, sanctification in its own peculiar brand of metaphysics. What we have is a chaos of both "isms" and metaphysical systems. Which metaphysics is the most "rational"? How does President Hutchins propose to quell all this confusion and accomplish his major purpose of liberating us from all kinds of nostrums, dogmas, and "isms"? In terms all he offers is educational authoritarianism. "In the current use of freedom," he writes, "it is an end in itself. But it must be clear that if each person has the right to make and achieve his own choices the result is anarchy and the dissolution of the whole."⁵ This is strange doctrine from a liberal; it sounds much like the dictatorial dogma that no man but one has a "right" to his own opinion; obviously it can be made to serve any end. Yet, again, if the author's metaphysics is comprehensive enough, as his arch defender alleges, to take in the most anti-metaphysical of our modern philosophies, there might be profit in its study. It could be made a metaphysics to end metaphysics, a faith to end faiths. "First principles," Professor McKeon writes,⁶ "are frequently accepted by habit and inertia, or by whim and emotional preference, or by authority, whether of church or academy or class." What President Hutchins advocates is "careful, laborious examination of first principles with all the devices that reason or the assembled experience of mankind can effect."⁷ Such a study would undoubtedly end in a frank confession of our ignorance of man and his universe and a resolute determination to reduce that ignorance by scientific methods (not omitting theory).

A final "imaginary horrible" brings us back to legal education. Too much emphasis on jurisprudence could return legal scholars to the sterile dialectics of an earlier day. What are these fundamental propositions and general principles that can be taught apart from "practice" and yet enable the stu-

4. Clark, *The Higher Learning in a Democracy* (1937) 47 I:R. J. ETHICS 317, 319.

5. Contrast the eloquent answer of Dean Clark, *supra* note 4, at 324: "In the very words of the criticism leveled against present university education, it is both anti-intellectual and vocational. It is anti-intellectual in that the scholar must conform not to the demands which his own mind makes of him but to that metaphysics, that view of the good life, which the university authorities set before him. It is vocational not in any narrow sense of instructing in skills to be used next week or next year but in the sense of training merely to get by, in conformity to set standards, with adventure into unknown or unrationalized fields of knowledge taboo. These dangers, even if merely potential, are too important to be lightly dismissed."

6. McKeon, *loc. cit. supra* note 2.

7. *Ibid.*

dent "to think in the subject matter" of his discipline, to "meet practical situations" not foreseen by his instructors? Speculative jurists have sought them without success for over two thousand years. "Jurisprudence," a great English authority on Roman law has written,⁸ "has no independent existence. Its formulae are meaningless except in relation to concrete rules. It is a part of the law." Even when removed from the transcendental and confined to practical problems, jurisprudence—at least as exemplified in England and America for the last century—is largely a monument to the folly of attempting to overpower "truth" by the formal analysis of circular legal doctrine. Learned scholar after learned scholar has wasted his energies manipulating rights, powers, privileges, immunities, liberties, duties, disabilities, liabilities, and no rights, and composite concepts like ownership, possession, title, lien, estate, entity and so forth, as if some manipulation of these concepts could, and should, control the behavior of judges.⁹ These efforts have not been wholly without effect; they have fortified tradition, have provided a comfortable faith in a government of laws and not of men, and have driven weak or timid judges, because of the supposed inelasticity of the concepts, to harsh decisions in particular cases; but they have done little to shed light on the actual operation of our legal system or to give it new direction. Such jurisprudence is, in the words of Thurman Arnold, "the shining but unfulfilled dream of a world governed by reason."¹⁰ This ancient, impotent jurisprudence is not, of course, the kind that President Hutchins is advocating. He demands a new and practicable jurisprudence; he would liberate us from conventional legal absolutism. This new jurisprudence is to be, he elaborates in a recent article,¹¹ an "ordered relation" of three studies, "the study of cases," "the study of how law operates in fact," and "the study of legal philosophy." The study of how law operates in fact takes in the "economical, social, and political" bases and effects of decisions; the study of legal philosophy takes in psychology as well as the rational sciences of ethics and politics. Just how jurisprudence is to supply this "ordered relation" or how it is to be supplied to jurisprudence is not made clear; but the important point is that in his positive program he simply reaffirms the "faith" of our legal "realists." What he is after is, again, a broadening of horizons—a jurisprudence to show the limitations of jurisprudence. "No law professor can claim to be one," he now writes,¹² "if he separates himself altogether from the 'realistic' movement." His own contribution to the movement is, I think, an incomprehensible verbal "screen" behind which the "realists" may be able, if they are astute, to put their aspirations into practice. He has taken the advice of the "neo-realists" to capture the weapons of the enemy and

8. Buckland, *The Difficulties of Abstract Jurisprudence* (1890) 6 L. Q. REV. 436, 438.

9. I do not belittle the destructive power of the Hohfeld system or the critical labors of the scholars who have used that system to shave down "fundamental" concepts and generalizations.

10. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935) 58.

11. Hutchins, *Legal Education* (1937) 4 UNIV. OF CHI. L. REV. 357, 368.

12. *Id.* at 362.

attack in the name of what you would reform.¹³ Whether the dangers in his ambiguities are real remains to be seen; Barnum might even come to believe in his own show.

THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW. By R. M. Jackson.¹ Cambridge: The University Press, 1936. Pp. xxxi, 134. \$3.75.

IN the preface to his Tagore Law Lectures Dr. Winfield recalled the temptation to which he had been put to devote them completely to the subject of quasi-contract, and though unfortunately he did not yield to this half-formed intention, students were grateful for the searching examination of the various causes of action said to be *quasi ex contractu* which he did provide in a chapter of that volume. A chapter did not permit him to deal adequately with the beginnings and the development of quasi-contractual relief, and it is to these that Mr. Jackson in the present volume has turned his attention. Though the subject has been dealt with in parts by Langdell, Ames, Street, and Sir William Holdsworth, there is available no detailed historical account of quasi-contract in English law, a deficiency which goes far to explain the difficulties modern lawyers and judges have found in explaining these obligations and in assigning them a proper place in an assumed precise dichotomy of tort and contract. The unfortunate *Sinclair v. Brougham*² is in large measure responsible both for the renewed interest in the study of quasi-contractual obligations in England and for the present day tendency to define quasi-contract in terms which exclude any reference to a basis in contract, whether "fictional," "implied in law," or "constructive," and proponents of this view have buttressed their argument by an appeal to history in the person of Lord Mansfield. Thus Dr. Winfield has pointed out that Lord Mansfield in *Moses v. Macferlan*³ altered the basis of the action for money had and received by introducing a theory of *acquum et bonum* to replace the theory of a contract implied in law.⁴ Dr. Hanbury has likewise noticed that Lord Mansfield introduced notions of an equitable character which gave the commonplace quasi-contractual obligation the appearance of an equitable institution enforced by common law remedies.⁵ And Mr. Fifoot, in a very recent book, regards *Sinclair v. Brougham* as substituting at the basis of quasi-contract Lord Sumner's fictitious contract for Lord Mansfield's unjust enrichment.⁶ These views Mr. Jackson finds doubtful. Behind Lord Mansfield's oratorical flourishes he finds no abandonment

13. Hamilton, Book Review (1936) 142 NATION 51, 52 [review of ARNOLD, THE SYMBOLS OF GOVERNMENT (1935)].

1. Lecturer in Law, University of Cambridge.
2. [1914] A. C. 398.
3. 2 Burr. 1005 (1760).
4. THE PROVINCE OF THE LAW OF TORT (1931) 127, 134.
5. MODERN EQUITY (1935) 93.
6. LORD MANSFIELD (1936) 247-48.