

## REVIEWS

RESTATEMENT OF THE LAW OF TORTS, Volume IV, Division 10, Chapter 41,  
As Adopted by the American Law Institute. St. Paul: American Law  
Institute, Publishers. 1939.

HERE in these late sections (Division Ten, Volume Four) of the *Restatement of Torts*, the American Law Institute's most recent effort to promote "certainty and clarity" and so to avoid either a confused "common law system" or "rigid legislative codes,"<sup>1</sup> are tucked away certain chapters on what "property" teachers have been accustomed to call "natural rights." Of these, Chapter 41 deals with Invasions of Interests in the Private Use of Waters ("Riparian Rights"), Chapter 40 with Invasions of Interests in the Private Use of Land (Private Nuisance) and Chapter 39 with Invasions of Interests in the Support of Land.

The query rises: why has the Institute removed all of these important problems from the domain of "property" and transplanted them in "tort"? Motion for removal came, the Preface tells us,<sup>2</sup> from a "Property group" (composed of distinguished "property" teachers and headed by Dean Fraser) to which these problems—designated as "Natural Rights in Land"—had been assigned. "After working for a year," this group recommended that what had been "entrusted to them should be approached and restated not as a part of the Law of Property, but as part of the Law of Torts, that is as limitations on the use of land which are imposed by law on the possessor because such uses interfere with the reasonable use of the possessors of neighboring land." Some expansion of this notion is found in a subsequent scope note.<sup>3</sup> "Riparian Rights," this note states, "are dealt with in the Restatement of this Subject, and in tort terminology, rather than in the Restatement of Property because, *fundamentally* and *analytically*, they constitute a field of tort liability, and also because they are inseparably tied up with the subject matter of private nuisance. . . ." <sup>4</sup> *Fundamentally* and *analytically*? Whatever these words may mean, the basic preconception which pervades these chapters is that tort rationales are the best available controls for the important social

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1. Preface, x. Note the curious limitation of possibilities here: the Institute's proposed *clear* "common law," our existing *confused* "common law," and "rigid legislative codes."

2. *Id.* at vii.

3. P. 340. More explicit still is RESTATEMENT, TORTS (Proposed Final Draft No. 5, 1939) note to § 12. Emphasis on "property rights" has hindered the tort analysis of surface waters problems. "As a result, the cases contain very little of analysis of liability in terms of tortious conduct, intent, negligence, and other tort concepts which have received intensive scrutiny and development in the last fifty years." Much difficulty has been caused, it is alleged, by courts' confused and indiscriminate use of the word "right."

4. [Italics supplied]. The inseparable "tie up" with "private nuisance" (c. 40) is not persuasive. Even the latter topic could have been more fruitfully treated in another context, that of "land planning."

problems hidden behind "natural rights."<sup>5</sup> What, in terms of the scope and policy perspective of the restatement materials, are the consequences of this preconception? For appraisal let us examine in some detail Chapter 41 on Riparian Rights.

The most obvious consequence of the *tort* distillation is the amazing amount of omission which it requires. "This chapter is restricted," the first scope note informs us,<sup>6</sup> "to the private use of waters as distinguished from the public use thereof for navigation, fishing and other public purposes, and therefore does not deal with invasions of interests in the public use of public watercourses or lakes, or with conflicts between public and private uses." Among the unspecified "other public purposes" could have been listed the supply of water for city use, public power plant and flood control works, and public irrigation and soil conservation projects.<sup>7</sup> Nor is this all. In the next paragraph we learn that it is "not within the scope of the Restatement of this Subject to state the rules governing special rights and privileges created by way of grant or other consent, prescription, or eminent domain."<sup>8</sup> All "special legal relations between the persons involved, such as easements, profits, licenses and the like" are under the *tort* taboo. Finally, the doctrine of "prior appropriation," despite its wide currency in a variety of guises,<sup>9</sup> gets summary dismissal: "In view of the widespread tendency in most Western States today to establish new water codes and to bring all controversies over water rights under the jurisdiction of special administrative tribunals, no attempt has been made in the Restatement of this Subject to deal with the law of Prior Appropriation."<sup>10</sup> So much for "this Subject's" excision of problems, doctrines and institutions. What remains?

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5. Assignment of the subject of "natural rights" in "property" could have been construed as an opportunity for comprehensive treatment of the whole problem of the use and conservation of water resources. If it was not so construed, our criticism is directed at both the "construction" and the "shaping" of the assignment.

6. Pp. 315, 316.

7. Many of the uses here listed as "omitted" get frequent, if scattered and impressionistic, mention in the chapter. Bold as the Institute is in blackletter definition, it nowhere comes to grips with its "public use" and "private use." Occasional passages suggest that a use is public where people or things move upon the water and not where water is extracted for use elsewhere; but other passages foreclose this inference. Presumably the Institute thus achieves the strategic position of being able to assert, when an "omitted" use is mentioned, that such a use is public or private as its rules are applicable or not. The fact is of course that "public use" and "private use" are polar terms describing a continuum of uses. The physical unities of a drainage basin make simple dichotomy futile.

8. P. 316. Cross reference is made to "Restatement of Property—Division, Servitudes." If all of the omitted problems are eventually somewhere "restated," an intricate system of cross references might conceivably provide a more comprehensive picture than that here proffered. But at what cost? Physical, utilization and institutional unities must be subsumed—and perhaps lost—under the artificial unities of the doctrinal structure.

9. Compare *In re Pigeon River Lumber Co.*, 12 P.U.R. (N.S.) 452 (1935) (licensing under Federal Power Act); *Bean v. Central Me. Power Co.*, 133 Me. 9, 173 Atl. 493 (1934) (state Mill Act); *Ickes v. Fox*, 300 U. S. 82 (1937) (federal reclamation project).

10. P. 341.

Elaborate definitions of commonplace concepts, distinctions of a questionable difference and repetitions of a doctrine of "reasonable user"—such is the sum. Building about the traditional defiance of the hydrologic cycle, the blackletter begins by defining, for eighteen pages,<sup>11</sup> "watercourses," "subterranean waters," and "surface waters" and such auxiliary concepts as "lake," "riparian land," "riparian proprietor," "use of water" and "harm." Most basic of the distinctions which we are offered—in justification of a separate chapter on interference with the use of water—is between invasions, through the instrumentality of water, of interests in the use of *land* and of interests in the use of *water*: water and land have peculiar physical inter-relations and water unlike land and air is communal and scarce.<sup>12</sup> Other distinctions, emphasized by blackletter and in separate sections, are between invasions involving and not involving competing *use* of the water<sup>13</sup> and between intentional and unintentional harms.<sup>14</sup> But if, with patience, we work on down through the serried ranks of blackletter, comment and illustration we always—or almost always—find that none of these definitions and none of these distinctions makes much difference anyhow; in the end whether we are dealing with watercourses,<sup>15</sup> subterranean waters<sup>16</sup> or surface waters,<sup>17</sup> whether the harm is intentional or unintentional,<sup>18</sup> whether the invasion is of an interest in land or an interest in water<sup>19</sup> or by a competing use of a non-competing use,<sup>20</sup> we always get back to "reasonableness" or "reasonable use."<sup>21</sup> For a use which causes substantial harm to another riparian proprietor to be reasonable, its utility must, we are told, outweigh the gravity of its harm.<sup>22</sup> *Utility and gravity?* For weighing these imponderables we are given a table of factors ("social value," "suitability of use," "burden of avoiding harm," "extent of harm") substantially similar to one expounded at greater length in the previous chapter on non-trespassory interference with the use of land.<sup>23</sup> One additional factor only appears here. In determining the "utility" or "the gravity of the harm" of a use, in controversies between riparians, the classification of the questioned use as riparian or non-riparian is made "important."<sup>24</sup> By this oblique, very oblique, attack upon the concept of "ripa-

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11. Pp. 317-336.

12. Pp. 314, 315.

13. § 849.

14. § 850.

15. § 851.

16. §§ 858-863, with cross references.

17. § 864, with cross references.

18. § 850 at 353. The problem of unintentional harm is stated as "fundamentally" one of "unreasonableness," to be determined "through application of the concepts of negligence, recklessness, and ultrahazardousness." The latter concepts require a cross reference to the whole of Volume II and to a few sections of Volume III of the *Restatement of Torts*.

19. C. 40, §§ 822-840.

20. § 849 with cross reference to c. 40, §§ 822-840.

21. "Reasonable use" is preferred to "natural flow" because, though the latter is "relatively more definite and certain," the former is more utilitarian (P. 344).

22. § 852.

23. §§ 853, 854. Cf. c. 40, §§ 827, 828.

24. §§ 853, 854, 855.

riar," sale of water to non-riparians or diversion outside the watershed could conceivably be legal.<sup>25</sup> But note just how oblique—and here is our only major recession from an all embracing "reasonable use"—this attack on riparian is. The non-riparian claimant—that is, a claimant who neither "owns" nor "possesses" a "parcel," not even a few inches of bed or bank—without "special right" is given no protection whatsoever in his use of the water against riparians making use of the water.<sup>26</sup> He is not "within the reason of the rule which protects the interests of riparian proprietors in the use of water."<sup>27</sup> Utilitarianism, communalty and scarcity all succumb at last to the peculiar physical interrelations of land and water.<sup>28</sup>

It is not our purpose to belittle the substantial achievement of Dean Fraser and his advisers in getting the enormous prestige of the Institute back of doctrines of "reasonable use," even as circumscribed by "riparian." So much, so good; but it is not enough. So flexible a doctrine as "reasonable use" can be made to serve the purpose of turning a court into an administrative body for determining what is fair and politic under all the circumstances of a particular dispute between individual litigants. Unfortunately, however, neither this doctrine nor any of its competitors can give a court the requisite staff, training, experience and powers to carry out the affirmative, multi-purpose programs which the public interest and the physical, engineering and utilization unities of a drainage basin require.<sup>29</sup> Floods, drouth and soil erosion make even the headlines in the daily newspapers scream not for "tort" limitations on free enterprise but for planned, collective control.<sup>30</sup> Going, if not gone—save in the pages of the A.L.I.—is the easy dichotomy of "private" versus "public" uses of water and with it the myopic assumption that the public interest can best be identified and secured in the private law suit. New ideas, attitudes, techniques and institutions—all beyond the scope and perspective of the Restatement—are emerging to make vital this notion of the public interest. Recognition of the interrelation of all forms of the use of water,<sup>31</sup> combined with a clear value-judgment that the benefits of

25. § 855, Comment a.

26. § 856.

27. *Id.* at 380.

28. Riparian land is defined somewhat liberally as "a parcel of land which includes a part of the bed of the watercourse or lake or which borders upon a public watercourse or lake, the bed of which is in public ownership." (§ 843). Riparian uses "are those made on or in connection with the use of the riparian land." (§ 855, Comment a). What is lacking is exploration of the "policy" alleged to have "crystallized" in these peculiar physical interrelations.

29. This correlation of physical, engineering and utilization unities is borrowed from COOKE, *Physical and Functional Relationships* in UPSTREAM ENGINEERING CONFERENCE, HEADWATERS CONTROL AND USE (1936). Mr. Cooke's exposition of the "unities" is most persuasive.

With the "scenic" tour of the judge in *McCarthy v. Bunker Hill & Sullivan Mining & Coal Co.*, 147 Fed. 981 (C. C. D. Idaho 1906) contrast the administrative control proposed in NAT. RESOURCES COMM., *WATER POLLUTION IN THE UNITED STATES* (1939).

30. For excellent popular exposition of this demand and the reasons behind it, see White, *We're Moving the Rain*, SATURDAY EVENING POST, April 27, 1940, p. 18.

31. UPSTREAM ENGINEERING CONFERENCE, HEADWATERS CONTROL AND USE (1936); NAT. RESOURCES COMM., *DRAINAGE BASIN PROBLEMS AND PROGRAMS* (Rev. ed. 1937);

such use should reach the majority of consumers,<sup>32</sup> invigorates the regional planning of TVA,<sup>33</sup> of the Columbia and other River Basins,<sup>34</sup> and underlies the Report of the Mississippi Valley Committee,<sup>35</sup> the administration of western codes<sup>36</sup> and the factual research of the National Resources Committee. The problems created by conflicting municipal, power and agricultural claims on the use of water,<sup>37</sup> the problems created by floods and the measures taken for their control,<sup>38</sup> and the problems created by erosion<sup>39</sup> and pollution<sup>40</sup> have long since broken the bounds of the Restatement's

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*Fly, The Role of the Federal Government in the Conservation and Utilization of Water Resources* (1938) 86 U. OF PA. L. REV. 274; NAT. RESOURCES COMM., WATER PLANNING (1938); NAT. RESOURCES COMM., DEFICIENCIES IN BASIC HYDROLOGIC DATA (1936).

32. Lasky, *From Prior Appropriation to Economic Distribution of Water by the State* (1929) 1 ROCKY MT. L. REV. 161; LAMPEN, ECONOMIC AND SOCIAL ASPECTS OF FEDERAL RECLAMATION (1930); ANNUAL REP., TVA (1939).

33. HODGE, THE TENNESSEE VALLEY AUTHORITY (1938); ANNUAL REP. TVA (1939); *Report of Joint Committee Investigating the Tennessee Valley Authority*, SEN. DOC. NO. 56, 76th Cong., 1st Sess. (1939); *Fly, op. cit. supra* note 31.

34. NAT. RESOURCES COMM., REGIONAL PLANNING, PT. I, THE PACIFIC NORTHWEST (1936); NAT. RESOURCES COMM., DRAINAGE BASIN PROBLEMS AND PROGRAMS (Rev. ed. 1937).

35. REP. MISSISSIPPI VALLEY COMM. OF PWA (1934).

36. Lasky, *op. cit. supra* note 32; Wiel, *Fifty Years of Water Law* (1936) 50 HARV. L. REV. 252; REP. ON STATE WATER PLAN, CAL. DEP'T OF PUBLIC WORKS (1930); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935).

37. An illustrative group of controversies, from California, can be found in *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 252 Pac. 607 (1926), *cert. denied*, 275 U. S. 486 (1927); *Peabody v. Vallejo*, 2 Cal. (2d) 351, 40 P. (2d) 486 (1935); *Meridian v. San Francisco*, 13 Cal. (2d) 424, 98 P. (2d) 572 (1939); *cf. United States v. Central Stockholders' Corp.*, 52 F. (2d) 322 (C. C. A. 9th, 1931); *San Joaquin & Kings River C. & I. Co. v. County of Stanislaus*, 233 U. S. 454 (1914); *Alabama Power Co. v. McNinch*, 94 F. (2d) 601 (App. D. C. 1938).

38. Brief formulation of the problems will be found in REP. MISSISSIPPI VALLEY COMM. OF PWA (1934) 27-29; NAT. RESOURCES COMM., DRAINAGE BASIN PROBLEMS AND PROGRAMS (Rev. ed. 1937) 53-54. For recent litigation see *United States v. Sponenbarger*, 308 U. S. 256 (1939); *Danforth v. United States*, 308 U. S. 271 (1939); *Cheesebro v. Los Angeles Flood Control Dist.*, 306 U. S. 459 (1939); *Franklin v. United States*, 101 F. (2d) 459 (1939), *aff'd on other grounds*, 308 U. S. 516 (1939); *Fly, op. cit. supra* note 31, at 281-284.

39. See NAT. RESOURCES BD. LAND PLANNING COMM., SUPP. REP., PT. V, SOIL EROSION (1925); LITTLE WATERS, THEIR USE AND RELATIONS TO THE LAND (U. S. Soil Conserv. Serv. 1932). Compare techniques suggested by *Thompson v. Andrews* 39 S. D. 477, 165 N. W. 9 (1917); *Miller v. Letzerich*, 121 Tex. 248, 49 S. W. (2d) 404; Note (1932) 85 A.L.R. 465 with STANDARD STATE SOIL CONSERVATION LAW (U. S. Dep't Agric. 1932).

40. For extent of the pollution problem and recent administrative developments and recommendations, see the excellent study, NAT. RESOURCES COMM., WATER POLLUTION IN THE UNITED STATES (1939). For variety and interplay of legal doctrine, see *Jacobson, Stream Pollution and Special Interests* (1933) 8 WIS. L. REV. 99; Comment (1936) 84 U. OF PA. L. REV. 630. The futility of attempting to handle the problems by litigation, even with tort rationales, is also suggested by *Squaw I. Freight Term. Co. v. Buffalo*, 273 N. Y. 119, 7 N. E. (2d) 10 (1937); *cf., on retrial*, 165 Misc. 722, 1 N. Y. S.

rationales, sprawled heedlessly across the boundaries of the individual state<sup>41</sup> and set in motion the processes by which new institutions are created.<sup>42</sup> Can the Restatement escape all these problems, attitudes, activities, and institutions and still promote "certainty and clarity"? Or must it escape them if it would promote "certainty and clarity"? Whatever the answer, Chapter 41 of the Restatement of Torts on Non-trespassory Invasions of Interests in the Private Use of Waters, despite all of its tort rationales, definitions, distinctions and intricate cross-references, stirs but a very small eddy in the law of waters; the main stream of contemporary drainage basin litigation and administration has long since passed it by.

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JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847. By John T. Horton. New York and London: D. Appleton-Century Co., 1939. Pp. x, 354. \$3.50.

IN his inaugural Ezra Stiles, the new President, urged the youths of Yale College to "observe how far the English law, whether by custom or acts of our legislatures, has been embodied in that of America." In the best Latin idiom of the day he insisted that "students would find it useful also to examine the great principles of the English law, both common and statute, for their own worth; they would find it beneficial to follow the reasonable opinions of the English judges." He predicted that, if a curricular place could be found for so liberal a study, a great genius might arise in our midst—a Bracton, Fleta, Bacon, Coke or Selden—who would wield the scattered fragments of our emergent law into a great commentary. This tribute to the law, appreciation of its English roots, prophecy for its native growth, came when the Declaration of Independence was just two years old. In the audience on that July day—with or without a hearing knowledge of Latin—was one James Kent. This book is an account of the distinctive way in which the hope of the President of the College was in due time fulfilled by the Yale freshman.

(2d) 589 (1938), *aff'd*, 256 App. Div. 582, 11 N. Y. S. (2d) 459 (1939), *aff'd*, 281 N. Y. 794, 24 N. E. (2d) 479 (1939). For the wide sweep of statutory law see Notes (1931) 72 A.L.R. 673, (1939) 122 A.L.R. 1509, and especially PA. STAT. ANN. (Purdon, Supp. 1938) tit. 35, § 691.

41. For recent and well documented opinions see *Hinderlider v. La Plata R. & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938); *Arizona v. California*, 283 U. S. 423 (1930).

42. Note the state planning commissions [see NAT. RESOURCES COMM., THE FUTURE OF STATE PLANNING (1938); NAT. RESOURCES PLANNING Bd., CURRENT PROGRAMS OF STATE PLANNING BOARDS (1939)], the great variety of federal agencies [see NAT. RESOURCES PLANNING Bd., FEDERAL RELATIONS TO LOCAL PLANNING (1939)], the regional and inter-state authorities, and such local organizations as soil conservation districts, rural electrification cooperatives, and flood control and reclamation districts.

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A biography enjoys no immunity to the functional approach. In its composition a turbulent mass of material must be subdued to an art form; the dominant principle of selection, arrangement, comment must be why one wants to know. To the general public James Kent is now hardly a name; the small group still interested or likely to be aroused are concerned with the James Kent of Johnson's Reports later done into the *Commentaries*. Never for a moment does the author forget his reference; an item must throw a light upon the man-of-the-law to win admission into these pages. A severe test for focus is the treatment of "early years"; here the biographer keeps both irrelevance and immortality upon the side-lines, displays the youth, reveals the mind of the jurist in the making. The boy saw "a broad sheet printed with bold and elegant words that spoke of royal tyrannies and a freedom to be vindicated with lives, fortune and sacred honor" — and was not deeply moved. Amid the alarums of the war for independence, he became engrossed in "an adventure with volumes written in sober prose upon the solid subject of the laws of England." A youth to whom, in the midst of revolution, Blackstone meant far more than the Declaration of Independence was already well on his way. His universe was shaped by Tom Jones, the Letters of Chesterfield, the debates of the Linonia society whose library was so rich in secular works as to make the name of Yale something of a scandal among the devout folk of Cambridge. Amid shudders over a threatened raid by Arnold, he received his diploma, a Greek testament and such admonition in Hebrew as he could take away.

It did not take long for temperament, association, reading and experience to equip him with a Tory universe. He fell easily into commerce with men of standing, substance and sound principles. His admission to the bar by a bench of three republican jurists, "filled with pomp and port" and scarcely able to attest his competence, impressed him with a want of the dignity which the law ought to possess. He followed Jay, opposed Clinton, was disturbed by the principles of Mr. Jefferson. He read Hume, Sir Matthew Hale and other stalwart worthies and shunned books saturated with the Jacobinical notions of the French. A simple scheme of values brought ethics and etiquette, politics and the law, into a single grand accord. He associated "bad manners with rude dress, low morals with bad manners and traced low morals to Democracy." In a crescendo of adjectives he found the populace "fierce, licentious, profligate, even Democratic." To him Democracy was *malum in se*, unpardonable because it was "the root of all other evils." And for its antidote he turned to the common law of England.

A note of triumph — or of irony — marks his great work. As independence became a reality, the new republic was little committed to any legal alliance. Ignorance, the exile of the loyalist leaders of the bar, the lack of published reports set afresh the stage upon which a system of law indigenously American might have arisen. The intellectual resources to block a native development had to be imported from abroad. The champions of an Anglican jurisprudence came late to their task. Mr. Jefferson had led his rabble into power before James Kent really got started; Joseph Story owed his judicial appointment to a President of democratical persuasion. But Kent with intelligence, industry and unflinching purpose turned his opportunity to full ac-

count. He overwhelmed American commonsense with the ponderous erudition of the English common law. He confronted every issue with a barrage of precedent. To a judiciary just beginning to practice a learned mystery, he opened the storehouse of knowledge and authority. And in order that his views might prevail far beyond his own jurisdiction, he saw to it that his opinions were printed and circulated. Even Jeffersonian judges, for want of an equivalent arsenal, and less zealous in meticulous scholarship, were unable to meet the challenge. Fate, too, was kind; for when the good republicans of New York sought to end the enterprise by removing him from the bench at an age at which a Supreme Court justice usually hits his stride, he merely shifted his medium and carried on the more strenuously. He took down Johnson's Reports, filled in the blanks, extended the gloss, articulated a miscellany of items and scribbled the *Commentaries*. He created a broad, comprehensive, authoritative corpus which was the law. It was as literate as a classic, as persuasive as an oration. As statesmen were filling legislative halls with the rights of men, Kent was writing the rights of property into the law of the land. Against England a democracy had won the war and lost the law.

All of this Horton recites with charm, conviction and corroborative detail. He has not shirked the dirty work of drudgery nor drawn back before highly technical material. If he had given perspective only, a presumption might have been set against his "study in conservatism"; if he had merely emptied his notebooks, the stark character of Kent's work might have been obscured. But a forest which has not lost its trees is a rather formidable reality; it sets the burden of proof heavily against any person who would dispute or seriously qualify. The universe that moved beneath the man's hat and the legal system of the Chancellor were as one; his importations from the English Reports did little violence to the everyday views he cherished. Given either the man or his law, as the author recites it, and the other can be deduced almost unto minute statement. It is difficult to think of another jurist who more rarely experienced the agony of conflict between professional compulsion and personal conviction.

As such biography goes, Horton is tops. Either he is lucky in his subject or he possesses unusual competence for his task. We have of late been treated to lives of Taney and Waite, of Field and Miller; but this book possesses the integrity which others of its vintage seem to lack. The biographer of Waite was never able to direct his eye to the ball; the life of Miller was saved from myopic pedantry only by the appearance of the Justice's own letters. As we were beginning to believe that any indulgence in understanding was alien to the biography of a jurist, this volume comes along as a welcome rebuttal. It meets every academic requirement, makes an esoteric subject human, threads its way through a technical maze without getting lost. And if it lacks the swift idiom of the best American prose, it is — as if with ironical intent — set down in the engaging style of an English classic. The author has not set a standard for books of its kind; instead he has proved that the life of a man-of-law can be written.

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AN INTRODUCTION TO THE SOCIOLOGY OF LAW. By N. S. Timasheff. Cambridge: Harvard University Committee on Research in the Social Sciences, 1939. Pp. xiv, 418.

SOCIOLOGY, as an independent branch of science, grew out of the collapse of the great metaphysical systems at the beginning of the nineteenth century. More particularly, it was the collapse of Hegel's philosophy which gave the final impulse to the development of an empirical science of society. For three reasons, the science of law was the last to be affected by this development. First, the two systems of sociology which dominated the nineteenth century, Comte's and Spencer's, were, because of their positivist and organismic assumptions, bound to underrate the actual importance of law for society and hence to disregard law as an independent subject for sociological research. In this they have been followed by almost all of the nineteenth century sociological systems.<sup>1</sup> In the second place, metaphysics, after being defeated in the field of general philosophy, firmly entrenched itself in political philosophy. At the present day, the metaphysical desires of mankind still find in political metaphysics a substitute for the satisfaction which general philosophy can no longer afford them. Empirical science has succeeded only intermittently and ephemerally in overcoming this strong psychological obstruction to the treatment of state and law as social phenomena. Finally, jurisprudence itself is the most powerful obstacle to the development of a sociology of law. For almost a century, jurisprudence has cherished a metaphysical belief in the "self-sufficiency"<sup>2</sup> of the legal order, envisaging the law as a sort of closed system whose positive rules contain all that is necessary to the scientific understanding of law. A mere logical process of interpretation would, in this belief, reveal what the law is and what it means, and it would neither be necessary nor permissible to go beyond the wording of the legal rules.

The merits and shortcomings of a systematic attempt at the sociology of law must be evaluated against this background of a hostile and powerful tradition, firmly rooted in positivist and organismic sociology, political metaphysics and legalistic jurisprudence. Sociology of law, as understood by Dr. Timasheff, exists only as a general theory of social interaction which excludes the systematic sociological analysis of specific historic groups and concrete situations. From this point of view, Dr. Timasheff's book is more than an introduction to the sociology of law; it is a general sociological theory of law itself. Its purpose is to analyze the social forces which are at work in law, their typical manifestations and relationships in the stages of equilibrium, change, differentiation and integration. Law, for Dr. Timasheff, is the result of two social forces: ethics and power. The term "ethics," conceived here in contradistinction to its usual meaning, covers the whole normative sphere, comprehending morals, custom and law.<sup>3</sup>

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1. A notable but scarcely noticed exception is *ALEX, DU DROIT ET DU POSITIVISME* (1876).

2. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1937) 57.

3. Although matters of terminology are of minor importance as long as the terms are understood, this departure from the normal use of "ethics" is rather unfortunate. For it inevitably leads and has already led (Cohen, Book Review (1940) 53 *HARV. L. REV.* 708, shoots at this terminological rabbit with the heavy artillery of Hobbes, Bentham,

The first of the book's four divisions, *Sociology and Law*, deals with *The Sociological Place of Law*, *The Place of the Sociology of Law in Science* and *The Historical Development of the Sociology of Law*. The three other parts deal respectively with the sociology of ethics, of power and of law. This book's original contribution to the sciences of law and sociology rests in its consistent application of the mechanical point of view to the normative sphere. As an attempt in this direction, Dr. Timasheff's work is unequalled for its encyclopedic use of literature and its breadth of systematic purpose. The book is unique in its mechanical analysis of the elements of the normative sphere, and its treatment of the logically possible and historically real manifestations, relationships and modifications of these elements. The work is a sort of chemistry of the normative sphere — the author, in fact, likes to draw upon this field of research for his illustrations. The limits of a review forbid enumeration of this book's many original contributions to different branches of the social sciences. Dr. Timasheff reveals powers of analysis and systematization which are unprecedented in this field. I am particularly impressed with the chapters on *Retribution*, *Polarization of Power*, *Changes in Power*, *Differentiation and Integration of Law*, *Imaginary Correlations*, and *Legal Disequilibrium and Legal Disintegration*.

It is inevitable that there will be matter for disagreement and criticism in a book which touches so many philosophical, psychological, sociological, political and legal problems. The subject matter requires the use of abstract language and the book necessarily makes heavy reading, but there is little doubt that saying common things in a common way would sometimes have lightened the reader's burden without sacrifice of terminological consistency. In view of the tremendous amount of literature quoted and discussed, one wonders why the names of Freud, Lasswell, Franz Oppenheimer and Rathe-  
 nau are not even mentioned. Important and elaborate theories, such as Kelsen's doctrine of the fundamental norm and the legal philosophy of the historical school, are sometimes put to summary execution in no more than a few vigorous sentences. I remain completely unconvinced by Dr. Timasheff's polemic against my theory of international law<sup>4</sup> and believe that Dr. Timasheff's own doctrine merely revives Jellinek's theory of auto-limitation with its implied negation of international law.

Multiplication of such isolated instances of personal disagreement would serve no useful purpose. But there is another criticism which touches the

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Austin, Holmes and Gray) to confusion between the accepted meaning of the terms referring to ethics and the meaning which Dr. Timasheff attributes to them. It may even be doubted that the author has himself always been able to avoid this error. When, for instance, he distinguishes between "legal domination and illegal or despotic domination" (the latter being devoid of justice), one cannot help wondering whether the objective or "generic" meaning of "ethics" has not been replaced here by the term's accepted meaning (in the sense of morals) in order to distinguish between good, that is, "legal," and bad, that is, "illegal or despotic," domination. The polemic against Kelsen's identification of state and law reveals similar reasoning. It is apparent that the argument here is based upon "natural law": the good law of the liberal, democratic state and law as such are identical; the bad "law" of the despotic state is not law at all. Compare, however, p. 301.

4. See also my remarks in Morgenthau, *Positivism, Functionalism, and International Law* (1940) 34 *Am. J. Int. L.* 276, n. 48.

very roots of the philosophy and psychology of this book. The book's philosophy is that of Neo-Kantianism, which dominated the continent at the turn of the century. In reading Dr. Timasheff's volume, I was frequently reminded of Kelsen's normative theory of law, equally based on Neo-Kantian philosophy. And indeed, Dr. Timasheff's theory is in many aspects simply the sociological counterpart of Kelsen's normative doctrine, attaining, like the latter, its scientific achievements in spite of its Neo-Kantian assumptions. For both, the final scientific aim is a system of general relationships, devoid of any specific historical content. "There can be only one sociology of law," says Dr. Timasheff. This is exactly what Kelsen proclaims with regard to the normative theory of law. Timasheff's statement, "'Ought to be' is a primary, irreducible content of consciousness"<sup>5</sup> might easily be a quotation from Kant, Hermann Cohen, or Kelsen.

This leads us to another point of criticism: Dr. Timasheff's psychological doctrine. It is not by accident that the author does not so much as mention any representative of the Gestalt school, or of psychoanalysis and its derivative studies. Dr. Timasheff's psychological propositions are scarcely affected by recent trends in psychology; they follow the static and formal pattern of Wundt's structuralism which classifies rather than explains. As the study of man's actions in society in the light of their psychological causation is one of the aims of sociology, an antiquated psychology cannot but affect a sociological theory which is built upon it. Had Dr. Timasheff paid more attention to modern psychology, he would have avoided certain Neo-Kantian atavisms and greatly increased the value of his analyses of ethical phenomena.

Finally, I wish to take exception to Dr. Timasheff's strange use of terminology. Scientific terms are conventional labels which are useful only in connection with classification. This seems to be Dr. Timasheff's opinion in theory, but not his practical attitude. Let us analyze an example. After tracing to Thomasius the distinction between law and morals as that between heteronomous and autonomous rules, Dr. Timasheff continues: "Later on, the theory was developed by Kant and Fichte . . . The separation between law and morals continues to dominate in French science . . . but it is also often expressed in German science; for instance, by Gierke . . . Among recent authors, Morgenthau . . . gives perhaps the strongest arguments in favor of the traditional theory; yet he is forced to recognize that, from its point of view (1) a value judgment concerning the behavior of another cannot be moral; (2) a legal norm cannot create a duty. *Both propositions are refuted by facts; this is, of course, a sufficient test, forcing us to reject the hypothesis*" [Italics supplied]. What are the "facts" which refute both propositions? They are nothing but the conventional usage which attaches the label "moral" to the value judgments referred to, and the label "duty" to the correlative of legal rights. These labels have no cognitive value of their own, nor are they "facts" which can refute statements concerning the things to which they are attached. Dr. Timasheff would have us believe that the label "Burgundy" on a bottle of wine is a "fact" which can refute the statement that the wine in the bottle does not have the qualities which Burgundy wines are supposed to possess.

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5. P. 68. See, in addition, p. 90.

Such weaknesses are inevitable in a book with a range as broad as this one, particularly when the work has endeavored to build upon ground strewn with the debris of previous structures. It is, in fact, surprising that the book does not have more defects. The late Professor Kantorowicz has paid this tribute to the unusual qualities of the work: "Dr. Timasheff's book is perhaps the best treatment of its subject that has come to the knowledge of the reviewer."<sup>6</sup> I unqualifiedly concur.

HANS J. MORGENTHAU †

THE POLITICS OF DEMOCRACY: AMERICAN PARTIES IN ACTION. By Pendleton Herring. New York: W. W. Norton & Co., Inc., 1940. Pp. xx, 468. \$3.75.

PENDLETON Herring, having given us excellent studies of the organization of pressure groups and of their impact on administration, now widens his gaze to include those processes of party government by which a common opinion is created and maintained. *The Politics of Democracy* is an important book because it gives systematic form to a reevaluation of American government which has been going forward in many places. We have long looked at our institutions through spectacles colored by admiration for Britain: not Wilson and Bryce only, but several of our more recent commentators, have condemned us for what seemed perverse aberrations from the ideal form. But the English election of 1935 and the unhappy way that led to Munich have left many of us with grave doubts. The experience of the dictatorships meanwhile has caused us to look freshly upon institutions which we had taken for granted or criticized as inefficient. "The vices of the politicians," says T. V. Smith, "we must not compare with the virtues of the secluded individual but with the vices of dictators." So John Chamberlain, in his *American Stakes*, has recently been telling us that the old fashioned boss represents a basic type of American liberal. And now Herring sets out with insight and enthusiasm to rehabilitate a fair portion of the rogues gallery of our political life.

This rehabilitation begins with the assumption that politics has for its major task the creation of a wide agreement. "Union," says Herring in a revealing sentence, "has been and continues to be the underlying problem of American politics." Without racial homogeneity, without congruous interests, without national memories running back into a dim past we must nevertheless establish for ourselves an unbroken common life. If that unity is not to be imposed from above, it must be fashioned piece by piece from within and continually refashioned as new interests emerge and as new aspirations become articulate. In that creative process liberalism and conservatism, a concern for the power of the majority and for the rights of the minority, all play their part. For the function of politics is to insure that no group shall be unnecessarily alienated by progress, and that none shall be permanently

6. Kantorowicz, Book Review (1940) 56 L. Q. Rev. 113.

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thwarted by adherence to the status quo. It is a process of adjustment that requires "artistry, adroitness, and some science."

The task is as ceaseless as it is immense, but we must depend for its performance upon the ordinary run of men. Politicians anxious to keep their jobs, partisan zealots, advocates of special interests, are as important in the construction of a shared opinion as those devoted to a large view of the common weal. Whatever folkways and institutions may bring these errant forces into the service of the whole must therefore be judged good. Money, patronage, organization—the accepted horrors of the democratic idealist—are seen in this context to play a highly useful part. A party structure radically decentralized, intrenched in that decentralization by the defeat of the President's purge and the passage of the Hatch Act, appeals to those local politicians who are able to collect and deliver the largest number of votes. Third parties, dominated by principle, may have their special function in sowing what the major parties will later reap; but to expect any clear division of policy between Democrats and Republicans is to deny the inherent genius of our system.

Those who think of political contests in terms of such conflicts of principle will miss the point of much that is valuable and significant: they will look askance, for example, upon the National Conventions. The Conventions, it is true, provide little opportunity for effective deliberation; but deliberation, as Herring points out, is not the only means of achieving harmony. Manipulation and bargaining are also necessary, and these monstrous gatherings are rich in questions to negotiate and human material with which to work. The Platform, to take another example, is a poor basis for predicting the party's future conduct. But the Platform, too, is a useful institution if judged aright: its value is in the process by which it is framed. Here preliminary antagonisms have been ironed out and the way prepared for the paramount task of choosing a candidate whom the whole party can support.

This approach to democratic politics clearly has some dangers. If the Platform is judged by the manoeuvres which it encourages, will not debate also be robbed of all meaningful content? If patronage is condoned as a means of winning the allegiance of unconvinced minorities, will not the need for a rigorous merit system be neglected? In carrying too far the cry of unity, moreover, we run into such situations as Herring candidly discusses in his chapter on *The Limitations of Debate*. There he suggests that issues which tend to divide the people should not be raised in campaigns; he approves Allan Nevins' opinion that Cleveland harmed the cause of tariff reform by introducing it into the campaign of 1888. Franklin Roosevelt did not bring court reform into the campaign of 1936, but there will be many who question whether that omission was in the spirit of democratic government.

There is thus a tendency in Herring's thought toward anti-intellectualism and quietism. He is saved from both, however, by a positive and guiding faith in the underlying values of Democracy. "No Adams," writes James Truslow Adams proudly, "has ever been a party man." But if Herring is unwilling to admit that this insistence of following one's own standards is characteristic of the best statesman, he nevertheless sets a criterion of no mean nature:

"The highest task of statesmanship," he says, "is to preserve the democratic system." That is a task, if it is rightly understood and resolutely pursued, which requires of a man all the courage, intelligence and magnanimity that he has.

AUGUST HECKSCHER, II †

THE ECONOMICS OF CORPORATE ENTERPRISE. By Norman S. Buchanan. New York: Henry Holt & Co., 1940. Pp. viii, 483. \$3.25.

THIS book is the first attempt, since Dewing's work, to integrate recent developments in the economic theory of the individual firm with the latest legal and statistical knowledge about the business corporation. Now that the attempt has been made with modern theory, one can see how much promise there is of enriching the field along the lines of Professor Buchanan's analysis. The book is a pioneering study which suggests the need for similar projects. Although it is intended as a text for college courses, it should be read by lawyers, economists and business men who desire a sound and useful approach to an old problem.

The most successful combination of economics and corporate practice is in the third part of the book—dealing with business reorganizations. Beginning with the distinction between the economic failure of a firm to earn profits at the going rate and the business failure of a firm unable to meet its debts as they mature, the author proceeds through a discussion of the causes of failure to a description and analysis of the procedures of reorganization. Although the lawyer will find the presentation of the legal phases of this topic elementary, and the treatment of the economic phases will tell the economist nothing new, the combination of the two problems will interest both. Professor Buchanan segregates five "critical problems of corporate reorganization in practice" which an adequate reorganization machinery must solve: deciding whether reorganization should follow upon business failure; providing new capital to carry through the reorganization; handling dissenting minorities; obtaining independent review of the plan; and keeping costs down. Although this method of treating the subject is stimulating, this list is open to some question. I would add to it at least the problem of determining priorities, and the desirability of early completion of reorganization. But, all in all, the device of selecting critical problems aids greatly in evaluating alternative legal procedures of reorganization and keeps the basic economic problems from being obscured in mazes of legal detail.

The chapters which treat the legal aspects of corporate enterprise are almost as successful. The integration here is between generalizations about the individual firm's place in the economic structure and the legal facts of corporate chartering and government. This dual treatment enables one both to see the management group in charge of a legal entity and to realize that the entity is also an economic unit within which the management may make decisions not directly related to the open market. As the size of the firm increases, the

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management's freedom of action is expanded, with important legal and economic consequences.

The book's remaining chapters, although well worth reading, are less satisfactory. The author's treatment of such problems as promotion, accounting and expansion has not accomplished the desired integration. His emphasis is on the nature of marginal analysis and its advisability in making corporate decisions. Corporate managers have, no doubt, failed to employ this useful tool to its full extent. But this does not warrant belaboring the point at the cost of curtailed treatment of such matters as fixed and variable costs, cyclical variations in the type of product demanded, present trends in accounting practice, the advantages of multi-unit expansion, or the effects of "leverage" upon the optimum size of a firm.

Although it is an author's privilege to set the bounds to his own work, I feel that the balance of Professor Buchanan's book is greatly damaged by his failure to afford thorough treatment to the pressing problems of corporate size and control, of governmental influences over capital markets and corporate financial practices and of inter-corporate competition.

Professor Buchanan's style is lucid and conveys the feeling that he has done much reading and studying before sitting down to write. His bibliography confirms the latter impression for it contains many useful materials not generally cited, although it lacks a few standard references which are, however, known to most students in the field.

This book will doubtless influence many students of the private corporation toward enriching their studies through a broader approach to their field. While they are so doing, it is to be hoped that Professor Buchanan will continue to lead along the route he has charted.

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