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Our Legal System and How It Operates, by Burke Shartel

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BOOK REVIEWS

OUR LEGAL SYSTEM AND HOW IT OPERATES. By Burke Shartel.*
Ann Arbor: University of Michigan Press. 1951. Pp. xxvii, 629.
\$6.00.

Professor Shartel has added one more to the growing list of books intended for use in first year law school courses on "Legal Method" or "Introduction to Law." His method is that of a lengthy text, with numerous problems, and often quite well-chosen ones, as a focus for classroom discussion. He rejects the historical, sociological, or jurisprudential approaches which might be taken to such a course, and chooses instead as his goal "an analytical and functional view of the American [legal] 'system as is.'"¹

There are several ways in which this book might be reviewed: The fundamental premise that law students need an introductory course could be examined; or an argument could be made that some approach other than the descriptive would be more fruitful. I am content, instead, to accept Professor Shartel's premises and his goal, for I think that the most important thing to be said of this book is that it is not what it purports to be. Far from describing the American legal system "as is", it pictures a legal system which never existed anywhere.

In his coyly entitled "Preface for the Initiated Reader,"² Professor Shartel suggests that his book may have value even to practicing lawyers and judges if they have not been doing an extensive amount of "reading and using the newer jurisprudence."³ From this reference it seemed fair to suppose that this book would embody, as indeed it should, the new insights as to what the law is really up to, to which thirty years of legal realism have contributed. And indeed the evidence is abundant that the author has read this "newer jurisprudence"—there is, for example, a passage which shows a fact skepticism worthy of Jerome Frank,⁴ and the longest chapter in the book is entitled "Legal Policies and Policy Making."⁵ The trouble is that the author hasn't profited enough from

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1. P. xi.

2. The author has also scattered throughout the book a number of footnotes intended for the initiated reader, which are introduced with the designation "(I. R.)," and which the beginning law student is apparently expected to ignore.

3. P. xiv.

4. Pp. 239-40.

5. Pp. 434-594.

his reading. He rejects the view of law as a sort of slot machine, but will recognize in its stead only "the *limited* creative role of the judge."⁶ (Italics added). He lists as an advantage which the law student has in studying law that "he does not have to make a decision which will have practical effects", and that he need not be moved by "human sympathy or prejudice."⁷ If I read Professor Shartel correctly, this can only mean that it is a good thing to spend three or four years building houses of cards even though they will tumble upon their first contact with the realities of law as it is administered in the outside world. This is made explicit a bit later when the author confesses his doubts as to "the extent to which a knowledge of people and their ways can be taught in law school," and suggests that this knowledge be acquired by the student "after he is a practitioner, not while he is in law school."⁸ If these doubts are sound, it seems to me time to close the law schools and go back to the old method of reading law in a lawyer's office. There, at least, real people and human sympathies and prejudices are allowed to enter. But of course the doubts are not sound, and any number of our good law schools are managing, with greater or less success, to tie up their teaching of law with life as it is lived.

Professor Shartel's main effort is to show what legal standards are, how they are created, and how they are applied. The impression left is that, with rare exceptions, the judge deciding a case need merely reach in and pick up the right legal standard, and all problems will vanish. No recognition here that "the authoritative tradition speaks with a forked tongue,"⁹ and that for every standard seeming to dictate one result there will doubtless be an equally good one which would support the opposite result. No recognition here that the policies which are considered at such exhausting length in the final chapter are at least as important in the decision whether or not to apply a particular standard to a specific case as they were in the original formulation—presumably at a time long past—of the standard.

All this, I think, would be bad in any book written about law at so late a day.¹⁰ It is downright dangerous in a book intended to introduce

6. P. 405.

7. P. 242.

8. Pp. 248-49.

9. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1252 (1931).

10. A distinguished teacher has recently suggested that Llewellyn's *THE BRAMBLE BUSH* has "a nostalgically old-fashioned sound" because the ideas which that book contains, and which are usually thought of as the essence of realism, have "destroyed classical jurisprudence" and "have served their time and passed out of controversy." Gilmore, *Book Review*, 60 YALE L.J. 1251, 1252 (1951). This book confirms my own view that at points west of New Haven there is still lots of life in the old dog conceptualism.

beginning law students to law "as it is." Professor Shartel is critical of some of the "realists"—citing particularly Frank, Arnold, Radin, Rodell, and the young Llewellyn as examples—for "a one-sided emphasis" which "overstressed the realist viewpoint."¹¹ Suppose that he is right in his criticism. Suppose that rules are a more important factor in the judicial process than these writers will concede. Still, it seems to me that it is the point of view of these men which must be gotten over to the novice in the law. There is no one more devoted to the niceties of the common law than the first year law student. Educated from grammar school on in the notion that courts decide cases the way The Law commands, and that judges cease to be men when they slip into a black robe, they urgently need a drastic shock treatment if they are to be even open-minded in their approach to the question of what law is and how it works. I require my first year students to read Rodell's *Woe Unto You, Lawyers*.¹² And I find that I still have to work hard to get them to see that law is a method by which human beings adjust the affairs of other human beings, rather than a closed system of abstract syllogisms. I'm afraid that with students who had been introduced to law through Professor Shartel's book, the job would be impossible.

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11. P. 247. Realists of whom Shartel approves are Pound, Dickinson, Fuller, Holmes, and possibly the mature Llewellyn. I should have thought that only the last two deserve to be called realists at all.

12. I also require reading of LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949), and of Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COL. L. REV.* 805 (1935). I'm sure that Shartel would include both of these in his list of "one-sided" works.

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