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Book Review. Radin, M., Law as Logic and Experience

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the study of law, and of law in a sense that is much more orthodox than some may think, although it provides materials for a very broad and deep study of that law.

ALFRED GAUSEWITZ*

LAW AS LOGIC AND EXPERIENCE. By Max Radin. New Haven: Yale University Press. 1940. Pp. ix, 171.

Mr. Radin is a learned man, a mature scholar, a stylist of charm and distinction. Hence, it goes without saying that his book, the Storrs Lectures delivered at Yale last year, provides a stimulating experience that is thoroughly worthwhile. He is concerned with general problems which he treats under the broad categories of "logic" and "experience." The book does not unfold systematically; rather do we profit from a sustained and mellow stream of wise observation on law and lawyers and judges, and their work.

In the case of so well-reputed a scholar as Mr. Radin there is less need for a detailed description of the enlightenment he provides than to scrutinize the evidence of any underlying legal philosophy; the following remarks are directed mainly to that end.

Mr. Radin begins his book by distinguishing "realism" from "conceptualism." At the outset, he states that "conceptualism" is "an inescapable form of the language of the law" (vii); on the succeeding page we are informed that "They [legal realists] cannot help constructing hypotheses because they cannot reach experience except by such imagined constructions, and experience is what they are after." (viii) Expectations are thus raised that Mr. Radin will bring his learning to bear meaningfully on the relation of "concept" to "experience"; this is not done. Instead we have presented firstly, an interpretation of the Greek usage of "right reason" "which," he tells us, "is, of course, logic." (2) The argument that "the formula established the notion that law is a kind of mathematics," (3) that "reason is, of course, logic" and the like, is a curiously circumscribed interpretation of one of the basic ideas of traditional philosophy. "Right reason" was as widely used as "Nature"; though one hesitates, therefore, to characterize its meaning briefly, it is apparent that such notions as judgment, insight, and intelligence (as opposed to impulse or emotion) come much closer to conveying the correct meaning than does "logic." There would be no point in stressing this did it not serve as a fair index to the author's general thesis that "experience" is the repository of all rational thought as well as of instinct and emotion. This *simplisme* may be defensible in some regard; it avails little to enlighten the issues raised by "nominalism" and so-called "conceptualism" or significant questions regarding the role and function of ideas in experience.

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To be sure, Mr. Radin registers numerous dissents from the anti-conceptualism of extreme American Legal Realists. "Certainly words and terms are not contemptible in law." (4) "Whether we like it or not, law as experience, as well as law as logic, is bound to be a matter of words to a very considerable degree." (4) But while there is insight into the nature of law-as-logic (*i.e.*, law as a formal discipline) almost always the discussion takes on a note of grudging concession—here the author reveals his sympathy with current suspicion of the role of logic in law. As most American Realists, he warns that we must be armed against this artful fellow. "We must be on our guard. We cannot dispense with logic. It creeps insidiously into any determination. . . ." (98) So, too, this bias plus rather interesting philological predilections are revealed in his accounting for the fact that in continental systems "there is a tendency to declare that not what the judge says but what he ought to say is the law." (40) "That is," announces Mr. Radin, "another result of the ambiguity of the word which in Continental languages is used for law." (40)

Mr. Radin displays an even more unfortunate bias in sweeping assertions of the basic irrationality of human beings. "Man is by nature an irrational creature that yearns to be rational." (7) "And evidently we do not take thought about rights and duties before we act or refrain. It is a matter of instincts, and, even more often, of habits which are the result of impulses almost or quite unconscious." (21-22) No wonder that with this unquestioning faith in the older psycho-analysis, Mr. Radin greatly discounts the role of law in everyday life. "Human experience is . . . very rarely determined by conscious application of norms, least of all legal norms." (25) It might come as a surprise even to so well-informed a reader, to know that such an ardent Freudian as Franz Alexander recently wrote that psychiatrists must revise their notion of human nature as irrational, instinctual, and selfish; that the facts indicate *equally* rationality and benevolence. One need not labor the assertion that a resulting philosophy of law might be less "sophisticated," but more defensible from any common sense point of view.

Finally, in this brief survey of indications of Mr. Radin's philosophical position, we may note his attitude towards, if not analysis of, "law." Any phenomena "become legal facts just as soon as a lawyer undertakes to deal with them professionally" (16); they "become legal facts, because they have been examined by lawyers in court before other lawyers." (17) By the time Mr. Radin finishes, "law" has become a sort of vocabulary, and "lawyers," philologists trained in a special language, who talk much without the slightest appreciable affect on anyone's conduct. "Not every statement made by lawyers is a legal statement. Really to be law the statements must be made by a special class of lawyers—those whom we call judges or courts." (37) The implications of such characterization should not be dismissed as futile; they suggest not so much the bankrupt behaviorism of the recent American Realism as total lack

of consideration of the sociology of law. That is especially unfortunate since this discipline provides the knowledge essential to a view of law that can synthesize law-as-concept with law-as-fact. In short, it is the one approach that would seem particularly fruitful in the hands of a moderate Realist like Mr. Radin who is much too wise to swallow the utter nihilism of the extremists. This failure to consider carefully the relationship of law to society leads to a view of law that is fortuitous, determined by what lawyers happen to do without any concern as to why lawyers do what they "happen" to do.

Despite its serious limitations when judged by its explicit and unsystematic forays into jurisprudence, the book is, as stated, suggestive, discriminating, and, sometimes, even wholesome. For Mr. Radin's comments on specific problems are invariably thought-provoking. His insight parallels almost the entire field of important legal phenomena; his role as a wise companion and acute commentator results in a running critique that is stimulating throughout and of so continuous and detailed a nature as to defy adequate description within the limits of a review.

Of the many interesting proposals made, only one, presented at some length, concerning arbitration of disputes, can be noted. He stresses the desirability of "the effort to render future relations between the persons affected possible and profitable," (87) and argues that this would require the court "to take into account not what happened but what will happen." (89) He would not compromise with "acts unmistakably marked wrong, like cruelty and exploitation" (94) but insists that "most situations do not come to us so conveniently tagged" as right or wrong (94); he concludes that "arbitration could take the place of litigation generally . . . in all cases where the issue is not clearly between the abused and the abuser, the victim and the wrongdoer." (94-5) But Mr. Radin recognizes also that "we should like our judgments to be capable of guiding the litigants in the case of future disputes." (97) Quite apart from the many intrinsic problems which general arbitration versus adjudication raises, one wonders how he would reconcile the various conflicting ends: compromise based on future relations, and the significance of the past facts, compromise growing from the unique facts of each particular case, and yet guidance for the future. If human conduct is mainly irrational, one can readily dismiss any nostalgic predilection concerning aid to future cases; more difficult questions concern the author's apparent disregard of the past facts. Partly, this is due to his skepticism regarding determination of the "truth" concerning the past (a rather odd position for a legal historian to assume), partly, as noted, to the view that there is rarely a clear ethical principle involved. But positive law has traditionally functioned in this very area to prescribe an ascertainable norm, also to facilitate some degree of security and of certainty.

Significantly enough he does not carry his proposed sweeping reform to the criminal law. Here his concern for protection of the

individual against official abuse leads him to insist on traditional guaranties and procedures—up to the point of verdict. After that he would look to sentencing experts—certainly not to lawyers or judges. Having shown a healthy awareness that penology is “still in its infancy,” (114) Mr. Radin indicates merely a diluted confidence in the superior qualifications of penologists to sentence criminals “properly” (115). The past facts, the values involved, popular psychology, legal rules, apparently weigh little with him here. It is a current trend whose validity cannot be discussed here; but it must be apparent that if positive law is to have nothing whatever to do with sentencing criminals, Mr. Radin’s sensibilities concerning safeguarding of the innocent carry him to a rigorously limited position. Do not the same morals require us to be equally, perhaps more, concerned with our brethren who have transgressed? If Mr. Radin will not trust the separation of the guilty from the innocent to “expert” discretion, because he fears official abuse, is it likely that such abuse will be less when “experts” (*cf.* his earlier remarks about penology) deal with admitted criminals?

The final chapter on Justice is a type of eclecticism that defies neat classification, but is nonetheless pregnant with much insight. How far he is from many American Realists is here revealed by his insistence on “a process of moral valuation” (160); by his appreciation of “a sense of human values in which a strong and passionate feeling for the irreducible dignity of human life itself is the basic measure” (161); by his approval of Kant’s imperative that “no man may be considered merely as a means to an end of another man.” (161) “Humanity is, after all, the business of the law. When the law forgets that, it were well that its right hand should forget its cunning and its eloquent tongue cleave to the roof of his mouth.” (164) So ends this book by an alleged American Realist! It is from this point on, that one hopes Mr. Radin will some day begin his speculation, test the consistency of his discourse from this perspective, and press on to the construction of a legal philosophy that will have adequate reference to such an ethics. He would need to reexamine his dogmas concerning the irrationality of human conduct, the criteria of law, and its scope in human affairs.

These are times that challenge legal philosophers towards accomplishment that far transcends erudition and *belles lettres*. If there is any sense whatever in our professions both as citizens and as legal scholars, beyond personal predilection and self-service, this is assuredly the day to discover and expound it. This reviewer is one of many who hold that law plays a vital role, possibly the most important role of all the disciplines and institutions, in the preservation of values that are intellectually defensible. Accordingly, I hope Mr. Radin may be induced some day to reexamine the postulates of his present book. In that event I am confident he would bring his distinguished talent to bear effectively upon the vital challenge to contemporary legal scholarship.

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