THE NEWER SOCIAL SCIENTISTS LOOK AT LAW

By Ralph F. Fuchs

The Legal Foundations of Capitalism, by John R. Commons. New York; The MacMillan Co. 1924. Pp. x, 394.

A Grammar of Politics, by Harold J. Laski. New Haven; Yale University Press. London; Allen & Unwin. 1925. Pp. 672.

Social Control of Business, by John Maurice Clark. Chicago; University of Chicago Press. 1926. Pp. xviii, 483.

I.

Lawyers who like to keep in touch with currents of thought in the social sciences and lawyers who have a desire to escape occasionally from the mass of detail which engulfs them in order to reflect upon what it is all about, could not do better than to read one or all of the three books mentioned in the heading to this article. All are recent surveys of the social scene by scholars of recognized standing. Each is concerned with the problem of how human values are realized from the resources at the command of the race. Each considers at length the function of law in attaining the ends which are being sought. None of the authors has an ax to grind, and the clear-cut, realistic approach which each makes to the problem which he sets himself forms a contrast to the empty phrases with which many speakers and writers content themselves.

Quite definitely since 1913, and in a preliminary way before that, those in the forefront of economic thought have departed from the way of thinking of the older *laissez faire* school.[1] The economic system has

[1] Thorstein Veblen, in a series of books which constitutes a thorough-going criticism of current institutions and modes of thought, brought to light many of the ways in which economic phenomena reflect other forces than intelligent pursuit of self-interest by economically-minded men. See especially The Theory of the Leisure Class (1902), A Theory of Business Enterprise (1921), The Instinct of Workmanship (1914), and Absentee Ownership and Business Enterprise in Recent Times (1923). The accumulation of industrial and social problems which demanded and received legislative treatment at the expense of individual liberty as previously understood, made it apparent long in advance of any new theory that the *laissez faire* system was not working perfectly. A particularly acute problem was that of business cycles and recurring financial panics. At the same time (1913) that prolonged agitation and study produced the Federal Reserve Act to introduce thorough-going control, Wesley C. Mitchell's study, Business Cycles, which laid the blame at the door of the

come to be viewed by economists as a complex of physical, pyschological, and institutional forces which are shaped to definite ends by conscious human effort. At the same time, or perhaps a bit in advance, Mr. Justice Holmes and others in the field of law insisted that neither logic nor doctrinaire individualism were or ever had been sufficient guides in the administration of justice and that legislators and judges should consciously have an eye upon the consequences of their acts.[2]

The basis of the older view in both law and economics[3] has been set forth by Blackstone perhaps as well as by anyone else. God, says the famous commentator, provided the law of nature to which human beings must conform. He recognized, however, that man was so frail a creature and one so indolent that he would never discover the law of nature for its own sake.

> As, therefore, the Creator is a being not only of *power* and *wisdom,* but also of infinite *goodness,* he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For He has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, He has not perplexed the law of nature with a multitude of rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised, but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness."[4]

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profit system, focused attention upon the method of studying economic problems by means of detailed statistics, a method which has ever since been regarded as necessary in order to supply the materials for economic reasoning.

[2] Holmes, THE COMMON LAW (1880) 1; COLLECTED LEGAL PAPERS, 179 et ff. (1897), 244 et ff. (1899). More recent expositions of this view, containing citations to the literature by which it has been built up, are Pound, LAW AND MORALS (1924), and Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1922) and THE GROWTH OF THE LAW (1924). The historical researches of Holmes, Pollock and Maitland, Jenks, Holdsworth, and others have, of course, been important; for they have laid bare the forces that have made the law what it has been and what it is.

[3] For the relation between economic and legal individualism see Pound, LIBERTY OF CONTRACT, 18 Yale L. J. 454, reprinted in part in THE RATIONAL BASIS OF LEGAL INSTITUTIONS (Modern Legal Philosophy Series), p. 124.

[4] Com., bk. I, 40-41. The later utilitarians did not, of course, ascribe a divine origin to their system. With them man was simply a being capable of pursuing his own happiness, and the nature of society was such that the doing so by each individual could not but conduce to the greatest possible happiness of all. The result was the same. John Stuart Mill's statement of the province of law and government in a system organized along such lines remains unsurpassed as an

It follows that the state, through law, should refrain from coercing individuals except to the extent that is absolutely necessary to protect each in the security of his person and property; for only thus can each be free to pursue his own happiness.

Of course no legal-economic order based entirely upon doctrinaire individualism has ever actually existed. The use of public force has never been confined to the indispensable minimum of keeping one man, in pursuing his own happiness, from trespassing upon the liberty and property of another. There have always been tariffs, poor relief, usury laws, and associations and corporations possessed of special privileges. The reason, obviously, is that any system which carried individualism to its logical conclusions would disintegrate over night. It is clear, moreover, that pressing difficulties have since 1850 caused one fresh departure after another from the individualistic, *laissez faire* doctrines.[5] Economic theory and juristic thinking have only recently been freed from a preconception and modified to accord with the facts.

Contemporaneously with the foregoing development in economic and legal thought[6] there has occurred a movement in the realm of political theory which has undermined another favorite legal doctrine—that of the unchangeable sovereignty of the state. It has occurred to a num-

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intelligent defense of *laissez faire*. Portions of it are reproduced in THE RATIONAL BASIS OF LEGAL INSTITUTIONS, *supra*, 14-31.

[5] There has, it is true, been a professed return to *laissez faire* views in the United States during the past few years. Interference by government with business is quite generally condemned. This tendency is due in part to the prevailing prosperity and in part to a renewed realization by "uplifters" that it is definite human beings and not a more or less vague "society" that must be raised to higher levels.

To a considerable extent, however, the prevailing temper, in so far, at least, as it is expressed in opposition to increases in the scope of Federal authority, is caused by a long-continued reaction from the war-time exercise of Federal power and by dislike of the eighteenth amendment and the Volstead Act. Opposition which springs from these causes is more apparent than real. Thus Senators from the Middle West who are violently opposed to "Federal centralization" are, for the most part, in favor of Federal aid for construction of state highways, Federal flood control, Federal aid to farmers, and Federal regulation of primary elections. Journalistic condemnation of bureaucracy, at least where it is of a "liberal" character, stops short of opposition to Federal investigation of public utility holding companies. Federal control of radio broadcasting has just been established (U. S. Code, tit. 47, ch. 4), and the oil industry is crying out for control of some sort. On the whole it seems safe to say that the main tendency, in opinion and practice as well as in theory, is still toward a greater exercise of the powers of government and away from *laissez faire*.

[6] The sociologists should not go without mention. In their attempts to explain why people individually and collectively behave as they do they have necessarily taken account of many factors, physical, psychological, cultural, and environmental, which economists and jurists had previously ignored. Their influence on this account has been great. See especially Charles Horton Cooley, SOCIAL ORGANIZATION (1921) and SOCIAL PROCESS (1918).

ber of students during recent years that there was no fundamental difference between the law enforced by the state and the rules prescribed by other bodies to which individuals and groups give obedience. Each class of rules has certain sanctions to support it, whether the agency behind it be a church, a trade union, a lodge, a family, or a government. No body of rules, moreover, whatever the authority behind it, is entirely secure from violation or from ultimate overthrow —the law no more than the rest. Why, then, put the law in a class by itself?[7]

Many political thinkers have come by the foregoing route to the view that society is governed by a large number of institutions, each of which has its own law and exercises authority over a particular sphere. All of these institutions derive their ultimate powers through the adherence and obedience of individuals, whose several loyalties, forming a vague consensus, give to the various political, cultural, religious, and economic institutions whatever priority they may possess over one another. The state may now be supreme; but it is so only by sufferance, only in part, and only so long as people choose to keep it so.[8]

Thus it is that the self-seeking individual and the sovereign state have both been cast out as rulers of the entire social system. Economists and political scientists, each freed from his allegiance to a divinely ordained monarch, have met on common ground to sketch the social scene. Each has been at liberty to paint a picture which should flatter no one and to bestow his own loyalty where it seemed to him best to do so. In this situation it is natural to ask, What of the law, whose own most faithful followers have come to perceive that

[7] The theory that the ultimate sanction of law lies not in the sovereignty of the state but in the conformity of law to custom, natural law, the population's sense of what is right, or what not, is, of course, not a new one to lawyers. Troubles with prohibition enforcement have revived it in its full strength. But the political theorists' placing of law in the same general class with other rules has no important parallel since medieval times.

[8] One factor in overthrowing the orthodox theory of sovereignty was the historical researches of J. N. Figgis, who brought out that that theory was forged as a weapon to be used by the states of Europe in their struggles with the Papacy and the Holy Roman Empire. See DIVINE RIGHTS OF KINGS (1914). Maitland's introduction to Greicke, POLITICAL THEORIES OF THE MIDDLE AGE (1900), gave currency in England and in this country to the view that corporations and associations have an existence which is anterior to and independent of their legalization by the state. Harold J. Laski, in a series of essays contained in THE PROBLEM OF SOVEREIGNTY (1917), AUTHORITY IN THE MODERN STATE (1919), and THE FOUNDATIONS OF SOVEREIGNTY (1921), established the "pluralistic" view firmly in Anglo-American political science. For an excellent brief statement of the general position of the pluralists see Sabine and Shepard, introduction to Krabbe, THE MODERN IDEA OF THE STATE (1922).

she must win adherents through merit? The three books which it is the province of this article to summarize and interpret from a legal point of view, are not without answers to this question.

II.

John Maurice Clark is an economist who has previously given evidence of the fresh approach which he makes to economic problems.[9] His concern in *The Social Control of Business,* as the title indicates, is quite specifically with the problem of directing business activity to social ends, but the implications regarding the direction of other forms of activity are clear. The problem of control is important, he thinks, because "It is at bottom the problem of adjusting conflicting interests and claims of 'rights,'[10] and harnessing selfish interests to that mutual service which the division of labor has made one of the most fundamental and most commonplace features of industry."[11] Naturally law, "the most specialized and highly finished engine of control employed by society,"[12] comes in for a large share of attention.

Mr. Clark's attack upon his problem is a direct one. He proceeds at once to examine current institutions in a "search for principles of control . . . which are actively at work in the problems of 'applied economics,' "[13] pausing only to define control, social control, and business. Control, briefly, exists "whenever the individual is forced or persuaded to act in the interest of any group of which he is a member, rather than in his own personal interest" (p. 8). Control is social in proportion to the inclusiveness of the group which exercises it, and this is true of control exercised through the state no less than of other forms (p. 9). Business, perhaps, is gainful work, with mutual exchange as its unifying feature; but the important thing to realize is that it implies control of some sort. Certainly there must be rules of the game, at least for the purpose of defining procedure, enforcing agreements, and protecting property (pp. 12-13), and an individual is as much controlled when competition limits the price or the wage he receives as when a law forbids extortion. The real issues simply relate to the desirable kinds and amounts of control.

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[9] See THE ECONOMICS OF OVERHEAD COSTS (1923).

[10] This is virtually Dean Pound's statement of the function of law which he, in turn, ascribes to Jhering. See LAW AND MORALS, 112-117; THE END OF LAW AS DEVELOPED IN LEGAL RULES AND DOCTRINES, 27 Harv. L. Rev., l. c. 225-6.

[11] Author's Preface, xiii.

[12] Ross, SOCIAL CONTROL, 106.

[13] Author's Preface, xiv.

It is clear, moreover, that the individualistic system, as we are pleased to call it, which prevails today, is a far different thing from the individualism which Blackstone and his contemporaries at times envisaged. Even the ideal of the present-day individualist includes bankruptcy legislation, private corporations, and the tariff; and there is much besides in the shape of economic organization and social legislation which could not possibly be abolished and which must be taken into account by any new philosophy which is worth considering. In fact, "Individualism and control are both new, and the case for both needs to be completely restated" (pp. 30-1).

"Most modern thinkers," says Mr. Clark (p. 33), "judge a system by its results, approving or condemning it according as it does not meet the essential needs of humanity in a satisfactory way, or as well as they can be met in a world born to toil and hardship." Mr. Clark adopts this standard for judging the system of individualism, its possible modifications, and the alternatives to it. Any system of control must, in order to be successful, harness the self-interest of individuals to the service of the common good (p. 35). The present system "has a strong basis both in custom and in individual psychology, not to mention a very impressive record of works" (p. 39). On the other hand the critics "cite a sickening mass of abuses" (p. 40).

The basic difficulty with the present situation is that the individualistic system, by means of the easy assumption that each individual knows what he wants, that hence the population as a whole knows what it wants, and that the machinery of the market will enable this demand to express itself, has concentrated its attention upon so organizing production as to supply the demand thus expressed (pp. 45-50). Not only have inevitable inequalities of opportunity between individuals been overlooked, but the basic fact has not been realized that (p. 46):

> Production . . . involves, not only the making of goods to gratify existing wants, but also the creation and guidance of demand, the whole process of bargaining and negotiation by which the terms of division are settled, and the underlying function of defining and enforcing rights of person and property, which determines to just what extent business can be parasitic and still remain legal. And in a more fundamental way still, the individual is so molded in body, mind, and character by his economic activities and relations, stimuli and disabilities, freedoms and servitudes, that industry can truly be said to make the men and women who work in it, no less than the commodities it turns out for the market.

The courts have reflected this one-sided attitude of ignoring the effect of production upon people, both in framing the rules of the common law and in passing upon the constitutionality of legislation. They have been quick to impose an obligation to serve upon those engaged in occupations upon which the public is peculiarly dependent (pp. 38, 198-9), to refuse to enforce certain forms of restraint of trade, to permit drastic regulation of the service and rates of natural monopolies or public utilities (pp. 198-9), and to aid in the prevention of monopolies and combinations (p. 192). All of the practices aimed at by these acts and abstentions of the courts interfere with the operation of the machinery of production or directly obstruct the channels whereby demand is supplied. On the other hand corporations, being efficient instruments of production, have been aided in becoming the dominant form of business unit. Many attempts of legislatures to deprive them of some degree of power in the interests of workers or of the community have been defeated (p. 192), and the efforts of workers to oppose the might of organized capital with their own full strength have not, on the whole, been viewed with sympathy. The concept of "public interest," whereby limitation of the power of a business or industrial unit as against consumers is justified, needs to be extended so as to include a clearer recognition of the "public interest" in any economic relations and transactions in which parties are of unequal strength or have unequal facilities for obtaining needed information (pp. 199-200). Only thus can the effect of business upon workers and society as a whole, as well as its relations to consumers, be controlled.

Mr. Clark does not advocate any of the measures commonly proposed for limiting the power of the courts to pass upon the constitutionality of legislation. While he feels that greater freedom and responsibility for the legislatures would result in an improved quality of statutes (pp. 144-5), the primary need, he thinks, is for greater certainty and realism in the application of the "due process of law" clauses. The phrase, "due process of law," as it has been interpreted, is too broad. The constitutional provisions which embody it should be made into three separate provisions such that different ways of taking "life, liberty, and property" would be recognized and governed by different limitations (p. 202).

The first provision suggested would apply to the taking of life, of all of the liberty of a person, or of all of his rights in any bit of physical property. Here the present restrictions should stand unchanged.

The second provision would apply to the regulation of industries to which the doctrine of "public interest" in its present meaning applies, and it would define reasonable regulation more precisely than at present and permit a more satisfactory solution of the valuation question as it affects regulation of rates. The third provision would apply to all other restrictions upon liberty or rights of property, such as minimum wage and other "labor legislation," legislation designed to prevent the sale of harmful or adulterated products, legislation limiting the use of real property, such as zoning laws in cities, and presumably legislation affecting free speech and similar "rights." This provision would be so drawn, if possible, as to insure the validity of all acts of the legislatures which with any show of reason attempted to deal with conditions that could be demonstrated to exist.

This proposal is moderate enough, certainly. It would, of course, overthrow the decision in the case of *Meyer v. Nebraska,*[14] in which a law prohibiting the teaching of German in all the schools of a state was overthrown, and confirm the *Gitlow*[15] and *Whitney*[16] cases, in which state legislatures were upheld in their power to prohibit utterances which advocate revolution by force; but it is, perhaps, well that legislatures be made fully responsible for the policy of the state in matters of this kind, as well as in matters of social and economic import.

So far as concerns the legal system in general, Mr. Clark assumes that it will continue to perform its present functions, and he advocates its use as a tool in bringing about changes wherever it is likely to do needed work effectively. With the underlying views of John Locke and of Blackstone as to the purpose of law he has no fault to find. Law ought to promote personal security, personal liberty, and private property, but these are human needs rather than rights (p. 96). In promoting these needs choices have to be made, specific rights, wrongs, and duties recognized, and particular remedies employed. It is here, and particularly with reference to remedies, that the traditional legal methods at times prove inadequate. Even if a right to damages existed for injuries not now recognized, such as the injury resulting from the erection of a store in a residential neighborhood, it would be out of the question to have a common law of zoning which should provide redress. Nor could a court, even if applied to for an injunction, pass on the question satisfactorily. Matters of this sort require that the

[14] 262 U. S. 390, 67 L. Ed. 1042, 43 Sup. Ct. 625, (1923).
[15] 268 U. S. 652, 69 L. Ed. 1138, 45 Sup. Ct. 625.
[16] 71 L. Ed. (adv.) 675, 47 Sup. Ct. 641 (1927).

initiative in preventing infractions be taken by public officials and that expert tribunals have the deciding voice—in short, administrative justice. Similarly, disease prevention and other public services wherein the cooperation of all the members of a community is necessary, cannot be brought about by penalizing those responsible for harmful conditions. Legislation and court decision clearly must evolve methods which measure up to the demands of modern society upon them.

In the field of general substantive law, Mr. Clark points out, the crucial issues so far as economic questions are concerned, relate to the protection which is to be afforded to economic privileges or liberties—the privilege of using one's property, the privilege of trading with another, the privilege of working for another or of employing another, the privilege of persuading another not to work, and so forth (pp. 98-105). The whole working of the economic system under individualism depends upon the voluntary exercise of freedom by individuals. Most legal duties are negative in character—that is, duties to refrain from injuring rather than to perform useful acts or confer benefits (pp. 14-15). The chief restraints upon freedom, which these negative duties supplement, arise from the exercise of freedom by others—that is, from competition. It is, however, the further business of law to maintain a balance between conflicting liberties, and this is a delicate matter. It is often a matter of choice whether to call an interference with one man's liberty a wrong or simply an exercise by another of his own liberty, as has often been demonstrated in labor cases and cases involving trade competition. The rules of legitimate competition will remain for a long time the chief means of directing economic activity, and the courts must define many of those rules.

What has been noticed is, of course, only a small portion of *The Social Control of Business*. The greater part of the book is taken up with a realistic description of the results of the system of individualism and a discussion of the possible instruments of change, including an evaluation of the codes of ethics of various trades and professions. "Always the problem is twofold: first, can any other system show less waste and more surplus? and, second, what changes can be made without costing more than they are worth?" (p. 161). The author is skeptical and therefore conservative. His estimate of the possibilities of public ownership and operation (pp. 266, 289-90) is not such as to arouse the fears of adherents of private enterprise. His statements that in the public utility field "large profits are not expected" (p. 423) and that in the field of business at large "pro-

moters' profits as a major motive to combinations appear to belong largely to a past era . . . " (p. 428), indicate that he can even be charitable toward that business system whose exaggerated claims he does so much to deflate.

Conservatism, however, does not exclude a healthy willingness to experiment. One of the chief services which the book renders lies in its easily understood demonstration (ch. XXVIII) that individualism itself violates the law of supply and demand. There is no vast economic machine will be thrown completely out of gear by "interference" with its working. "Social control must reckon with the forces of supply and demand, but does not stand helpless before them" (p. 459). Following out this willingness to experiment, the last chapter, "If I Were Dictator," proposes the organization of industrial councils which, besides advisory duties, would "take on a wide range of quasi-public functions, doing things which would otherwise be done by congressional or state regulation." Thus there would be a "co-ordinate arm of government, based on individual instead of territorial constituencies." All this, however, would come about only "to the extent that these bodies should prove competent," and they would be "without formal powers of coercion." The political state is "not the only possible organ of social action" (p. 65), and its functioning is subject to serious weaknesses (pp. 186-9); but, as Woodrow Wilson wrote, "its sphere is limited only by its own wisdom" (p. 186). Presumably wisdom at the present time calls for it to retain its monopoly of physical coercion as a "gun behind the door."

III.

Mr. Laski's *Grammar of Politics* is no such survey of the possibilities of the present situation as Mr. Clark's book. It is radical both in the sense of going to the roots of social organization and in the sense of advocating far-reaching change. Its criticism of current institutions and its picture of an adequate governmental structure are far more satisfying than its fragmentary account of how we are to get from the one to the other.

The state, says Mr. Laski, is "an organization for enabling the mass of men to realize social good on the largest possible scale" (p. 25). While it is true that the state "is, in some form or another, an inevitable organization" (p. 88), it is false to give a particular state at a particular time any moral pre-eminence on that account. The state is not society. "The effective source of state-action is the small num-

ber of men whose decisions are legally binding upon the community" (p. 26). Their decisions may be good or bad, and the "instructed judgment" of each individual may lead him either to support or to oppose the state. If he disagrees with it he will, of course, weigh the consequences of opposition and employ only such means as seem wise under the circumstances (p. 39); but no state has any just claim to exist after a majority of its citizens have determined upon its overthrow.

Mr. Laski reverts again and again to "the individual, always, at least ultimately, isolated from his fellow men" (p. 141). In this individual are the roots of power, for it is upon his judgment of the manner in which he is being enabled to realize his own best self that institutions of all sorts must rely for their sanction. Any attempts to replace his judgment with that of another must fail, and so must any attempt to subordinate the good of all individuals to some other end.

Mr. Laski does not, however, like many other pluralists, hold to the view that it would be advantageous to replace the territorial state with a functional organization of society.[17] While it is true that functional organizations like labor unions and trade associations have an independent existence and command the loyalty of individuals, they represent aspects of the lives of people which it is impossible to fuse permanently into a whole. "To exhaust the associations to which a man belongs is not to exhaust the man himself" (p. 67). To combine associations cannot enable men to realize social good. For that purpose people must be organized as wholes.

> Within the State, they meet as persons. Their claims are equal claims. . . . They are, as a matter of social theory, simply persons who need certain services they cannot themselves produce if they are to realize themselves. Clearly a function of this kind, however it is organized, involves a pre-eminence of other functions. The State controls the level at which men are to live as men. . . . The State is regulating, directly and indirectly, to secure common needs at the level which the society as a whole deems essential to the fulfilment of its general end.
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> That is the function of the State in society. It is the association to protect the interests of men as citizens, not in the detail of their productive effort, but in the large outline within which that productive effort is made (p. 70).

The state, to a considerable extent, ministers to people as consumers.

[17] This view is perhaps best set forth in the writings of G. D. H. Cole.

"In an aspect of this kind, the State is obviously a public service corporation" (p. 69).[18]

In thus ministering to the needs of people the State serves the end of liberty. For:

> Liberty . . . is a positive thing. It does not merely mean absence of restraint. . . . My freedoms are avenues of choice through which I may, as I deem fit, construct for myself my own course of conduct. And the freedoms I must possess to enjoy a general liberty are those which, in their sum, will constitute the path through which my best self is capable of attainment. . . . Freedoms are . . . opportunities which history has shown to be essential to the attainment of personality (pp. 142-4).

Liberty is founded upon equality, properly understood (pp. 152-72).

The state, in Mr. Laski's view, is bound to secure conditions for the laborer which make possible "the realization of his humanity" (p. 110). Legislation to this end is not a deprivation to anyone of his liberty. It is simply securing the liberty of those who would otherwise be oppressed. It is, in fact, part of a general system of checking the exercise of power by groups. For, as Mr. Laski repeats again and again, it is the plain lesson of history that "unhampered enjoyment of power by a minority will always result in a selfish use of power." And it makes no difference whether the power be economic or political, or whether it be exercised by private individuals or by public officials.

The importance of law in regulating the use of power and in realizing the rights of the citizen is one of the points which Mr. Laski stresses most strongly. He has a keen sense of the significance of those "legal technicalities" which frequently are visited with contempt by social scientists.

> What seem, on the surface, he says, to be insignificant procedural changes—as when a man becomes entitled before trial to a copy of the indictment upon which he is charged, or is able in the witness-box to testify upon his own behalf, or may appeal from the verdict of a jury and the sentence of a judge to a body of legal experts beyond them—these, for all their forbiddingly technical character, are more nearly related to freedom than the splendid sentences in which Rousseau depicts the conditions of its attainment.
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> It is, Mr. Laski says further, integral to the notion of a

[18] This is the theory of M. Leon Du Guit, a famous French jurist and political scientist, to whom Anglo-American pluralists are heavily in debt. See the preface to the second edition of Du Guit's TRAITE DE DROIT CONSTITUTIONNEL (1921).

> State built upon right that the citizen should be surrounded by full judicial safeguards. . . . There is rarely a better index to the quality of the State-life than the justice it offers to its citizens. . . . The rule of law, in brief, is fundamental, and the rule of law means that no person, and no office, however exalted, are exceptions to the rule of law.
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> There are two obvious corollaries to this doctrine. The first is the genuine independence of the judiciary. . . .
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> The second corollary is that the union of the executive and the judicial function is inadmissible" (p. 128).

It follows, as regards what is termed administrative law, that

> The power of the judiciary over the executive is, . . . if contingent, nevertheless essential. . . . There must be complaint before decision, and the complaint must come from the citizen body. But when the complaint is proved, the executive should have no authority to transcend the judicial will. Remedy, if remedy be required, is the business of the legislature (p. 298).

The state, furthermore, should be suable for all wrongs (p. 394). The judiciary should be appointed and be removable only for physical disability or corruption, and this is true even though the appointive system has been abused by politicians (pp. 300-1, 545-9). Political and judicial office should not follow one from the other (pp. 551-2). Courts of general jurisdiction should be manned only by trained lawyers as judges (p. 561), with juries to safeguard individuals in criminal trials and in civil trials in which the personal element is prominent (p. 360). But cases which, for example, concern especially a single trade might well be tried in the first instance by courts set up within the trade (p. 562).

The fact that all is not well in the temple of justice does not go unnoticed. Punishment is not fitted either to the offense or to the criminal (pp. 563-4). The poor do not have access to the courts, and public offices for the giving of legal advice are badly needed (pp. 564-72). Lawyers are unduly conservative, and it is essential that they bestir themselves so as to bring about a "continuous improvement of the law" (p. 672-80). The specific suggestions which the author makes to this end are five in number: (1) changes in legal education so as to make it more a "human and philosophic discipline"; (2) better organization of the profession for research and improvement; (3) constant official research into the problems of the administration of justice; (4) the utilization of lay experience with the working of law; and (5) the utilization of judicial experience. Each unit of legal organization ought to be "not merely a trade union but also a research or-

ganization," through which the bar "would seek to answer, not merely general legal problems, but also the special legal problems of their own city."

The particular question of the relation of the courts to the constitution is one with respect to which neither the American system nor the system in his own country, Great Britain, satisfies the author. There should, he thinks, be a written constitution with fundamental provisions to safeguard the individual, which might be amended by two-thirds vote of the legislature (pp. 304-5). In a federal state, however, the distribution of power is a judicial question, and amendment of the constitution must be more difficult than in the case of a unitary state, although not so difficult as in the United States (pp. 306-7).

Mr. Laski's main argument, of course, goes far beyond the points here noticed, and it will be possible only to indicate his fundamental thesis. It will be impossible, he thinks, to maintain a healthy society unless the property system is drastically modified—in fact, all but wiped out—and unless education becomes much more widely disseminated than it now is. Many pages are spent in denunciation of the injustice and cruelty of the present order, and political democracy is declared to be impossible in the face of concentrated economic power. Education, of course, is essential to the individual's self-realization and his participation in government.

Assuming that these two reforms have been wrought and that all possible safeguards against the abuse of power have been erected, it is necessary to base the legislative and administrative structure upon recognition of the fact that, "Will that is made by activity as distinct from consent that is inferred from reception is the foundation upon which authority must be based" (p. 244). Accordingly all possible means must be provided for the activity of persons and groups in connection with matters which concern them. Organization all down the line, by shops, by trades, by professions, by industries, by consumer groups, and by neighborhoods and communities, is essential. Each group is entitled to self-government of its internal affairs and to be consulted by external authority, from the central legislature and executive on down, before decisions are made which affect it. Only thus can experience be utilized as a guide in shaping policy, the individual be made to feel that his interests have received due weight in the making of decisions, and government be established firmly enough to withstand the inevitable shocks. Self-government of industry is implied; but a large part of it would become public enterprise, and pri-

vate industry would be subject to minimum standards established by the state and to safeguards which would, for example, put it beyond the power of any craft to visit expulsion of a member from his vocation (p. 514).

The foregoing logic, which calls for participation by all interested parties in the government of all human affairs, with the common good as the ultimate aim, applies in the international sphere as well as in connection with the affairs of a particular state. Questions which concern all nations must be decided only after due representation of all, and there must be adequate machinery to give effect to the law thus formulated. For obvious reasons that machinery will be less compact than in the merely national state, but it will be none the less effective for its purpose. The difficulties connected with the doctrine of sovereignty, it need hardly be said, do not trouble the author as they do the lawyers in the United States Senate.

IV.

Mr. Commons' chief concern in *The Legal Foundations of Capitalism* is with the question of how it is that things get done one way rather than another. Stated differently, the problem is why certain values, rather than others, come to prevail. To put a typical question, What really determines that a railroad shall spread itself over a large part of a continent and render service of a certain character for a certain price? Or that children shall receive an education of a certain quality at the expense of taxpayers whose relative contributions are what they are? Or that one business may compete with another in certain ways but not in others? Or that the marriage relation is what it is?

The traditional answer would be that individuals, pursuing their self-interest and meeting with others doing the same thing, had, by contract, evolved these means of satisfying their several wants. It would be recognized, in addition, that the state, by fiat, had established certain rules to insure fair play, and that account would have to be taken of these rules. All else would be conceived to follow from the interplay of the foregoing forces. Of course this answer does not satisfy Mr. Commons.

What he sees, first of all, is certain limiting factors. The "principle of mechanism" and the "principle of scarcity," which the older economists recognized (ch. I), are at work and do in a sense limit what the human race can accomplish (p. 135). But the really re-

markable aspect of life, and the one with which the social scientist is primarily concerned, is the aspect of "economy." Economy is the proportioning of resources, and the result of it is not a sum but a product. By means of proper economy the resources at the command of the race can be made to yield an indefinite store of value. The difference between bad and good economy is the difference between extinction of civilized life and the attainment of higher and higher levels.

> A single glove on the one hand may yield a certain pleasure, but if there is no glove for the other hand the total happiness is grievously impaired. The whole is not the sum of the parts but an amazing multiple of them. Throughout the entire scheme of proportioning food, clothing, shelter, whiskey, and miscellaneous, the pleasure derived from all is *not* a *sum* of pleasures or virtues but a *multiple,* in which one little mistake or vice, though it be but an act in ten thousand, vitiates the pleasure or virtue of all the others and transforms happiness into misery, morality into scandal.
>
> Thus it is that in the economy of nature and man the mere proportioning of resources, without enlarging or expanding them, or even in spite of their contraction and repression, creates of itself new and astonishing products of a higher, or at least a different order in the scale of values. Chemical activity is a reproportioning of chemical elements; business assets, personal happiness and moral character are a reproportioning of the opportunities and powers that constitute resources (p. 41).

There is, further, an "ascending scale of economy from nature to man and society" (p. 42). When one examines social, or political, economy, he discovers that the determination of how things shall be done is made by a whole hierarchy of institutions and functionaries, each exercising control and making decisions within certain limits (pp. 134-151). Take, for example, a contract for a job of plumbing. The number of institutions and functionaries which has a hand in fixing the terms of the bargain will vary with the circumstances, but it is certain to be considerable. The parties themselves may haggle over the profit to be allowed on the job, choose between different styles of fixtures, and so forth. But the wages of the men who do the work probably are fixed by custom and agreement and maintained by the vigilance of trade union officials, while the price of materials may be fixed by agreement among the manufacturers and maintained by sundry kinds of pressure. The plumber's church or that of the owner of the house, in conjunction with a trade union or in the absence of one, may dictate that none of the work shall be done on Sunday. The owner's

wife may see to it that no unduly bad language is used during the course of the work. The plumber could not do the work at all if he had not been licensed by the state, and the work itself probably must conform to certain requirements prescribed in statutes. Farther in the background, certain judges have laid it down that the various lesser members of the hierarchy of control are justified in enforcing certain dictates but not others and in employing certain means of coercion but not others. All down the line, from the minister and the wife through the plumbers' walking delegate to the licensing officials, the sanitary inspector, and the judge, the various functionaries exercise greater or less discretion. The wife must decide whether certain language violates the proprieties; the minister whether special circumstances justify Sunday work; the walking delegate whether the plumber must employ a helper; the licensing officials whether the plumber is qualified; the judges whether it violates the law, which, in part, has been laid down by the legislature, for the manufacturers to maintain prices and whether it is constitutional to require that plumbers have licenses. Each of these decisions must be maintained by adequate authority and find support in the wills of those affected by it, or it will break down in the face of opposition. The resultant of the whole mass of decisions, pressures, agreements, and oppositions is the particular job of plumbing.

In the hierarchy of control which governs the mass of relations and transactions Mr. Commons distinguishes three kinds of institutions: cultural, such as churches, clubs, lodges, and families; economic, such as corporations, labor unions, and trade associations; and politico-legal, such as legislatures, bureaucracies, and courts (p. 64). Each has its officials, to whom is entrusted greater or less discretion. What controls the discretion of an official is rules, expressed or unexpressed, which are backed by some species of coercion; and similar rules govern the individual in his actions as a private citizen. These rules are based upon precedent, and they are modified and further defined by each successive exercise of discretion or, occasionally, by direct departure from precedent. The prevailing body of "working rules" determines the economy of the time (pp. 134-142).

No lawyer needs to be told that the foregoing account of the genesis of "working rules" is a statement of the growth and application of the common law. It is partly because Anglo-American lawyers and judges have long been to some extent conscious of the nature of what they were doing and have, consequently, left an adequate series of records, that

Mr. Commons selects the law, rather than some other institution in the hierarchy of control, as his object of study in relation to economy (pp. 83-4). Chiefly, however, it is because, as society is now organized, especially in the United States, law and the courts are actually supreme over other institutions in the fields in which they operate (pp. 100, 145).

A large part of *The Legal Foundations of Capitalism* is devoted to tracing the legal development by which the idea of property has been transformed "from physical things to the exchange value of things" —"from a concept of *holding* things for one's own use to *withholding* things from others' use, protected, in either case, by the physical power of the sovereign" (p. 52). This transition is the legal aspect of the transition from a feudal economy to a business economy, for it is property which is the controlling factor in the present-day economic system.

> Where production was isolated, or the owner held under his control all of the material things as well as the laborers necessary to the support of himself and dependents, the concept of exclusive holding for self was a workable definition of property. But when markets expanded, when laborers were emancipated, when people began to live by bargain and sale, when population increased and all resources became private property, then the power to *withhold* from others emerged gradually from that exclusive *holding* for self as an economic attribute of property. The one is implied in the other, but is not unfolded until new conditions draw it out (p. 93).

The essence of the modern idea of property is "expected transactions on the market where one's assets and liabilities are determined by the ups and downs of prices" (p. 20). The unfolding of the idea of property as it is now entertained occurred through the commutation of feudal dues (ch. VI), making the holding of land largely a means to money income; through the development of the concept of choses in action (pp. 235-40) and the growth of the law of negotiable instruments (pp. 246-54); and through the recognition of good will, or expected transactions in the market, as property (pp. 261-288). At the present time the conflict in this field relates to the valuation of public utilities for rate-making purposes, where, for example, one question is whether the monopoly power of utilities over consumers shall be recognized as an element of value, or as property, upon which the owners are entitled to a return (pp. 172-213).

It was through Coke's fruitful misconception as to the meaning

of Magna Charta, whereby the meaning of "liberties" was changed from franchises to freedom, that a legal basis was found for extinguishing the royal prerogative in economic affairs and throwing the field open to private initiative, or to property (pp. 47-51). The modern problem is to create a basis for limiting the power of property. A basis is being constructed by the development of the doctrine of "public interest" or "public purpose," whereby the legislature is enabled, within the limits of "due process of law," to give effect to the demands of the common welfare (ch. IX). More than this, the rival power of associated labor—also freed by a legal development—is asserting itself and forcing the courts to choose between recognition of its rights and the rights of property (ch. VIII).

At present as in the past, as Mr. Commons sees, the judges are laying down new law and charting the course for the future. They derive their new law from custom, or from non-legal precedents, as well as from extension of recognized legal principles. But they are not mere mouthpieces of forces which control them. They choose between customs, and "whoever chooses is the lawgiver" (p. 300). In giving the law the judge, however firmly he feels himself bound to "the collective reasoning of the past and the present" (p. 352), necessarily gives effect in some degree to purpose, and the purpose to which he gives effect can be none other than his own purpose (p. 354), which the just judge makes as expressive as he can of the best values about him. For the time being at least his purpose is the social purpose; for "America has at last attained the ideal of Plato, two thousand years ago, of a government of philosophers" (p. 361). For himself, the philosopher has done his work well when he attains a "satisfied sense of fitness"; but the ultimate judgment will come from the disposition which is made of his work by "the predominant forces of society" (p. 366).

Mr. Commons, unfortunately, has tied himself in his book to the view that the world of human affairs may be broken up entirely into "transactions" which it is the purpose of working rules to govern. This conception is a fruitful one, but it does not account for everything. One can, perhaps, take the view that the inability of an employer to force an employee to remain at work forbids the "transaction" of beating him into submission or of imprisoning him, or that it is an implied term in the "transaction" of hiring. But it seems better to regard it as a rule which governs a continuing relation,[19] and

[19] GRAMMAR OF POLITICS, 276; Pound, SPIRIT OF THE COMMON LAW, 20-31.

Mr. Commons' system loses nothing in consequence of the change. A related error is that of including many dreary pages of analysis and criticism of the Hohfeld system of jural relations,[20] whereby the various possible and impossible "transactions" between individuals are finally systematized and tabulated. As a check upon the logic of lawyers and courts such a system is of value, but it is of doubtful aid in making clear to lay readers the place of law in governing the conduct of people.

V.

When one comes to summarize the significance of the foregoing books to the lawyer, he is met at the outset by the criticism that they are of no significance at all, for the reason that they are the work of men who are not initiated into the craft. Mr. Commons has been castigated by one reviewer[21] for confusion in the use of complicated legal terminology, for errors in technical legal history, and for mistakes in the statement of points of law. Mr. Clark, in *The Social Control of Business,* is not guiltless of similar offenses. He too yields to the fascination of neat but complicated diagrams (pp. 102-3); he refers to the contract clause of the Federal Constitution as a part of the Bill of Rights (p. 194, n. 1); and he states that "receivers always have the power to raise capital by issuing 'receiver's certificates'" (p. 124). Even Mr. Laski, who is more wary, tells the reader of *A Grammar of Politics* that "It has been decided by the highest American tribunal that the decisions of the Secretary of Labor in all immigration cases are final" (p. 389).

But these are not essential points. What it is essential to decide is whether an economist or political scientist who deals with law has correctly stated the substance of its influence upon the problem he is attacking; whether he has apprehended the forces that have been active in the work of legislatures and courts; whether he has grasped the place of law in the strategy of the present and of the future; and whether he has brought to light the economic, political, and social factors of which the law ought to take account. Analysis of this sort, no matter by whom it is accomplished, is of the utmost value so long as the collateral errors do not eat into the core of the work. Errors there will be; for the economist and the political scientist can no more keep out of the legal field than the jurist can keep out of economics and political science. Business men, politicians, and lawyers

[20] 23 YALE L. J. 16; 26 YALE L. J. 710.
[21] G. C. Henderson, in 37 HARV. L. REV. 923.

in their daily work can hire each other; but not so students, who must see things whole.[22]

Measured by the standards which have just been defined, the authors of the three books here reviewed have been successful. A composite picture, drawn from their several works, reveals few conflicts. It may fairly be said to represent the general views of those who are in the van of the social sciences at the present time.

The picture is not a simple one. "We have, above all, lost confidence in the simplicity of the earlier thinkers."[23] Complexity is inevitable because "The grounds of complexity lie in the facts.[24] We must, in short, study the "stubborn, irreducible facts" and not seek to ignore differences or to gloss over difficulties. If the ultimate synthesis is more complicated than formerly it may also prove to be richer in values and more permanent, yet freer in its development.

For the lawyer the main outlines are clear. The state whose instrument he is, is a finite institution which must be justified by its works. But in some form an organization, with human beings as ultimate units, is inevitable; and it must have law as its foundation and its cap-stone. It is not unreasonable to hope and to believe that the present state and the present law, if they are developed with sufficient intelligence and liberality of spirit, will continue indefinitely to occupy a position of primacy among instruments of control.

The needs which must be met, however, are many. It must, first of all, be recognized that freedom without opportunity is an empty and a useless thing and that it is as much the task of the law to provide the latter as to preserve the former. There must, secondly, be a realization on the part of lawyers and judges that the values and interests with which the law will deal tomorrow are real factors today in commerce and industry, urban life and rural society. There the legal profession must increasingly resort for materials with which to work and for appreciation of the character of the task which faces it. The dangers of that centralization of power which many lawyers fear must, in the third place, be avoided by insuring to each group in the com-

[22] "All the social sciences must be co-workers, and emphatically all must be co-workers with jurisprudence. When we set off a bit of social control and define its bounds by analytical criteria and essay to study it by its own light and with its own materials and its own methods exclusively, our results, however logical in appearance, are as arbitrary and as futile for any but theoretical purposes, as the division of the body of the defaulting debtor among his co-creditors in primitive law." Pound, LAW AND MORALS, 123-4.

[23] GRAMMAR OF POLITICS, 15.

[24] *Ibid.*, 271.

munity, whether it be economic, cultural, or geographic in character, the greatest possible control of its internal affairs and a genuine voice in the larger matters which concern it. The integration which the community, or central state, makes of these various group activities must, in the fourth place, be such as to assert unhesitatingly the paramount importance of the ends it holds in view, and these ends must be defined by judges whose sympathies are broad and whose vision extends beyond the present. There must be a willingness, lastly, to yield first place to the ends of that world community which is coming into being.

These points are not new, nor are there lacking jurists who have asserted them again and again. What the social scientists have done better than the jurists, however, is to envisage the entire social system and, with appreciation of the realities of the toiling world, to assert the possibility of an order of things in which there shall be economic justice and yet be at least as much as before to go around. If the legal profession can but adopt this attitude, we may, in the words of a foreign observer,[25] "feel confident that the capacity which the common law has exhibited through so many centuries, of flexibly adapting itself to the needs and economic life of the people, will again be displayed, and that the law will prove equal to its next great task, inexorably imposed upon it by the modern organization of a completely industrialized democracy. . . ."

One further point requires mention. Both Mr. Clark, though with reservations (pp. 67-79), and Mr. Laski (p. 16) assume democracy as the true form of governmental organization and some sort of equality as the purpose of society. Mr. Clark does so because democracy seems undeniably a part of the temper of the present age; Mr. Laski because history teaches the inevitable downfall of any system conducted by less than the whole people for the benefit of all. The raucous voices of Mr. Mencken and his not inconsiderable following, as well as the admiration which is felt for Benito Mussolini in some quarters, serve to remind us, however, that there are dissentients in this country from the temper of the age; and there are many who will read history differently from Mr. Laski. The intelligence testers, moreover, call attention constantly to the abandonment of democracy which some of them think lies just around the corner. If any of these

[25] Josef Redlich, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (Carnegie Foundation for the Advancement of Teaching, 1914), 65.

schools of thought comes to prevail, we shall have to discard Mr. Clark and Mr. Laski.

Not so Mr. Commons. He is as good a democrat as either of the other two, as a lifetime of concern with labor problems proves. But his machinery of control can serve any master, and the discretion of his judges and lesser officials can be exercised in one direction as well as in another. Mr. Commons does not, in *The Legal Foundations of Capitalism,* attempt to define the ends which the social order must serve, although it is clear where his sympathies lie.

Lawyers and judges as well as social scientists, of course, need to know which ends are to be chosen as well as how the machinery operates by which the choosing is done. In an age in which pragmatism is the prevailing philosophy one can appeal to experience as Mr. Laski does, or select the prevailing view like Mr. Clark, and define one's purpose upon that basis. But if the "intellectual climate" changes, as it may be doing today, democracy will need defenders armed with other arguments to supplement pragmatic ones. Social scientists, lawyers, and jurists, when they cannot leave open the question of ends as Mr. Commons does, will have to write books which apply only to one age, or ground their purposes firmly—in religion and metaphysics!

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