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The Canon of American Legal Thought

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THE CANON OF AMERICAN LEGAL THOUGHT

Edited by David Kennedy and William W. Fisher III.
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REVIEWED BY ROBERT E. RODES, JR.

Professors Kennedy and Fisher have put together a book containing twenty essays, most of them first published in law reviews. They are elegantly presented, and each is preceded by an introductory essay by one of the editors, which provides background information on the author, analyzes the piece lucidly and succinctly, and situates it in the development of American legal thought. Each piece is also preceded by a bibliography, which further situates it by describing the rest of the author's work and summarizing the commentary it has evoked. All the works are given in full, adding considerably to what can be learned from the casebook extracts. It is interesting, for instance, to learn what cases Felix Cohen uses to illustrate his famous *Transcendental Nonsense and the Functional Approach* (173), and to find on looking them up that they are neither transcendental nor nonsense.[1]

Kennedy and Fisher call their book *The Canon of American Legal Thought*, and characterize the works included as "the twenty most important works of American legal thought" (ix). Any reviewer worth his salt will naturally take such a claim as a challenge. Actually, though, there are only a few works included that I would have left out, or left out that I would have included. First of all, I would have put in something by Roscoe Pound. To be sure, the most important expressions of his thought are in books rather than law review articles, but the books have freestanding chapters that could have been used.[2]

Among law review articles, I would not have left out Charles Reich's "The New Property"[3] or Margaret Jane Radin's "Property and Personhood."[4] In explaining their choices (12-14), the editors tell us that they have relied to a considerable extent on what weight their colleagues in the legal academy assign to different works. They were sorry, they tell us, to find so little

1. For instance, he is scornful of a line of cases on whether a foreign corporation can be served with process in a state. But the arguments would be no different if it were a natural person residing in another state and being served through his local agents. Cohen may be right in preferring arguments more addressed to the practical consequences of deciding one way or the other. But the arguments actually used are, as I say, neither transcendental nor nonsense.

2. I use in my Jurisprudence course "The Courts and the Crown," Chapter III of *The Spirit of the Common Law*, and "The Task of Law," Chapter III of *Social Control Through Law*.

3. *Yale Law Journal* 73 (1964) 734.

4. *Stanford Law Review* 34 (1982) 957.

mention of Reich's work among colleagues today. I believe that is because his insights have so thoroughly prevailed in the law that questions about them are no longer interesting. The editors do not mention Radin at all; neither, presumably, do their colleagues. I suppose that is because her insights have not yet come into their own. I think they are more important than many of the insights deployed here.

As for criticism of what the editors chose to include, I would say first that they have done an injustice to Karl Llewellyn by using "Some Realism about Realism" (141), which is, after all, more a compendium of other people's thought than an example of his own. My choice would have been "Law Observance versus Law Enforcement."[5] In the case of Robert Cover, I would have preferred his "Nomos and Narrative"[6] to the editors' choice of "Violence and the Word" (753). The latter piece devotes a great deal of its argument to the death penalty, which is so far *sui generis* that nothing one says about it can be applied with confidence to anything else.

On Feminist Jurisprudence, the editors have chosen "Feminism, Marxism, Method, and the State" (847 and 869), a two-part article by Catharine MacKinnon. For Critical Race Theory, they have used the Introduction by Kimberlé Crenshaw, Niel Gotanda, Gary Peller, and Kendall Thomas to an anthology on the subject, *Critical Race Theory: The Key Writings that Formed the Movement* (903). In both cases, the editors seem to have chosen a more sweeping critique of existing institutions over a more practical one.[7] In other works, MacKinnon has told us very clearly and persuasively where she thinks the law goes wrong in its treatment of women and what she thinks should be done about it.[8] Here, though, her main complaint about the law seems to be that too many men are involved in making and applying it. In the case of Critical Race Theory, the function of an Introduction is to introduce, so the

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5. *Proceedings of the Conference on Social Work* 127 (1928).

6. *Harvard Law Review* 97 (1983) 4.

7. Perhaps my disagreement with the editors here relates to the distinction between Legal Theory and Jurisprudence, which they develop briefly on pp. 2-3. Jurisprudence seems to be more centrally concerned than Legal Theory with what will enhance the wisdom and resourcefulness of working lawyers. Yale Law School Professor Robert W. Gordon says in a back cover blurb that Legal Theory is "of more general interest to law students than jurisprudence." I hope he is mistaken. For my view of the scope of Jurisprudence, see my *Pilgrim Law* (Notre Dame, IN: University of Notre Dame Press, 1998), 1-3. For another take on the relation between the legal academy and working lawyers, see Mary Ann Glendon's critique of "The New Academy," *A Nation under Lawyers* (New York: Farrar, Straus, and Giroux, 1994), 199-229.

8. E.g., "Pornography as Defamation and Discrimination," *Boston University Law Review* 71 (1991) 793; "Reflections on Sex Equality under Law," *Yale Law Journal* 100 (1991) 1281.

editors have introduced us to a whole body of material without giving us any of it to read.

In any event, it is pretty clear that sixteen of the twenty articles in the collection belong there. I will not attempt an extensive comment on any of them; each has been extensively commented on, and the results have been cited and discussed by our editors. I will try rather to point out a few common threads running through the whole body of the material. These do seem to be, as the editors intended, the main themes of American legal thought in the twentieth century. The works are divided both chronologically and thematically, pursuant to the editors' perception of the way in which themes succeed one another in the ascendency. In my own thematic treatment, however, I will disregard the chronology.

The whole enterprise seems to be set in motion by a new awareness that law is not merely a set of general rules—do this; don't do that—to be applied by judges to particular cases that come before them. The law has a task, and its practitioners, judges, lawyers, legislators, administrators, and all, have a set of tools with which to carry it out. These papers are all devoted to refining the tools, reformulating the task, or both. Holmes's "The Path of the Law" (29), with which the collection naturally begins, began the attack on rules and deductions. John Dewey, whose "Logical Method and Law" is included here (23), offers a philosophical coherence to the idea of testing rules by their effect on cases as they come up. Felix Cohen's piece, to which I have already referred, urges us to reorganize our legal concepts to reflect what we want to accomplish with them.

Conceptual refinement is of course the main theme of Wesley Hohfeld's "Fundamental Legal Concepts" (55), source of the "Hohfeldian" analysis so familiar to law students of my generation. Other works in the collection also seem primarily aimed at conceptual refinement. Thus, Guido Calabresi and Douglas Melamed in "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (415) offer what they call a framework for classifying property rights and entitlements in accordance with their susceptibility to transfer. Duncan Kennedy, one of the founders of the Critical Legal Studies movement, is represented here by "Form and Substance in Private Law Adjudication" (661), in which he relates different ways of judging to different views of the relation between the individual and society. Marc Galanter, in "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change" (495), shows how our system of litigation favors "repeat players" over "one-shotters," and offers a few suggestions for leveling the playing field..

Articles that can be regarded as reformulating the task begin with a 1923 piece by Robert Hale, "Coercion and Distribution in a Supposedly Non-

coercive State" (93). Hale points out that the distinction between interfering with the economy and letting it alone is illusory: protecting property and enforcing contracts is as much of an interference as confiscating property and invalidating contracts. It follows that we cannot avoid deciding what approach is best in a given situation. Lon Fuller's "Consideration and Form" (221) deploys a rather similar insight in analyzing the rationale for requiring a showing of consideration if contracts are to be enforced. Ronald Coase, in "The Problem of Social Cost" (365), looks at the law of nuisance in terms of weighing gains to one party against losses to another, and so lays the foundation for the Law and Economics movement.

There are three articles in the collection that call for rethinking tools and task together. Henry M. Hart, Jr. and Albert M. Sachs, in a segment of their unpublished (albeit fairly widely distributed) casebook, *The Legal Process: Basic Problems in the Making and Application of Law* (255), deal with the multiplicity of tribunals, proceedings, and negotiations set in motion by a carload of spoiled melons, bidding their students take the whole apparatus into account, and see how it does or does not support fair dealing between merchants and a supply of fresh fruit for the public. Stewart Macaulay, in "Non-Contractual Relations in Business: A Preliminary Study" (465), uses the tools of sociology to examine how the law of contracts and its enforcement affect the actual practice of business people in dealing with one another. Abraham Chayes, in "The Role of the Judge in Public Law Litigation" (612), considers the way litigation is often used not so much to determine the dispute between the parties as to establish what the law is to be for everyone.

To the extent that judges, with their limited political accountability, make laws rather than apply laws made by other people, a serious question of legitimacy arises. By what right do these people, accountable to no one but themselves, make our laws for us? Chayes raises the question, but is content to leave it pretty much up in the air. Three articles address it directly. Herbert Wechsler's "Toward Neutral Principles of Constitutional Law" (325) argues that judicial decisions are legitimate if they are "principled," and that they are principled if they rest "on reasons that in their generality and their neutrality transcend any immediate result that is involved" (337). Ronald Dworkin, in his article, "Hard Cases" (564), develops a much more elaborate theory of principled judging. He distinguishes between "principles," which are for the courts, and policies, which are for the legislature. "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal" (570). Arguments of principle are the ones it is proper for a judge to consider. Frank Michelman, in "Law's Republic" (790) (perhaps named in response to Dworkin's book, *Law's Empire*), puts Dworkin's two concepts back together, and suggests that

the courts are simply one of a number of elements through which a social consensus on "republican" values is developed and maintained: "Why *ought* the Supreme Court not be an organ of politics if that is what it takes to secure liberty and justice...?" (792).

Putting all this material together, what can we learn about the way the work of the law has been carried on in our country during the century just ended? A few things, I am sure, of enduring value. First of all, that law is a technology, not a mere deductive science. Our profession places us in control of powerful forces that have a profound effect on the world around us, and it behooves us to know what we are doing when we deploy them. Anyone who helps us learn more about what we are doing, as several of these authors do, is doing us a service. Second, judges have choices to make in deciding cases. Their decisions are not determined for them either by existing legal materials or by the facts proved before them. On the other hand, they are not free to dispose of people's affairs exactly as they think best. They must look for principles which, if they are not "neutral," will at least enable them to treat like cases alike.

It is here that these authors, and, with them, the whole intellectual enterprise they represent, are less than successful. For instance, when Wechsler advocates neutral principles, he says very little about neutral as between what and what. Dworkin, in distinguishing between policies and principles, has nothing much to say about where to find either. Duncan Kennedy formulates a dichotomy between "individualism" and "altruism" in such a way that one is about as unattractive as the other. His individualism seems to be purely egotistical, his altruism purely communitarian, so that any vision of a society of individuals treating each other decently seems to fall between the cracks. Michelman appeals to something that looks very like a *Volksgeist*,[9] but takes no account of the inherent moral ambivalence of the *Volk* beyond expressing a wistful trust in the judiciary to make things come out right.

There is no point going on with these thumbnail critiques of the different authors. What they add up to is that nowhere in the collection is there a guiding vision of right and wrong, or of the role of law in embodying the best moral reflection of the community, and showing how we can all live comfortably together and encourage one another to do good and avoid evil. That, of course, is not the fault of the editors. They cannot be expected to include material that is not there to be included. Rather, by putting together so much and such wide-ranging material, they have newly underlined a continuing defect in American legal theory, and, indeed, in American law.

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9. See my "On the Historical School of Jurisprudence," *American Journal of Jurisprudence* 49 (2004) 165.

The works in this collection may not be indisputably the twenty most important works of American legal thought, if, indeed, there is any criterion by which the importance of such works can be measured. But they are all very good, and they are all examples—some of them seminal examples—of important trends. With their generous and lucid critical and bibliographic introductions,[10] they will surely come to be the first place anyone will look who wants to find out about one of the schools or authors represented. If they are not now the Canon of American Legal Thought, this book will go far toward making them so.

10. I count 159 pages of introduction and 55 pages of bibliography to 623 pages of articles.