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## Fuller, The Morality of Law

Ovid C. Lewis

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## Fuller, The Morality of Law

### Erratum

PAGE 351, LINE 7: change "proffered" to "profered."

## BOOK REVIEWS

THE MORALITY OF THE LAW. By Lon L. Fuller. New Haven: Yale University Press. 1964. Pp. vii, 202. \$5.00.

The heuristic value of a theory is reflected by its capacity to provoke curiosity, stimulate further research and writing, stir up doubt, and even arouse disbelief and resistance to its acceptance. If the heuristic influence of a theory of law is the crucial test for its significance, then that presented in *The Morality of Law* passes with ease. Since publication last year, the interest, and sometimes disbelief, generated by this little book has produced fourteen book reviews<sup>1</sup> and a comprehensive critique.<sup>2</sup>

Unfortunately the direct utility of Fuller's theory of law for a fuller understanding of law and legal institutions is not as readily discernible as is its heuristic impact. In fact, the noted proliferation of commentaries concerning his text constitutes in part, a protest to a theory of law that portends obfuscation rather than elucidation. Such a protest is scarcely startling since Professor Fuller apparently is involved in a one-man recrudescence of natural law theory which "is the view which denies the possibility of a rigid separation of the *is* and the *ought*, and which tolerates a confusion of them in legal discussion."<sup>3</sup> Although the resulting failure to distinguish facts from values and morality from law, will "inevitably tend to obscure the boundary between law and morality and to im-

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<sup>1</sup> Brady, Book Review, 43 TEXAS L. REV. 258 (1964); Campbell, Book Review, 28 MODERN L. REV. 370 (1965); Dias, Book Review, 1965 CAMB. L.J. 157 (1965); Hanft, Book Review, 43 N.C.L. REV. 238 (1964); Hart, Book Review, 78 HARV. L. REV. 1281 (1965); Hosking, Book Review, 40 CALIF. S.B.J. 90 (1965); Hughes, Book Review, 17 STAN. L. REV. 547 (1965); Mandelbaum, Book Review, 10 N.Y.L.F. 648 (1964); McDowell, Book Review, 44 B.U.L. REV. 587 (1964); Meyer, Book Review, 10 MCGILL L.J. 380 (1964); Rose, Book Review, 39 TUL. L. REV. 387 (1965); Savarese, Book Review, 53 GEO. L.J. 250 (1964); Tucker, Book Review, 40 IND. L.J. 270 (1965); Wasserstrom, Book Review, 19 RUTGERS L. REV. 581 (1965).

<sup>2</sup> Summers, *Professor Fuller on Morality and Law*, 18 J. LEGAL ED. 1 (1965).

<sup>3</sup> FULLER, THE LAW IN QUEST OF ITSELF 5 (1940). For a critical review see Cohen, *Should Legal Thought Abandon Clear Distinctions?*, 36 ILL. L. REV. 239 (1941). In commenting on *The Law in Quest of Itself*, Professor Cowan observes: "Fuller shows in this book quite clearly the links of modern legal realism with natural law. In fact, he just barely misses calling for a revival of natural law." Cowan, *A Report on the Status of Philosophy of Law in the United States*, 50 COLUM. L. REV. 1086, 1096 (1950). The thesis advanced here is that in *The Morality of Law* Fuller does not miss. On the confusion and difficulties inherent in the natural law approach see Kelsen, *Plato and the Doctrine of Natural Law*, 14 VAND. L. REV. 23 (1960); Nielsen, *An Examination of the Thomistic Theory of Natural Moral Law*, 4 NATURAL L.F. 44 (1959).

port into the law the looser and freer ways characteristic of ethical thinking,"<sup>4</sup> Professor Fuller continues to deny that the *is* and *ought* can be distinguished, at least where purposive behavior is involved.<sup>5</sup> Ironically, one of the explicit aims of *The Morality of Law* is "to clarify the meaning of morality" (p. 3). Success in this respect would of course enhance our ability to separate, at least for purposes of analysis, law and morals as well as the *is* and the *ought*, thereby enabling us ultimately to make more responsible evaluations.<sup>6</sup> But, as one might anticipate, confronted with Fuller's passion for fusing *is* and *ought*, the meaning of morality is something less than clarified by this book which apprises the reader that morality has an "inner morality,"<sup>7</sup> (p. 130) and that morality is "concerned with controlling human conduct by rules" (p. 130). Since law is defined as the "enterprise of subjecting human conduct to the governance of rules" (pp. 91, 96, 106, 122, 124, 130) the boundary between law and morality is indeed obscured.

Professor Fuller's contribution to clarity is the distinction between a morality of duty and a morality of aspiration.<sup>8</sup> The morality of duty consists of "the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain goals must fail of its mark" (pp. 5-6). As one moves away from "the conditions obviously essential to social life" (p. 27) a point is reached "where the pressure of duty leaves off and the challenge of excellence begins" (p. 10). It is precisely at this point that one reaches the level of a morality of aspiration, "the morality of the Good Life, of excellence, of the fullest realization of human powers" (p. 5). It is crucial, according to Fuller, that this point be

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<sup>4</sup> FULLER, *op. cit. supra* note 3, at 130.

<sup>5</sup> Professor Fuller's insistence on a fusion of the *is* and the *ought* is the central issue in the Hart-Fuller and Fuller-Nagel debates. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Fuller, *Human Purpose and Natural Law*, 3 NATURAL L.F. 68 (1958); Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, 3 NATURAL L.F. 77 (1958); Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL L.F. 83 (1958); Nagel, *Fact, Value, and Human Purpose*, 4 NATURAL L.F. 26 (1959). Professor Hart develops his position with great clarity and force in *THE CONCEPT OF LAW* (1961), criticized by Fuller in a chapter entitled "The Concept of Law," in *THE MORALITY OF LAW* 95 (1964). Professor Hart as of this date has had the last published word. See Hart, *supra* note 1.

<sup>6</sup> See Nagel, *Fact, Value, and Human Purpose*, 4 NATURAL L.F. 26, 36-37 (1959).

<sup>7</sup> The implication of this view within the context of Fuller's complete theory is that morality may be immoral. See Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 638 (1958).

<sup>8</sup> A distinction which he admits is "by no means new" and which was discussed by Professor Hart in *THE CONCEPT OF LAW* 176-80 (1961).

determined accurately, since the law can in most cases effectively enforce only the morality of duty:

[T]here is no way open to us by which we can compel a man to live the life of reason. We can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality (p. 9).<sup>9</sup>

It seems clear that not only is the proffered distinction a difficult one to make (at least as difficult as that between the *is* and the *ought*) but it also lacks sufficient preciseness of definition. Morality is a term that may refer to that which is desired or that which is desirable, to a "practical socio-cultural fact in respect to matters of right and wrong, good and evil, and [to] . . . theories about the ends, standards, principles according to which the actual state of affairs is to be surveyed and judged."<sup>10</sup> Professor Hart proposes that we call the existing mores of any given social group "positive morality," and those general moral principles or ideals used as criterion for evaluation of positive morality and other social institutions "critical morality."<sup>11</sup> Morality necessarily refers to a man's values,

his preferences and avoidances, his desire-objects and aversion-objects, his pleasure and pain tendencies, his goals, ideals, interests and disinterests, what he takes to be right and wrong, good and evil, beautiful and ugly, useful and useless, his approvals and disapprovals, his criteria of taste and standards of judgment, and so forth.<sup>12</sup>

In a recent extensive commentary Professor Summers develops and documents at such length Fuller's failure to define and clarify

<sup>9</sup> A point made by St. Thomas Aquinas who noted that "human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained." AQUINAS, *Summa Theologica*, in THE GREAT LEGAL PHILOSOPHERS 56, 74 (Morris ed 1959).

<sup>10</sup> DEWEY, RECONSTRUCTION IN PHILOSOPHY 19-20 (Mentor ed. 1950).

<sup>11</sup> HART, LAW, LIBERTY AND MORALITY 20 (1963). After an extensive study, employing a similar dichotomy, several cultural anthropologists concluded that the general lesson of our inquiry would seem to be that ethical concepts, no matter how detached they are felt to be in consciousness, have cultural roots and cultural functions, and their meaning is to be found in the offices they perform. And criteria would seem to have a similar character. The criteria in any evaluation of virtues, goals, ideals, needs, and so on, are other virtues, goals, ideals, needs, more abstract or more concrete, which have become enlisted on behalf of the ethical concepts to carry out their office in the given context.

EDEL & EDEL, ANTHROPOLOGY AND ETHICS 226 (1959).

<sup>12</sup> Edel, *Concept of Values in Contemporary Philosophical Value Theory*, 20 PHILOSOPHY OF SCIENCE 198 (1953). For an excellent survey of the problems of terminology in moral and ethical inquiry see Handy & Kurtz, *A Current Appraisal of Behavioral Sciences*, 7 THE AM. BEHAVIORAL SCIENTIST 131-35 (Supp. No. 7, 1964).

adequately the concept of morality, that little more need be said on that subject,<sup>13</sup> except to note that it is not clear what is gained by calling the minimal standards that must be met for the survival and maintenance of a going society a "morality of duty" rather than functional imperatives,<sup>14</sup> functional prerequisites,<sup>15</sup> or even eunomics.<sup>16</sup> There are enough difficulties inherent in a structural-functional analysis of society, or its subsystems, without intentionally adding the confusion of fusion of fact and value to the inquiry.<sup>17</sup> Analytically, once the ends or needs of a society are determined, determination of the means that will achieve these ends is strictly factual, although rejection or selection among alternative means involves a moral inquiry.<sup>18</sup>

If the functional prerequisites for the maintenance and survival of a society constitute a morality of duty, then minimal requirements for the effective maintenance of a legal system also are properly categorized in Fuller's terms as a morality of duty. Instead Fuller describes these requirements as law's inner morality<sup>19</sup> or the internal morality of law.<sup>20</sup> The internal morality of law is concerned with the "ways in which [a legal system] . . . must be constructed and

<sup>13</sup> Summers arrives at the following conclusion: "Thus, in sum, the author's *approach* to the clarification of morality cannot be adequate to the task. He does not tell us whether he is clarifying morality as it is or as it ought to be. The distinctions he undertakes to draw are sufficient only to provide the crudest account of the internal complexities of morality." Summers, *supra* note 2, at 5.

<sup>14</sup> See PARSONS, AN OUTLINE OF THE SOCIAL SYSTEM, IN THEORIES OF SOCIETY 30; 38 (Parsons, Shils, Naegle & Pitts eds. 1961). For a functional analysis of law employing Parsons approach see BREDEMBIER, *Law as an Integrative Mechanism*, in LAW AND SOCIOLOGY 73 (Evan ed. 1962).

<sup>15</sup> See Aberle, Cohen, Davis, Levy & Sutton, *The Functional Prerequisites of a Society*, 60 ETHICS 100 (1950).

<sup>16</sup> "[Eunomics] . . . may be defined as the science, theory, or study of good order and workable arrangements. Eunomics involves no commitment to 'ultimate ends.'" Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 477 (1954).

<sup>17</sup> Professor Fuller observed not too long ago that it is virtually impossible to draw clear-cut distinctions between ends and instrumental means for achieving those ends. See STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY 103 (1959). In addition it is extremely difficult to demonstrate exactly what are the functional imperatives for a society. The principal objections to the functional approach are set forth in the recent monograph FUNCTIONALISM IN THE SOCIAL SCIENCES: THE STRENGTH AND LIMITS OF FUNCTIONALISM IN ANTHROPOLOGY, ECONOMICS, POLITICAL SCIENCE, AND SOCIOLOGY (Martindale ed. 1965). See especially the following pages of the monograph: 7, 9, 14, 22-25, 30, 33, 78, 87, 121-24, 140, 142-43, 157-59.

<sup>18</sup> This is not to suggest that the selection of an appropriate means of achieving a desired end is an easy task. As Austin noted: "[I]t is far easier to conceive justly what would be useful law, than so construct that same law that it may accomplish the design of the lawgiver." 2 AUSTIN, JURISPRUDENCE 1136 (4th ed. 1873).

<sup>19</sup> See, e.g., FULLER, THE MORALITY OF LAW 42-43 (1964).

<sup>20</sup> See, e.g., *id.* at 44, 47.

administered if it is to be efficacious and at the same time remain what it purports to be" (p. 97). Since these functional imperatives of a social subsystem, according to Fuller, constitute a morality, he is constrained to categorize them as either a morality of duty or one of aspiration. He concludes that although law's inner morality embraces both a morality of duty and of aspiration, the demand for creativity and excellence of the inner morality condemns it "to remain largely a morality of aspiration and not of duty" (p. 43).<sup>21</sup>

Recognizing the not inconsiderable differences between St. Thomas Aquinas and Lon Fuller, it is nonetheless possible to find some significant congruencies between the Thomistic view of law and that presented in *The Morality of Law*, especially in the manner in which one ascertains the content of the moralities of duty and aspiration.<sup>22</sup>

Like Aquinas and Aristotle, Fuller stresses the role of reason in moral inquiry. The morality of duty deals with the "more obvious manifestations of chance and irrationality" (p. 9). Since it operates "at the lower levels of human achievement" a "defective performance can be recognized, if care is taken, with comparative certainty" (p. 31). "We can . . . know what is plainly unjust [the concern of a morality of duty] without committing ourselves to declare with finality what perfect justice [the concern of a morality of aspiration] would be like" (p. 12).<sup>23</sup> This emphasis on reason in ascertaining the morality of duty and the internal morality of law, coupled with Fuller's insistence that law be viewed teleologically, *i.e.*, as a purposeful enterprise aiming at "subjecting human conduct to the guidance and control of general rules" (p. 146), is reminiscent of the Thomistic notion of the practical reason which directs one properly toward achieving a particular goal.<sup>24</sup> For Aquinas "the last end of human life is bliss or happiness."<sup>25</sup> Although Professor Fuller characterizes his own approach as a "modest" teleology (p. 147), he is not one who engages in "unconscious metaphysics"<sup>26</sup> and thus we can assume that he intends to adopt the view that law is directed toward an end and shaped by a purpose. Teleological

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<sup>21</sup> See also *id.* at 104.

<sup>22</sup> See note 9 *supra*. For a good summary of Aquinas' functionalism, see Davitt, *Law as Means to End — Thomas Aquinas*, 14 VAND. L. REV. 65 (1960).

<sup>23</sup> On the notion that certain basic ethical truths are self-evident see AQUINAS, *op. cit.* *supra* note 9, at 67.

<sup>24</sup> *Id.* at 57, 67.

<sup>25</sup> *Id.* at 58.

<sup>26</sup> See Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 J. LEGAL ED. 495, 505 (1949).

explanations need not necessarily espouse the idea that an ultimate end-out-of-view directs change, but generally they are associated with the doctrine that "goals or ends of activity are dynamic agents in their own realizations."<sup>27</sup> Fuller, like Aquinas, apparently adheres to the latter view, for how else could he write the following:

It is, then, precisely because law is a purposeful enterprise that it displays structural constancies which the legal theorist can discover and treat as uniformities in the factually given. If he realized on what he built his theory, he might be less inclined to conceive of himself as being like the scientist who discovers a uniformity of inanimate nature. But perhaps in the course of rethinking his subject he might gain a new respect for his own species and come to see that it, too, and not merely the electron, can leave behind a discernible pattern (p. 151).

Coherence and goodness have more affinity than coherence and evil. Accepting this belief, I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are.<sup>28</sup>

[A] judge faced with two equally plausible interpretations of a statute might properly prefer that which would bring its terms into harmony with generally accepted principles of right and wrong (p. 132)

and thus

[the judge] . . . is playing his part in the eternal process by which the common law works itself pure and adapts itself to the needs of a new day.<sup>29</sup>

Thus, Fuller's penchant for perceiving phenomena as purposeful with fact and value fused illustrates the merit of the objections to a functional approach of many who anticipate therein the teleological implication of a metaphysical ordering<sup>30</sup> and that the pulling force of the system is easily exaggerated.<sup>31</sup>

<sup>27</sup> See NAGEL, *THE STRUCTURE OF SCIENCE* 402 (1961). "The teleological viewpoint explains the present in terms of the future. According to this viewpoint, man's personality is comprehended in terms of where it is going, not where it has been." HALL & LINDZEY, *THEORIES OF PERSONALITY* 96 (1957).

<sup>28</sup> Fuller, *supra* note 7, at 636. This of course raises the same issues and perplexities as the Thomistic "inclination to the good." "Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance." AQUINAS, *op. cit. supra* note 9, at 66. On the problems attendant on acceptance of this view see Nielsen, *supra* note 3. On coherence theories see HALL, *OUR KNOWLEDGE OF FACT AND VALUE* 78-80 (1961).

<sup>29</sup> FULLER, *op. cit. supra* note 3, at 140.

<sup>30</sup> See SPENCER, *The Nature and Value of Functionalism in Anthropology*, in *FUNCTIONALISM IN THE SOCIAL SCIENCES* 1, 14 (1965).

<sup>31</sup> See KRUPP, *Equilibrium Theory in Economics and in Functional Analysis as Types of Explanation*, in *FUNCTIONALISM IN THE SOCIAL SCIENCES* 65, 78 (1965).

Aquinas' theory of resistance postulated that where the law is contrary to the common good, it is not to be obeyed, unless the disorder created by disobedience is more onerous than the evil occasioned by obedience to an unjust law.<sup>32</sup> A law is contrary to the common good not only for pursuing evil ends, but for being improper in form. The requirements that law must meet to be binding in conscience are included in Aquinas' definition of law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."<sup>33</sup> Fuller's theory of resistance is based in large part on the requirement of promulgation without which, law, the purposive enterprise of subjecting human conduct to the governance of rules, could not succeed. If the internal morality of law is not satisfied, then "there is no moral obligation to obey the law" (p. 39).<sup>34</sup> Fuller lists eight ways in which the internal morality of law may fail: (1) absence of rules; (2) lack of promulgation; (3) an excess of retroactive legislation; (4) incomprehensible rules; (5) contradictory rules; (6) rules impossible to perform; (7) too frequent alteration of the rules; and (8) lack of congruence between the law-in-books and the law-in-action.<sup>35</sup>

Aquinas stressed the rule element in law ("law is a rule and measure of acts . . . , a rule of reason"),<sup>36</sup> the requirement of promulgation,<sup>37</sup> and by implication, the need for understandable and consistent rules.<sup>38</sup> Aquinas' commentary on the problem of too frequent changes in the law is especially pertinent:

[H]uman law is rightly changed, in so far as such change is conducive to the common weal. But, to a certain extent, the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws, seeing that what is done contrary to general custom, even in slight matters, is

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<sup>32</sup> When the positive law is contrary to divine law then, regardless of the resulting disorder, one must resist the unjust law. See, AQUINAS, *op. cit. supra* note 9, at 74.

<sup>33</sup> *Id.* at 60.

<sup>34</sup> "A total failure in [the inner morality of law] . . . does not simply result in a bad system of law; it results in something that is not properly called a legal system at all. . . ." (p. 39).

<sup>35</sup> *Id.* at 39.

<sup>36</sup> AQUINAS, *op. cit. supra* note 9, at 57.

<sup>37</sup> "A law is imposed on others by way of a rule and measure. Now a rule or measure is implied by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force." *Id.* at 60.

<sup>38</sup> *Ibid.*

looked upon as grave. Consequently, when a law is changed, the binding power of the law is diminished, in so far as custom is abolished. Wherefore human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect. Such compensation may arise either from some very great and very evident benefit conferred by the new enactment; or from the extreme urgency of the case, due to the fact that either the existing law is clearly unjust, or its observance extremely harmful. Wherefore the jurist says that *in establishing new laws, there should be evidence of the benefit to be derived before departing from a law which has long been considered just.*<sup>39</sup>

On the possibility of performance of the law Aquinas states: "Wherefore laws imposed on men should also be in keeping with their condition, for . . . law should be *possible both according to nature, and according to the customs of the country.*"<sup>40</sup>

Finally, Aquinas would certainly have desired that the law-in-action comport with the law-in-books. Why else would he have stressed that "*it is better that all things be regulated by law, than left to be decided by judges.*"<sup>41</sup>

It is thus possible, even in such a brief overview, to see that Aquinas' analysis adumbrated much that Fuller has to say concerning both morality and the requisites for an effective legal system. An examination of these requirements is useful, and Fuller does an excellent job in his discussion of his "inner morality of the law" (p. 97), which he also calls procedural natural law. However, in view of his merger of value and fact and "modest" teleological (p. 147) tendencies, it appears that Fuller is more natural lawyer than his disclaimers would indicate.<sup>42</sup> For this reason many of the same strictures that apply to Thomistic doctrines are relevant to *The Morality of Law*:

[T]he whole theory [Thomistic teleology] rests on the confusion between *what ought to be* and *what is* . . . values and facts are distinct, and Aquinas and his followers are not clear about this distinction, precisely because they looked upon nature as purposive, as having some kind of moral end in itself. This conception of a purposive nature is not only false but it also serves to obfuscate the basic distinction between facts and values that is so essential if we are to understand the nature of moral argument and decision.<sup>43</sup>

<sup>39</sup> *Id.* at 77.

<sup>40</sup> *Id.* at 73.

<sup>41</sup> *Id.* at 70.

<sup>42</sup> See FULLER, *op. cit. supra* note 19, at 96.

<sup>43</sup> Nielsen, *supra* note 3, at 59.

Today, more than ever, a reasoned analysis of law and legal institutions is desirable. Confusion of fact and value, morality and instrumental concepts, and regression to a teleological orientation is not the road to a better understanding of the law and its impact on society. Burdened with these defects, the heuristic influence of *The Morality of Law* can only be on a short term basis.

OVID C. LEWIS\*

ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER 1066-1215. By Doris M. Stenton. Philadelphia: The American Philosophical Society. 1964. Pp. ix, 238. \$2.50.

The general history of English justice between 1066 and 1215 is well-known to anyone who has had occasion to study the great works of Maitland<sup>1</sup> or Bigelow.<sup>2</sup> There is, however, a great corpus of knowledge concerning the centuries immediately before and after 1066 that even the omnivorous energies of these great scholars could not reach. Finally uncovered by a lifetime of research, Lady Stenton, former General Editor of the Pipe Roll Society, presents in this book<sup>3</sup> for the first time her findings and conclusions on an unfamiliar but important subject in the development of English legal institutions.

Concentrating on procedure in civil pleas and the gradual creation of a bench of judges and a legal profession, Lady Stenton begins with an analysis of procedural developments in the early twelfth century and the dependence of these developments on the Anglo-Saxon past. In this respect, she maintains, contrary to popular belief, that the conquest of William I introduced little new law into the English kingdom. "William I was not a voluminous legislator. He willed that all should have 'the law of King Edward in lands and in all things, having added thereto the things which I have appointed for the welfare of the people of the English'" (p. 6). With the exception of a few minor refinements in the penal laws and the separation of lay and ecclesiastical justice, "he added little to the procedure of the courts" (p. 6). In the same vein, Lady Stenton rejects previous notions<sup>4</sup> that the Frankish inquest was the source

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\* Associate Professor of Law, Western Reserve University School of Law.

of the English jury, finding instead, that it appeared in certain practices of the Anglo-Saxons and Danes in the generations before 1066.<sup>5</sup> "There is no longer any inherent improbability in the suggestion that the jury, common to the Scandinavian peoples on either side of the North Sea, rising to the surface for a moment under Aethelred II, may have persisted in England to become incorporated into the fabric of the Anglo-Norman state" (p. 16).

Perhaps one of the most productive periods of original legal reform between 1066 and 1215 was the reign of Henry II. Lady Stenton characterizes this period in the second chapter of the book as part of "the Angevin leap forward" (pp. 22-53). "Supported by as able a group of ministers as ever served an English king," Henry II produced a new and highly individualistic legal system (p. 26). Notable among the accomplishments of this period was the use and development of the returnable writ.<sup>6</sup> Although the vast mass of

<sup>1</sup> MAITLAND & POLLOCK, HISTORY OF ENGLISH LAW (2d ed. 1898).

<sup>2</sup> BIGELOW, HISTORY OF PROCEDURE IN ENGLAND (1880); BIGELOW, PLACITA ANGLO-NORMANNICA (1879).

<sup>3</sup> The book includes major portions of the Jayne Lecture for 1963, comprising the first three chapters, the Raleigh Lectures of the British Academy for 1958, comprising the fourth chapter, and six appendices that include documents significant to the development of the ideas set forth.

<sup>4</sup> Maitland reached the conclusion that the English jury system had its origin in the Frankish inquests, but only after raising some doubt. Consider the following commentary: "No doubt there is here a field for research, but it seems unlikely that any new discovery will disturb the derivation of our English from the Frankish inquests. We cannot say *a priori* that there is only one possible origin for the jury. We cannot even say that England was unprepared for the introduction of this institution; but that the Norman duke brought it with him as one of his prerogatives can hardly be disputed." MAITLAND & POLLOCK, *op. cit. supra* note 1, at 143.

<sup>5</sup> Vinogradoff was also skeptical of the notion that the Normans brought the jury system to England. Writing in 1908, he stated: "The continuity of the Frankish and Norman inquest procedure . . . does not preclude that in preconquestual England itself there had existed legal customs which prepared the way for the indictment jury of the twelfth century." VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY 7 (1908). Commenting on this observation, Lady Stenton states that "Vinogradoff knew more than Maitland of the Scandinavian element in English law and was less ready than most of his contemporaries to write it off because there was little evidence about it coming from an early date" (p. 17).

<sup>6</sup> It is generally understood that none of the old executive or *justicies* writs predating the reign of Henry II were returnable. Professor van Caenegem has recently argued, however, that a system of returnable writs was in existence long before the reign of Henry II. He suggests that there is evidence that the returnable writ system began with William I and William II. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 77 (1959). But Lady Stenton points out that although writs utilized during those periods had certain attributes of a returnable writ, most lacked the essential elements of a true returnable writ. She notes that not one (1) appointed a day for the hearing of the action, (2) indicated the way it should be dealt with, or (3) instructed the recipient of the writ to send men to view the land at issue and appear when the case was heard with the summoners and the writ (pp. 33-34).

eyre rolls made up in the last years of Henry II have been destroyed, sufficient evidence has been found to lead Lady Stenton to conclude "that it was Henry II with his returnable writs and his carefully built up bench of judges, through his own versatility and that of his great Justiciar, Rannuf de Glanville, who had started the wheel in perpetual motion which generated the English common law" (p. 53).

Turning her attention in the third chapter from the development of procedure to the establishment of the courts of justice and the beginning of the legal profession, Lady Stenton again points to pre-conquest Anglo-Saxon institutions as providing the foundations for these Anglo-Norman developments. Although no central court system existed in the old English state, the judicial needs of the people and the administrative needs of the crown were adequately satisfied by such local courts as the shire and hundred. Moreover, even after the feudal courts had been established, these local courts continued to play an important role in English justice; indeed even William I ordered all men to seek "the hundred and shire courts as our ancestors commanded. . . ."<sup>7</sup> Thus, no regular supervision of the local courts was carried out in the early post-conquest days. But as commerce increased, so too did the need for a central court system. It is in the discussion of this subject that Lady Stenton reveals for the first time new evidence of the importance of the royal ministers and their influence on English common law.

In the last chapter of the textual portion of the book, Lady Stenton re-evaluates the work of King John and the development of the courts of justice during his reign. Although generally characterized as an illiterate intrigant in popular fables, King John appears in this book as a hard-working, intelligent monarch; as one genuinely interested in the development of English justice. "In the long view it may well appear that in the matter of judicial administration King John deserves credit rather than blame. He should be credited with readiness to allow litigants access to the benefits of his courts and the wisdom of his judges even if their pleas did not conform precisely with established rules. In this way the common law grew in volume and strength" (pp. 113-14). King John is also to be credited with lending vital support to the legal profession by encouraging the practice of leaving the conduct of cases in his courts to an attorney.

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<sup>7</sup> LIBBERMANN, *DIE GESETZE DER ANGELSACHSEN* 448 (Halle ed. 1903). In like manner, Henry I willed that all men should go to the shires and hundreds as they had in the time of King Edward. STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY* 122 (9th ed. 1913).

It is not difficult to conclude after reading this book that Lady Stenton has accomplished a graceful and thorough piece of work in English legal history. The fruits of a lifetime of careful research and thought are tightly compacted within the most refined limits. Moreover, the style in which this newly discovered evidence is presented is unique; for beyond Lady Stenton's precise evaluation of the mass of documents studied is the pleasure one finds in the rich prose that weaves together some of the most important developments in the history of English common law.

GARY L. BRYENTON\*

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\* Member of the Ohio Bar.