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Book Reviews

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Book Reviews

CONSTITUTIONAL BRICOLAGE. By *Gerald Garvey*.† Princeton: Princeton University Press, 1971. Pp. xi, 160. \$7.50.

and

ANTHROPOLOGY OF LAW. By *Leopold Pospisil*.†† New York: Harper & Row Publishers, 1971. Pp. xiii, 385. \$12.95.

In the discussion of intellectual labor, law is a relatively old and anthropology a relatively new specialization. The law trained—Lewis Henry Morgan,¹ Sir Henry Maine,² and Emile Durkheim³—were present at the creation of the anthropological enterprise during the nineteenth century. But the strands of filiation weakened until the collaboration of lawyer-jurisprude Karl Llewellyn and anthropologist E. Adamson Hoebel on *The Cheyenne Way* (1941).⁴ Since then an increasing number of anthropologists have interested themselves in “law stuff.”⁵ Their efforts have produced a body of theoretical and empirical work which is relevant to both the content and the procedures appropriate to a comprehensive theory of jurisprudence. The impact of this work on recent legal scholarship, unfortunately, has been minimal. Legal academics, faced with the obsolescence of the traditional skills of the word warrior, have borrowed the trappings of adjacent disciplines with slight regard to their appropriateness to fundamental jurispruden-

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1. MORGAN'S ANCIENT SOCIETY (1877) pioneered in the study of kinship and social organization. For an assessment of Maine's relevance to current concerns, see M. FORTES, KINSHIP AND THE SOCIAL ORDER (1969). Peculiarly enough, the writings of the American lawyer Morgan heavily influenced Marx and Engels' conception of primitive society. L. POSPISIL, ANTHROPOLOGY OF LAW, 153, 157-58 (1971) [hereinafter cited as POSPISIL].

2. MAINE'S ANCIENT LAW (1861), an attempt to put the philosophy of law on an empirical foundation, laid the foundation for the anthropology of law. Maine's famous generalization about the passage from status to contract retains some theoretical validity—at least within the British tradition of social anthropology. See, e.g., M. GLUCKMAN, POLITICS, LAW, AND RITUAL IN TRIBAL SOCIETY, 17-18 (1965).

3. See E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (G. Simpson transl. 1964). Maine and Durkheim are co-responsible for the selection of the law of contracts as the theoretical paradigm for the understanding of law in modern society. For a recent, more fruitful paradigm based on constitutional law, understood in its broadest sense as the allocation of authority in society, see McDougal, Lasswell and Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (1967).

4. I might suggest that anyone puzzled by the emphasis of the Uniform Commercial Code on custom (U.C.C. § 1-205, 1964) need look no further than its chief draftsman, Llewellyn's, anthropological investigations.

5. One milestone was the special issue on the ethnography of law edited by Laura Nader (who is, appropriately, Ralph's sister) for the *Journal of the American Anthropological Association*. See 67 AM. ANTHROPOLOGIST (no. 6, pt. 2) 1 (1965).

tial concerns—laws as a process of authority and control. Thus, we have appropriated sociology's obsession for methodology⁶ without the theoretical discipline that saves empiricism from mindlessness. So too, the adoption of the modish standpoint of welfare economics⁷ without caveats concerning either its problematic status within economics⁸ or its failure to focus on authoritative decision.⁹

Of the books called to account here, one is by a Czech emigre scholar with formal training in both law and anthropology.¹⁰ The other is by a political scientist.¹¹ To examine them in reverse order of interest and competence compels us to deal with Professor Garvey's performance first. I will be brief in order to be merciful. The notion of examining American Constitutional law in light of the anthropological theories of Claude Levi-Strauss is not in itself utterly senseless. There are several sizable theoretical problems unmentioned by Garvey such as the applicability of theories generated in a pre-literate, traditional cultural matrix to the pendentically literate matrix of Supreme Court decisions in a complex, mass, industrial society. But, as Roman rhetoricians have it, let us pass over these matters without mentioning the boundary distinction between literate and non-literate societies, one that many anthropologists regard as crucial (Levi-Strauss is not one). Has Professor Garvey correctly understood the Levi-Strauss conception of bricolage upon which he has bottomed his book? Garvey's definition of bricolage is "a process of fabricating 'make-do' solutions to problems as they arise, using a limited . . . store of doctrines, materials, and tools."¹² Thus constitutional bricolage is "the art of judges" which ". . . reflects the larger process by which a society tries to maintain its syntax—its consistency and identity over time—by selecting responses to problems as they arise from a limited cultural reserve."¹³ Clearly, Garvey's Levi-Strauss is a pragmatist in the grand tradition of John Dewey who has propounded a theory of decision-making within the framework of primitive society. However, Levi-Strauss' theory of bricolage in *The Savage Mind* is rather different.¹⁴ His point was to

6. See, e.g., most of the articles now appearing in the LAW AND SOCIETY REVIEW.

7. See, e.g., G. CALABRESI, THE COST OF ACCIDENTS (1970).

8. See I. LITTLE, A CRITIQUE OF WELFARE ECONOMICS (1962).

9. See the many recent articles of Professor Robert Birmingham of Indiana Law School.

10. POSPISIL 153, 157-58.

11. G. GARVEY, CONSTITUTIONAL BRICOLAGE (1971) [hereinafter cited as GARVEY].

12. *Id.* at 5.

13. *Id.*

14. See C. LEVI-STRAUSS, THE SAVAGE MIND *passim* (1962).

distinguish two distinct and equally valid modes of cognition (and creativity): (1) The bricoleur who is retrospective in focus and relies on analogy and (2) the scientist who is systematic and analytic. Mediating between these cognitive standpoints is that of the creative artist. Levi-Strauss addressed himself in these epistemological formulations to matters made problematic within the French intellectual world by Jean-Paul Sartre's rejection of the analytic standpoint in his *Critique de La Raison Dialectique*. For Sartre, knowledge can arise only from *praxis-aposition* which Levi-Strauss rejects. Levi-Strauss' theory is a theory about thinking, not, as Garvey has it, about doing or about the relationship between thinking and doing. Furthermore, the application of Garvey's tendentious interpretation of bricolage to law work is, except in Garvey's own assertions, scarcely obvious.

The villain of Garvey's world lurks in our values, more specifically in the paradigm of social interaction based on exchange (buyers and sellers in a market place) which he contends has been adopted wholesale in our jurisprudence of constitutional law.¹⁵ According to Garvey, courts have viewed all Constitutional Law as if it were Contract Law.¹⁶ As I have indicated,¹⁷ there is some validity to the proposition insofar as it applies to theorists.¹⁸ But judges have not been as foolish as theorists, especially when deciding cases involving contracts. Garvey rather naively alludes to rules such as "meeting of the minds" and "consideration" as Contract Law absolutes.¹⁹ It was the great merit of Karl Llewellyn and other legal realists to have shown over thirty years ago how illusory was the certainty and predictability claimed for these rules and how much such rules, mechanically applied, blocked, rather than facilitated, the process of exchange.²⁰ It is not tribute to the breadth of Professor Garvey's scholarship that he fails to deal with the realist

15. GARVEY, *passim* 26-65.

16. *Id.* at 28-29.

17. *Supra* note 3.

18. For a particularly foolish and ethnocentric example of the "contractualist" ideology, see A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD, 37-38, 40 (1970). Professor Bozeman dichotomizes between civilized societies which recognize contract as an ordering principle and the primitives who do not. She would be interested to discover that the Kapauku Papuans, a tribe of Stone Age primitives in New Guinea, have a highly developed exchange and market oriented economy based on contract. See L. POSPISIL, THE KAPAUKU PAPUANS & THEIR LAW (1958); KAPAUKU PAPUAN ECONOMY (1963).

19. GARVEY 28-29.

20. Llewellyn, *On Our Case Law of Contract: Offer and Acceptance*, I, 48 YALE L.J. 1 (1938). See the articles collected in Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 217 (1966). See also, F. KESSLER AND G. GILMORE, CONTRACTS 1-15 (2d ed. 1970).

position that courts are more responsive to facts than to theories, that paradigms are poor predictors of decisions.²¹ Indeed, within Garvey's own scheme, how can judges be described in chapter one as eclectic bricoleurs eager to get-on-with-the-job and in chapter two as tunnel-visioned sectarians of the exchange paradigm.

The last chapters of this puzzling book attempt a historical analysis of the movement of constitutional rhetoric but the author's reach continually exceeds his grasp. Kenneth Burke did it better, shorter, and with style.²² In sum, Garvey's book lays the ground work for the reconstruction of the Tower of Babel. It is a veritable *Summa* of the modish, derivative, slipshod kind of work that parodies scholarship. Had I not read two other recent Princeton titles that were as bad,²³ I would have been stunned that a university press had uttered such a patent intellectual forgery.

Professor Leopold Pospisil's work is at the opposite end of the continuum. It attempts to canvass systematically the theoretical legacy of both jurisprudence and anthropology in order to arrive at a cross-culturally applicable theory about law. As the introductory chapter makes clear, the testing ground for the theoretical apparatus so derived is not the rhetorical *trompe l'oeil* of the content of written decisions, but the procedures whereby authority and control are allocated.²⁴ Chapter one concludes with a brilliant exposition of the theoretical role of violence in any overriding system of public order.²⁵

Chapter two, "The Form of Law," provides a thorough refutation of the hypotheses about law associated with legal positivism—law conceived of as a set of abstract rules in a hierarchical system of formal adjudication. As Pospisil points out, this scheme is thoroughly ethnocentric and would deny the status of law not only to so-called primitive societies, but also to classical Chinese, Indian and Greek societies. Then Pospisil turns his attention to crudely behavioral conceptions of law, those that can give no account of the *ought*, the authoritative dimension of law.

Chapter three, "Attributes of Law," is an important theoretical contribution to the continuing and presumably endless debate about the essence or nature of law. Most jurisprudential formulations are really

21. See generally Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

22. K. BURKE, *A GRAMMAR OF MOTIVES* 323-401 (1945).

23. See BOZEMAN *supra* note 18; R. MINEAR, *VICTOR'S JUSTICE* (1971).

24. POSPISIL 1.

25. *Id.* at 10, figure 1.

demand theories in disguise—the author wants to tell you what law *ought* to be, not to provide you with the tools and empirical indices by which an observer can differentiate law from non-law without inserting his own preferences.²⁶ In this chapter, Pospisil shows himself somewhat too faithful to his Roman law and Continental (neo-Kantian) philosophical background. Thus Pospisil superimposes upon the crucial attributes of authority and sanction (control)²⁷ two attributes more appropriate to a demand theory. First is the attribute of intention of universal application.²⁸ The term “intention of universal application” is unmistakably a product of the tradition of speculative philosophy. Whatever its ancestry, however, the attribute of intention must be grounded in the expectations not only of decision-makers (as Pospisil has it) but of all relevant sectors of the community.²⁹ Furthermore, if one presses the universality part of the formulation a bit, the fascinating operations of corruption, fixing, or influencing the decision-making processes which result in unique outcomes or special treatment are excluded from the focus of a comprehensive theory about law. In view of the mounting literature linking corruption and influence-peddling to any structured authority system, such an exclusion would be dubious.³⁰

The attribute of *obligatio* also creates problems. It is defined as “that part of a decision which states the rights of one party to a dispute and the duties of another.”³¹ Thus according to Pospisil, a statement by an authority without the creation of the social-jural relationship of *obligatio* is not law. But a decision by an authority saying *non liquet* or announcing an abstention doctrine has the same impact on the value position of the claimants as does one possessing *obligatio*. Furthermore the attribute dichotomizes between the authoritative statement and the real events in the social world which led up to the claim. According to Pospisil, these real world events are irrelevant to the study of law.³² Pospisil’s position here is surely a step backwards in terms of the scope of inquiry defined as relevant by the legal realists two scholarly genera-

26. E.g., L. FULLER, *THE MORALITY OF LAW* (1964).

27. His discussion of these attributes (POSPISIL 44-48, 87-94) can be fruitfully compared with the discussion of authority control in McDougal and Lasswell, *Criteria for a Theory About Law*, S. CAL. L. REV. 362, 384-85 (1971).

28. POSPISIL 78-81.

29. Otherwise the expectations of top authoritative elites would define law. If this were so, the mosaic of authority systems operating separately and even coarchically within the territorial state would not be law.

30. See *POLITICAL CORRUPTION* (A. Heidenheimer ed. 1971); J. SCOTT, *COMPARATIVE POLITICAL CORRUPTION* (1971).

31. POSPISIL 80.

32. *Id.* at 84.

tions ago. Finally, the attribute *obligatio* excludes from our focus of attention sanctions purportedly emanating from a supernatural force.³³ As a student of classical civilizations, Professor Pospisil surely must be familiar with the authoritative force of the pronouncement of the Oracle at Delphi in regulating intergroup behavior in classical Greece.³⁴ And no study of the processes of authority and control that we call law could ignore the impact of the coarchical system of authority based on the Roman religion on Roman law.

Chapter four, "Legal Levels and Multiplicity of Legal Systems," focuses on patterns of law in substate entities. Pospisil's careful exegesis of the relevant theoretical and empirical materials constitutes the most thorough refutation available of the myth that the state is the sole possessor of authority. Pospisil remarks that "any human society . . . does not possess a single consistent legal system, but as many such systems as there are functioning subgroups."³⁵ This is a truth intuitively known to the practicing lawyer, thrust upon him in his dealings with the diverse mosaic of occupational, ethnic, regional subcultures which make up American society.³⁶ This chapter should be required reading for scholar and practitioner alike.

Chapters five and six on "Change of Legal Systems" and "Change of Laws" come down very hard on the notion widely held by jurists unfamiliar with the current ethnographic literature that so-called primitive societies are static or without authority. Professor Pospisil treats the reader to an exceptionally fine discussion of the major theorists, high-lighted by discussions of Marx and Durkheim, that are critical to the point of pugnacity. And, in chapter six, the author reintegrates political and legal decision, which were separated for theoretical purposes earlier in the book,³⁷ by distinguishing between "authoritarian" law imposed on the community from above and "customary" law which refers to socially internalized acceptance of the authoritative decision.³⁸ Such a distinction is an interesting, but insufficiently comprehensible

33. *Id.* at 85.

34. See M. LEVI, *POLITICAL POWER IN THE ANCIENT WORLD* 36-73 (J. Costello, transl. 1968).

35. *Id.* at 98.

36. See Simonett, *The Common Law of Morrison County*, 49 A.B.A.J. 263 (1963). Pospisil's work has, of course, devastating implications for those who deny the existence of international law on the grounds that there is no unitary authority in international society. So, too, for those scholars in the criminal law field who close their eyes to the reality of conflicting subsystems of authority and control within the state. For a provocative discussion, see A. TURK, *CRIMINALITY AND LEGAL ORDER* (1969).

37. POSPISIL 77, figure 2.

38. *Id.* at 193-97, especially figure 3 at 195.

attempt to root law in an empirically observable context. Although, for reasons cogently expressed elsewhere,³⁹ I disagree with any theoretical separation of politics and law—the resolution of this question will be settled not by a logomachy of definitions, but by the hard work of observation which Professor Pospisil has so brilliantly executed.

Chapter seven consists of a competent review of jurisprudential literature on justice but lacks the tang and bite of earlier sections which were based on field work rather than on library research. I would have appreciated more on concepts of justice entertained either expressly by members of tribal society or as inferred from their patterns of decision, and less on a rehash of Bentham, Pound et al.⁴⁰

Chapter eight is made up of an attempt to analyze and classify legal norms in two societies (the Kapauku, and Tirolean) on a dichotomous grid. This effort, based on an analogous procedure in the componential analyses of kinship systems,⁴¹ would be of greatest interest to anthropologists and to legal logicians. The schema is highly formalistic, in fact it is reminiscent of Hohfeld, and no attempt is made to relate the normative grid to policy alternatives. Pospisil remarks that he would have appreciated such a schema during his exam preparations while a law student in Czechoslovakia.⁴² Surely, there are more important tasks confronting scholars than the creation, however meticulously thought-through, of sophisticated Gilbert's outlines. I would hope that the thoughtful reader of Pospisil's work regards it as a challenge to get out of the library and into the field—not as an invitation to refine further the syntactic subtleties of our word obsessed profession.

One final thought. The tone of Professor Pospisil's work is rather egocentric, almost arrogant. If that observation is true, the performance given in this book gives the author much to be arrogant about. It is the best book in its field since *The Cheyenne Way* and it makes the most substantial empirical contribution to putting jurisprudence on an scientific, cross-cultural foundation since Ehrlich's *Fundamental Principles of the Sociology of Law*.

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39. See generally H. LASSWELL, *POLITICS—WHO GETS WHAT, WHEN, HOW* (1958); H. LASSWELL & A. KAPLAN, *POWER & SOCIETY* (1948).

40. In fairness, the jurisprudence specialist will find much new in the author's discussion of such ignored figures (*i.e.*, ignored in the Anglo-American tradition) as Kohler, von Ihering, and Stammler.

41. For an understanding of "componential analyses," see Goodenough, *Componential Analysis and the Study of Meaning*, 32 *LANGUAGE* 195 (1956).

42. POSPISIL 339.

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