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John Rockwell Snowden

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BOOK REVIEW

JURISFICTION. By J. Stanley McQuade, LL. B., M.D., Ph. D.¹
Norcross: The Harrison Company. 1982, Pp. 269.

Reviewed by John Rockwell Snowden²

The January 7, 1983, Plenary Session, Annual Meetings of the Association of American Law Schools, at Cincinnati, Ohio called for a wide ranging consideration of American legal scholarship, its current condition and future expectations. An impressive array of scholars gave talks which have been recently edited and published as "American Legal Scholarship: Directions and Dilemmas," in the *Journal of Legal Education*.³

In March of 1983, a good day, a simple twist of fate, and a Harrison Company flyer began this reviewer on "The Primrose Path to Juristic Wisdom"⁴ with J. Stanley McQuade's *Jurisdiction*. Professor McQuade and the scholars at the Plenary Session share a concern for ". . . the intellectual dimension of American legal education."⁵ While the AALS directed its attention to the work of practicing law teachers, *Jurisdiction* is aimed at practicing law students. Yet, student and teacher face a similar environment and look to the same perplexing future.

Jurisdiction asks its reader to consider ". . . thinking and thoughtfulness and reflection in depth."⁶ It argues that it takes

1. Lynch Professor of the Philosophy of Law, Campbell University School of Law, Buies Creek, North Carolina. Professor McQuade received the bulk of his formal education in Belfast, Northern Ireland. Before associating himself with Campbell University, Professor McQuade lectured in Christian ethics, engaged in the general practice of medicine, professed philosophy, and worked as an anesthesiologist.

2. Associate Professor of Law, University of Nebraska College of Law, Lincoln, Nebraska.

3. 33 J. LEGAL EDUC. 403-58 (1983).

4. This is the subtitle of J. S. McQUADE, *JURISFICTION* (1982).

5. Allen, *Legal Scholarship: Present Status and Future Prospects*, 33 J. LEGAL EDUC. 403 (1983).

6. J. S. McQUADE, *JURISFICTION* 1 (1982) [hereinafter cited as *JURISFICTION*].

more than a case of rules and a bag of tricks to be a good lawyer. In particular, a good lawyer should have some smattering of the roots and sources of law and the legal profession. Moreover, some familiarity with the recurring questions of the role and efficacy of law in society is essential. *Jurisfiction* introduces these notions by presenting edited selections from the work of classic jurists: Savigny, Field, Carter, Austin, Holmes, Oliphant, Pound, Hutchinson, Stone, Plato, Bentham, Mill, and Aquinas. Professor McQuade adds a few notes on several subjects and contributes selections on language philosophy, prudential theories of justice, and justice as a practical concept for lawyers.

Jurisfiction takes its title from McQuade's use of fictional vignettes to introduce the readings. The vignettes are short plays, lectures, essays, reviews, game shows and even a ballet all created by imaginary authors. These are intended to introduce a bit of fun for the aid of learning and to give the reader a preview of the issues to be addressed by the readings to follow. An illustration accompanies each of the fictions.⁷ After each vignette, a few "interlocutory injunctions" are used to focus the reader's attention.

The vignettes are silly, and in that, one may find the strengths and the weaknesses of *Jurisfiction*. To discuss these energies and frailties, the directions and dilemmas of American legal scholarship will be put forward as a context for comprehension. For indeed, "[i]t is a commonplace that great men impose a burden upon those who come after them."⁸

Several of the scholars that gathered at Cincinnati to discuss the intellectual life of legal education noted a "pervasive unease."⁹ Legal scholarship was characterized as a great bazaar where many modes of teaching and writing may be sampled. Yet, this feast seemed to yield paranoia.

It is a time of rich development, and an inevitable consequence is that the exponents of every mode of legal writing or law teaching at times feel either suspicious or under suspicion. They believe that cold eyes are cast upon them as being in some way either passe irrelevant, or inferior—either "not real lawyers" or "mere

7. Mr. David Summers is the artist.

8. R. UNGER, *LAW IN MODERN SOCIETY* 1 (1976).

9. Allen, *supra* note 5, at 404. "We feel less confident than we did formerly that we understand our colleagues' judgements on questions of intellectual style, purpose, or technique. We sense a dissolving accord on what is good scholarly work." *Id.*

lawyers."¹⁰

This bewildering choice of the proper technique of inquiry is set against a background of skepticism and complexity, the legacy of American legal realism.¹¹ A legacy which leads some to find, "[i]t is accepted today, virtually universally, that the legal system can be best understood with the methods and theories of the social sciences."¹² While others conclude that realism has been turned on its head, that current orthodoxy, process jurisprudence, channels complexity and neutralizes skepticism.¹³

This is surely ground where angels fear to tread. Enter *Jurisdiction*, the fool, the heyoka. ". . . [I]n the heyoka ceremony, everything is backwards, and it is planned that the people shall be made to feel jolly and happy first, so that it may be easier for the power to come to them."¹⁴

Professor McQuade answers critics who would label his fictions silly. ". . . [T]hey are, but I am not ashamed. I learned long ago that if you want to be taken seriously you may have to become down right ridiculous."¹⁵ Unfortunately, the majority culture has few, if any, models for constructive foolery. It is, however, a valid way of teaching and learning, and perhaps a method of specification which might stand as an alternative to rationalism and historicism.

Viewed as a hermeneutic art the fools way concerns itself with ". . . the embeddedness of action in belief and the clustering of units of action-belief into totalities whose inner unity is neither logical nor causal."¹⁶ The vignettes and their functional authors open the doors to this way of seeing.

The use of fictional authors makes it easier to be aware of the

10. Hughes, *The Great American Legal Scholarship Bazaar*, 33 J. LEGAL EDUC. 424 (1983).

11. Dawson, *Legal Realism and Legal Scholarship*, 33 J. LEGAL EDUC. 406, 407-08 (1983).

12. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437 (1983). The law professor who prides herself on the virtues of a generalist is characterized by Professor Priest as a medieval anachronism awaiting the Enlightenment. *Id.* at 440.

13. White, *Closing the Circle*, 33 J. LEGAL EDUC. 449, 450 (1983).

14. J. NEIHARDT, *BLACK ELK SPEAKS* 192 (Bison Book ed. 1961).

15. *JURISDICTION* at 4.

16. R. UNGER, *LAW IN MODERN SOCIETY* 246 (1976). *See Id.* at 8-46, 245-62; R. UNGER, *KNOWLEDGE & POLITICS* 106-18 (1975). *See generally* B.J.F. LONERGAN, *INSIGHT* (1959).

distinction between what is said and what is believed as well as the tension between actual thought and conduct. Thus, there is insight to the dialectic of idea and event. This is the realist teaching, more honored in the breach, to examine the “. . . gap between the declarations and professed ideology of the law and the reality of areas of social life that it purports to regulate.”¹⁷

The fictions themselves argue eloquently for the heyoka methodology. A way of interpreting is to tell a story. Only by telling a story does one interpret another telling. Consequently, to know a thing one must do it, at least in the realm of language. This telling may be done overtly or covertly. It may be acted in the world or recounted in thought. There is, of course, no assurance that the telling speaks truly. There is no guarantee of authentic action.

Story-telling fights the general bias of common sense that condemns practicality to stagnation, classes, and states. The story may be “cosmopolis”.

What is necessary is a cosmopolis that is neither class nor state, that stands above all their claims, that cuts them down to size, that is founded on the native detachment and disinterestedness of every intelligence, that commands man's first allegiance, that implements itself primarily through that allegiance, that is too universal to be bribed, too impalpable to be forced, too effective to be ignored.¹⁸

Certainly the story fits the aspects of “cosmopolis” that Lonergan identifies: 1) It is not a police force; 2) It is concerned to make operative the timely and fruitful ideas that otherwise are inoperative; 3) It is not a busybody, but ignores the practical thus engaging in the supreme practice; 4) It purges itself of the rationalizations and myths that become part of the human heritage before it arrived; and finally 5) It is not easy, sweetness and light, where sweetness means sweet to me, and light means light to me.¹⁹

If ever a good story were needed, now is the time. You have noticed that the truth comes into this world with two faces. One is sad with suffering, and the other laughs; but it is the same face, laughing or weeping. When people are already in despair, maybe the laughing face is better for them; and when they feel too good and are too sure of being safe, maybe the weeping face is better for them to see. And so I think that is what the heyoka ceremony

17. Hughes, *supra* note 10, at 428.

18. B.J.F. LONERGAN, *INSIGHT* 238 (1959).

19. *Id.* at 238-41.

is for.²⁰

The remarks of Professor Vetter at the Plenary Session were particularly focused to “. . . suggest the question of how each person’s work fit the time at which it appeared.”²¹ And, Vetter *may* have anticipated the need for a story when remarking on post-war legal scholarship (rationalism and historicism), “[i]t is possible to say definitely that there is too much of it.”²²

Finally, the scholars longing to associate their methodology with science or economics, “. . . with a broader base of research tools,”²³ should consider that the story may be a part of, rather than distinct from, the “technological continuum.”²⁴ The story was one of the first tools, one of the first methodologies.

The fools methodology of the story is certainly the strong point of *Jurisdiction*. It presents a strong and traditional alternative to the depleted bank accounts of causality and logic by recognizing another well of knowledge, “seeing the point,” the “aha!” sensation.²⁵ Moreover, because it approaches imagination in ways not ordinarily described as thinking, but rather surprise or insight, its emphasis is not gaining, but being. It remembers the road of the spirit that crosses that of the flesh.²⁶

20. J. NEIHARDT, *supra* note 14, at 192-93. The quotation may also lend some insight to Roberto Unger’s KNOWLEDGE & POLITICS. Why would Unger tell a 295-page story of the antinomies of despair to ask, “Why then do you remain silent? Speak, God.” R. UNGER, KNOWLEDGE & POLITICS 295 (1975).

21. Vetter, *Postwar Legal Scholarship on Judicial Decisionmaking*, 33 J. LEGAL EDUC. 412, 422 (1983).

22. *Id.* at 412. See generally E.F. SCHUMACHER, SMALL IS BEAUTIFUL (1973).

23. Zimring, *Where Do the New Scholars Learn New Scholarship?* 33 J. LEGAL EDUC. 453, 455 (1983). See also Priest, *supra* note 12.

24. C.E. AYRES, THE THEORY OF ECONOMIC PROGRESS 322-23 (New Issues Press 3d ed. 1978); Weinel, *Comment on Rutherford: An Alternative Interpretation of the Instrumental Theory of Value*, 15 JOURNAL OF ECONOMIC ISSUES 1116 (1982).

25. Heilbroner, *The Dialectical Vision*, March 1, 1980, THE NEW REPUBLIC 30 (1980).

26. The story may be the origin of “deviationist doctrine,” and a way to find “. . . the mind’s opportunity in heart’s revenge.” Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 576-83, 675 (1983).

Story-tellers, “. . . have used the power they have—the power of words—to give their ideas the ring of higher truth, and they have presented themselves as lawgivers and judges of a nobler kind, whose art moves the hearts and minds of their readers, as no law can, to an appreciation of the ideal of justice.”

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If the story, and particularly the sacred silliness of the fool that awakens the spirit, responds to the dilemma of methodology problems remain. Knowing what makes it go and how to drive it, the destination remains in doubt. Perhaps Professor White had this in mind at the Plenary Session when he noted that the debates over the "case method" in the late nineteenth century and the debates over the "functional approach" in the 1920s and '30s share with current debates the fact that, ". . . the debates are really about political and philosophical premises."²⁷

The silly vignettes then must answer to interpretation of substance and message as well as method. Within the circle of life the road of spirit is not separated from the trail of laughter and tears. Though they may go in distinct directions, dreams and existence always meet.²⁸ If there are weaknesses in the stories of *Jurisdiction*, they may be that the stories fail to either transcend or illuminate the hierarchies of modern life.

Although some, if not all, of the fictional authors share the virtue of a slightly quirky character, they seem to be far from the cutting edge of the "terror of consciousness."²⁹ There is John Ignatius O'Flynn, L., who flunked out of law school and supports himself as a "bookie's runner," yet writes plays on legal themes. There is Michael Joseph O'Houlihan, LL.D., retired law teacher who gives weekly lectures in jurisprudence in the public houses. There is Count Nicolai Dimski who devotes his life to the production of a universal calculus containing every known system of thought in

(1983).

27. White, *supra* note 13, at 449-50. "The 'crisis' atmosphere in which the debates are conducted is fostered by the stark disagreements between critics and adherents on fundamental matters of belief." *Id.* at 450.

28. The story as the hermeneutical principal drives one in the doing ever closer to the elusive nature of being. Though this reviewer asserts that epistemology and ontology, knowing and being, cannot be separated they may be distinct foci or manifestations. See 2 B. BLANSHARD, *THE NATURE OF THOUGHT* 260-68 (1939). From the other end, Professor Jerome Hall seeks to influence a method by arguing for "law-as-action" as the subject matter of jurisprudence. J. HALL, *FOUNDATIONS OF JURISPRUDENCE* 175-77 (1973).

29. R. UNGER, *LAW IN MODERN SOCIETY* 133 (1976).

When a vision comes from the thunder beings of the west, it comes with terror like a thunder storm; but when the storm of vision has passed, the world is greener and happier; for whatever the truth of vision comes upon the world, it is like a rain. The world, you see, is happier after the terror of the storm.

J. NEIHARDT, *supra* note 14, at 192.

symbolic form. And, there is the Reverend Samuel McWaddy, D.D., long-time trustee of the Algonquin J. Calhoun School of Law, who uses a superficial meekness to skewer his adversary Judge John Marshall Burghermeister, LL.D., D. Litt., as the good judge celebrates Law Day.

These characters write vignettes that direct themselves to the readings that follow in such a way that the issues raised are largely irrelevant to inquiries which might sharply question the social organization and consciousness of modern life. With diffidence this reviewer finds the fictions too gentle with widespread injustice and hypocrisy. Professor Hughes noted that the legal academic is “. . . detached from reality and absorbed in largely irrelevant games”³⁰ They are a harmless bunch. Like the philosopher they are tolerated in the legal profession, generally thought to “give tone to a place,” and “. . . since they are generally well mannered and usually conceive their task as being to furnish analytical and ideological support for liberal constitutionalism, they can easily be absorbed.”³¹

As Robert Stevens pointed out at the Plenary Session, “. . . we are all prisoners of our structures.”³² Nevertheless, it may be the story teller that has the best chance to break free of the “reproduction of hierarchy”³³ and the “ordinary religion”³⁴ of the law school and the legal profession.³⁵ Jurisprudence, after all, is for many law students, lawyers, and legal academics an area of study that will be tolerated only as long as it remains an elective adornment.³⁶ One could hope that the heyoka methodology might for a moment stop the world.³⁷

30. Hughes, *supra* note 10, at 429.

31. *Id.* at 430.

32. Stevens, *American Legal Scholarship: Structural Constraints and Intellectual Conceptualism*, 33 J. LEGAL EDUC. 442 (1983).

33. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982). “. . . [O]ne might as well declare openly that all new ideas are taboo, as require that they be examined, evaluated, and approved by some heirarchy of officials and bureaucrats” Lonergan, *supra* note 18, at 234.

34. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978).

35. “You have used your energies, which might well have been better spent thinking about academic issues—or even legal scholarship—to prop up the frequently narrow-minded and sometimes bigoted views of the practicing profession.” Stevens, *supra* note 32, at 444.

36. Hughes, *supra* note 10, at 426.

37. “We need to develop a body of legal writing which contemplates deep

Why would John Ignatius O'Flynn, L., rejected by the law and living as an outlaw spend his time writing plays on legal themes? Perhaps Professor Kelman put his finger on it at the Plenary Session when he described a type of policy analysis prevalent in today's law schools as "Law Day homilies."³⁸

Yet, he found these homilies to be informed by a "genuinely moving Utopianism."³⁹ Certainly, the law written large in the spirit is infused with Utopian vision and once having been remembered it is hard to forget.⁴⁰

If this reviewer cries for better Utopias⁴¹ in the story telling of *Jurisdiction*, it is because the promise of insight is so great with the fools method.⁴² How has it been imagined; is imagined, and might be imagined that one may do for the one and for the whole? How might freedom and solidarity manifest themselves as inseparable yet distinct? How might the story be the practical cure to the long-run bias of common sense?

Professor McQuade has given legal education and perhaps legal scholarship the revolutionary gift of laughter. May it break the bonds of arrogance. Professor McQuade has given the songs of those that dreamed before us, the classical jurists. May it erase the guilt of self-suppression. "When the ceremony was over, everybody felt a great deal better, for it had been a day of fun. They were better able now to see the greenness of the world, the wideness of the sacred day, the colors of the earth, and to set these in their minds."⁴³

changes" *Id.* at 431.

38. Kelman, *The Past and Future of Legal Scholarship*, 33 J. LEGAL EDUC. 432, 434 (1983).

39. *Id.*

40. "Anthropologists tell us that blessed isles and paradises are part of the dreamworld of savages everywhere." F.E. MANUEL & F.P. MANUEL, *UTOPIAN THOUGHT IN THE WESTERN WORLD 1* (1979).

41. "Stripped of the rather silly and unpersuasive analogic and distinguishing techniques that the common-law buffs are trying to bring back into vogue, scholarship about law, if not legal practice, is nothing but Utopian theorizing. We need better Utopias." Kelman; *supra* note 38, at 436.

42. "The great utopia startles and yet is recognized as conceivable. It is not a sleepy or bizarre vision but one that satisfies a hunger or stimulates the mind and the body to the recognition of a new potentiality." F.E. MANUEL & F.P. MANUEL, *supra* note 40, at 29.

43. J. NEIHARDT, *supra* note 14, at 197.