

BOOK REVIEW

Jurisprudence: Readings and Cases

Mark R. MacGuigan

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This book is, to the best of my knowledge, the first classroom text on Jurisprudence produced in Canada. It is the second edition of a work previously published in 1963, under the same auspices, in mimeographed form, and selling at a much lower price (the new version is priced at \$20.00).

The courses taught under the name "Jurisprudence" vary widely in vocabulary, scope, content, and methodology, depending on the bias and preferences of the teacher. Professor MacGuigan, who formerly taught Jurisprudence at the University of Toronto School of Law, and now teaches this subject at the Osgoode Hall Law School, shows his preferences clearly in this annotated collection of readings. With some of these preferences I am in complete accord, and with others I differ from the author; but these matters of emphasis and orientation are inevitable when the subject taught is Jurisprudence. I found the first edition of Professor MacGuigan's book sufficiently original and useful to have begun using it in the introductory course in Jurisprudence at the Law Faculty of McGill University over two years ago, in preference to one of the several available American and British books on the subject. My reasons relate to an interest I share with Professor MacGuigan in the judicial process. I have been concerned for some time with the apparent irrelevance of legal philosophy and the schools of jurisprudence in the view of many hard-nosed, practice-oriented law students. Unless the course on Jurisprudence is an elective one, designed for those students with a substantial interest in philosophy, the teacher of Jurisprudence is thus faced with a serious problem. The ideal solution would seem to be to show the skeptical student how the orientation of the judge, be it positivist, analytical, sociological, Thomistic, or any other, is an important factor in determining the *decision* he will render and the *rationale* for the decision. What better way to do this than to

illustrate the consequences of adhering to a particular school by means of actual cases? Yet the average Jurisprudence book is either a collection of excerpts from the writing of legal philosophers, un-leavened by any cases, or else it is a heavily-footnoted text, in which the author covers the various approaches in some systematic way — historically, for example, or by contrasting the various schools, or by stating his own views and examining other philosophies in the light of his own. There are, of course, exceptions to this general rule. Lon Fuller's mimeographed readings include some beautifully-contrived fictitious cases indicating the consequences of the judge's own philosophy, be it imbued with positivism, linguistic analysis, natural law, American legal realism, or the sociological point of view. Dennis Lloyd's *Introduction to Jurisprudence with Selected Texts* (2nd edition, Stevens, London, 1965) includes a fair number of cases, and Thomas A. Cowan's little *American Jurisprudence Reader* (Oceana, N.Y., 1956) also uses a number of cases in a similar way. Professor MacGuigan, however, is the first person, to my knowledge, who has done this systematically. His book is divided into five chapters or sections, each of which is composed of two parts: a series of cases, followed by a series of readings. From time to time, the author inserts a note of his own. Thus, the first chapter is an introduction to the subject in general terms, while the following chapters are entitled, respectively, Positivism, Natural Law, Thought, Sociological Jurisprudence, and the Judicial Process. (Perhaps the order of the chapters on positivism and natural law could have been reversed on historical grounds, but the author's order is justifiable in terms of the greater relevance of positivism to most contemporary judicial decision-making). At the end of the book, there is an appendix on Jurisprudence in Canada, composed of a note by Professor MacGuigan on Canadian writings in the field, an article by Professor Edward McWhinney, and a speech by Judge Samuel Freedman.

The first edition of Professor MacGuigan's book lacked the appendix on Canadian writing, as well as some of the more recent readings now included in the second edition, such as the excerpt from Judith Shklar's *Legalism* in Chapter I, Rawls' *Justice as Fairness* in Chapter II, d'Entrèves' well-known article *The Case for Natural Law Re-examined* in Chapter III, and Irving Kayton's article on Jurimetrics in Chapter IV, to name only some examples. All these additions have rounded out the text and brought it up to date. Similarly, Professor MacGuigan's decision to put the cases ahead of the readings in each chapter also constitutes a significant improvement; in the first edition, the order was reversed, and the student whose primary interest was not philosophy had to wait

patiently before seeing the importance of the theory under discussion, while he can now plunge directly into the practical problems and then find out where theory can help to solve these.

There are some areas in which it appears to me that further improvement would be possible in future editions of this valuable book. Few of the cases selected are Canadian in origin, and it would have been appropriate, in a Canadian work, to make a special effort in this area. For example, the chapter on Natural Law should surely have included the Quebec case of *Chabot v. Les commissaires d'école de Lamorandière*,¹ to name only one example; in this case Thomistic principles were expressly used by Roman Catholic judges to prevent the imposition of Catholic religious instruction in a public confessional school contrary to the wishes of parents. It would seem to me that a significant number of Canadian cases could be found to illustrate the various jurisprudential schools at least as well as many of those chosen. In fact, I sometimes found it hard, at first glance, to determine the relevance of some of the cases used — presumably this problem would be much more acute for the uninitiated student. If a lack of obviously relevant cases exists, it might be better to follow Fuller and invent fictitious ones to fill the bill, rather than risk weakening the impact of the case selected because of the many other issues involved in it. Insofar as the readings from the various writers and legal philosophers are concerned, I would personally have preferred a greater emphasis on modern writers whose literary style and point of view are likely to be more acceptable to the student. Extensive readings from Hobbes, Bentham and Austin are certainly not the simplest of fare. Professor MacGuigan's own background in philosophy is obvious; his predilection for neo-Thomism is evidenced by lengthy selections from Aquinas as well as such more recent natural law writers as Dabin, who might be well-nigh incomprehensible to many students. Historical and sociological writers have been grouped together, a not unjustifiable decision on the part of the author. However, one might well ask why the American Legal Realists should be grouped under the heading of "The Judicial Process" with a positivist article like Goodhart's *Determining the Ratio Decidendi of a Case*, instead of being given a chapter of their own or grouped with the sociological writers. Besides, I would have thought that the entire book is primarily oriented towards the judicial process, in contradistinction to many other jurisprudential works; although it is true that the writers who appear in the earlier chapters of the book are also concerned with many other aspects of the law.

¹ (1957) Q.B. 707.

One might also ask why Kayton's article on Jurimetrics should be placed in this same chapter, when its real relevance is to the whole new area of research and development opened up by modern technology (particularly the digital computer), symbolic logic, and new mathematical and statistical techniques of analysis. It is to be hoped that in future editions, an entire chapter on Jurimetrics might be envisaged. Still, it must be remembered that even here Professor MacGuigan is a pioneer and an innovator; I know of no other collection of readings on "Jurisprudence" which has included this type of material.

In sum, Professor MacGuigan is to be congratulated for having produced this work. It is not only a noteworthy contribution to the small amount of Canadian literature in the field of Jurisprudence, but can hold its own with the several well-established collections of readings, largely American in origin, which have had the market largely to themselves for so many years, and all of which can be criticized or faulted in some minor way. The highly personal character of the subject makes some slight criticism of any jurisprudential work virtually inevitable on the part of any reviewer. This probably reflects as much on the reviewer as on the work reviewed, indicating as it does a mere divergence of legitimate views in an area where consensus is unlikely, and where diversity is a genuine source of richness.

Perry MEYER,
Associate Professor of Law,
McGill University.
