

## Davitt: The Elements of Law

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constitutional obstacles. For example, while a witness may not be deprived of his protections of the Fifth and Fourth amendments, he may still be compelled to testify as to presence of fissionable material known to him. Since the information is all that is sought and no provision is made for use in trial against the individual, it may be held that such a witness is not thus compelled to testify against himself.

Likewise, the prohibition against search and seizure is not violated by proviso allowing foreign inspectors to enter any factory or even home, to search for contraband material, so long as in any action against the individual, his own guarantees against search and seizure are respected.

Henkin makes a valid appraisal of safeguards by which our own criminal justice shelters Americans charged with crime. Some of these safeguards must yield to legal forms adopted by an international tribunal. American reaction is examined against the sensitivity of other countries which will be asked to submit their own nationals to trial by American judicial procedures. He reaches the honest conclusion that any individual tried by an American court is entitled to every constitutional protection our own judicial system affords.

However, a violation by any national, including a national of the United States, in another land, is a violation of the law of that land, and violation of the arms control agreement can properly be said to be violation of the law of the host country. Arms control violations may be classified as international crimes, triable by an international tribunal, even at the United Nations.

Inherent in the entire essay is the author's honest and passionate espousal of need for the armament inspection about which he speaks. The work is more than an arid examination of relevant statutes; it is a dedicated advocacy of the contemplated position he examines.

This articulate, forward looking and humanitarian study is of value beyond the continuous legal dissertation. The work is more than a scholarly examination of the philosophical concept of arms control and inspection. It is rather an original and creative incursion into a yet unknown field of constitutional law. Professor Henkin not only examines the law and the society in which such law must function; he also charts the path that a true creative and expanding body of law must take in order to fulfill its function in the society which changing forces will create in the very near future.

A study such as this, of the role of constitutional law in the society for which we must prepare, is one of the true functions of the philosopher of the law. It is not enough that students examine the developing body of law; the student must anticipate the demands which society will make upon the body of law, and show the direction required to meet these demands. Such a study as this is eloquent testimony that the law need not be "the dead hand of the past upon the present," but, as constituted, possesses the vitality to embrace conditions and circumstances unforeseen even a few years ago.

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*The Elements of Law.* By THOMAS E. DAVITT, S.J. Boston: Little, Brown & Co., 1959. Pp. xxi+370. \$9.00.

A treatise on jurisprudence is a formidable task, combining as it must, in one compact form, both concrete law and the non-legal premises from which the law has its origin, its development and its justification. This is the area of legal

study that is claimed not only by the jurist, but by the psychologist, the economist, the sociologist and above all the philosopher.

In this work Fr. Davitt uses commendable restraint in keeping his attention on the law as it is applied in the courts of the country today. It is a compromise between the case book approach, in which the emphasis is placed on the law in all of its details, and the analysis of legal philosophers which so often stresses the burgeoning or conflicting theories of law as to slight substantive law itself. The author's principal concern is the law as it interests lawyers and he wisely leaves to others the broad vista of abstract philosophy of law and the deep insight into the legal giants that have shaped American law.

Much of today's law does not appear on the surface. Neither the courts nor the law professors have the opportunity, and perhaps not the education, required to probe these non-legal elements that give law its ultimate direction and much of its consistency. These are the "Elements" discussed in this book. With as deft a hand as a surgeon's, Fr. Davitt cuts through the tissue of the law and exposes the vital organs of the American legal system that supply order and justice to society.

Selectivity is essential in such a broad subject, and there is little reason to quarrel with the judicious choice of the parts of law treated by Fr. Davitt. The first section explores fundamental ideas over the entire field of positive law. It is thorough and precise, but so divided into minute sections that the reader may feel that he is delving into an encyclopedia of law. The second section takes the Thomistic concept of natural law, or man-discovered law as the author prefers to term it, and shows its relation to positive or man-made law. This is the heart of the author's legal philosophy, and once he has established the means-end relation as the norm of all human action, all particular laws are judged in the light of this relation.

Of special appeal to the legal practitioner is the third section, for it concentrates on major problems that have arisen in the following areas of substantive law: Constitutions, crimes, torts, property, contracts, and equity. Procedural law, as chiefly a matter of methodology, is passed over. Criminal law lends itself particularly to jurisprudential investigation, for here the law must take a stand on personal responsibility, *malum prohibitum*, insanity and the other essentially human characteristics of law. Torts are hardly less intriguing since, with the notion of absolute responsibility, the entire structure of responsibility toward private citizens is questioned. Property introduces the philosophy and dignity of human labor as a just title to ownership. Fr. Davitt coordinates these legal issues with his general philosophy, and suggests solutions based on the soundest of reasons and our general legal traditions.

The final part of the book is devoted to political theory as the integration of law into government for the common good of society. While only incidental to the theme of the book as such, these chapters do indicate the over-all interlacing of law and politics.

"Elements of Law" deserves careful consideration as an introduction to jurisprudence. What is sacrificed in theoretical philosophy receives more than adequate compensation in the logical consistency and scholarly documentation with which every point is made.

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