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The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos, edited by Albert Broderick. Cambridge, Massachusetts: Harvard University Press, 1970. Pp. xxv, 370. Cloth: $15.00.

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Book Review

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The procedural framework of the legal system occupies a central position in recent studies of contemporary jurisprudence and the comparative philosophy of law. The processes of law, as Paul Freund recently remarked, rather than its particular judgments or results, offer insights which "may teach us to cope with the great antinomies of our aspirations: liberty and order; privacy and knowledge; stability and change; security and responsibility."[1]

The legal enterprise, defined in Henry M. Hart's studies around the principle of institutionalized decision and settlement, is a creative force in society. Law serves persons existing in radical interdependence by procedures ordained duly to direct and domesticate power. The legal order is a positive context for the developing interrelationships of rights and duties between individuals and organizations within the national state and the international community.

Focusing upon the centrality of a progressive and societal role of law, jurists are increasingly turning from treatises preoccupied with systematic conceptualization and codification to a methodology of interdisciplinary analysis. Illustrative of this trend are the recent studies of Freund, Lon L. Fuller's *The Anatomy of Law* and two very significant studies of the judicial process, Alexander Bickel's *The Supreme Court and the Idea of Justice* and Schubert and Danelski's *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West.*

The present collection of essays taken from the writings of Maurice Hauriou, Georges Renard and Joseph T. Delos brings welcome light upon the

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1. P. FREUND, ON LAW AND JUSTICE v (1969).

American scene. Careful editing and meticulous annotation make this volume a valuable contribution to the analytic endeavor. An equally worthy translation serves to convey with clarity and precision the thinking of the great French jurists as they explored the dynamics of social interaction to establish law and right upon the institutional foundations of society.

Roscoe Pound classified the work of Maurice Hauriou, Dean of the Faculté de Droit of Toulouse in the first quarter of the century, as neo-scholastic sociological jurisprudence. What Kant attributed in the development of legal obligation to will, Marx to economic wants, Post to instincts, Weber to values and William James to desires and demands in conflict, Pound says Hauriou ascribed to institutions.[2] Pound found this a dangerous shift of the basic legal unit away from the individual man. He feared submergence in the demands of the corporate state. Yet it is now clear that Hauriou compensated by a rich personalism which enabled him to strike a theoretical balance that Pound had failed to see.

Hauriou sought an explanation for the developing legal order that would avoid both an individualistic disintegration in the fictionalized citadel of contract and denigration of legal personality by the equation of legal order with the state. For this reason he repeatedly criticized Léon Duguit, who he thought had used sociological theory in such a way as to jeopardize the very integrity of personal rights as a creation of the mass of consciences. This he thought would leave unprotected the rights of any dissident minority. But with equal vigor he opposed Hans Kelsen's pure theory of law as a formalistic construct unrelated to the dynamics of the social factor. Both extremes failed to account for the complexities or the evolution of positive law by reducing them to a single explanation, a "monism" as he termed it. The individual, Hauriou believed, is antecedent to both law and state, not in the privity of a shielded subjectivity, but as a social being, as needing for growth and fulfillment the structure of institutionalized relationships.

Hauriou's studies of French administrative law, of which he is the acknowledged master, led him to the theory of the institution. The integration of custom, contract and legislation in a processive and relational matrix of positive law has been further developed by his two most important disciples, Georges Renard, formerly professor of public law at Nancy, and Joseph T. Delos, professor of sociology and law at Lille. They have gone beyond Hauriou into a general institutional theory or philosophy of law. Of the three, Delos alone, who contributes a retrospective essay to this volume, is still alive.

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2. 3 R. POUND, JURISPRUDENCE 342 (1959).

Man in his natural sociability is the basic datum, the principal "social fact" in a galaxy of interrelated phenomena which supply the concrete concern for justice in positive law. In the view of the institutionalists, these social facts tend to coalesce in structured institutions under the influence of directive ideas. The rational element or guiding idea is the leading reason for cooperation in the formation of organizations and the vital, moving force of institutions. Hauriou defined institution basically as:

> . . . an idea of a work or enterprise that is realized and endures juridically in a social milieu; for the realization of this idea, a power is organized that equips it with organs; on the other hand, among the members of the social group interested in the realization of the idea, manifestations of communion occur that are directed by the organs of the power and regulated by procedures.[3]

The role of authority within any institution is to further the attainment of this organizing and directive idea. The exercise of authority, however, depends on the observable stage of ideational development, wherein the role of sociology is pivotal. Social facts supply the stuff of positive law, but the directing idea remains normative. Progress in society depends upon the rational development of basic ideas in the light of critical moral principles bearing upon the values of order, justice and liberty, and the need procedurally to balance power with power to compensate for human weaknesses.

The legal enterprise is thus the art of achieving the idea, the common personal and social objectives of interdependent men and institutions. Law is not only deductive, but primarily practical. Hauriou cites favorably the definition of Celsus that law is an art, *ars boni et aequi.* Utilizing the data of the social and behavioral sciences, law properly functions to the attainment of fundamental moral ideas for the common good of society. These moral ideas can be verified by the observation of the reality of men living in society.

As Delos remarks, this means preeminently a return to reality, to an objective natural law based upon the observation of human nature, not as an abstract notion or concept, but as that which is "most real and most living in each one, the principle of all the instincts, vital forces, intellectual, moral or physical needs, that give birth to the life of society and provide it with its ends."[4]

Social relationships are real. They constitute an "objective reality, exterior to the individuals who are the support and the terms of these relationships,

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3. THE FRENCH INSTITUTIONALISTS 99 (A. Broderick ed. 1970).
4. *Id.* at 265.

and they are irreducible to psychological or interpsychological realities."[5] Thus, institutions as unlike as the family and organized international society have an incontestable natural foundation in an observable reality.

An institutional conception of law thus means

> . . . a conception of juridical reality that, applied to foundations and groups, brings out the fundamental role of the directing idea; applied to the study of the legislative act, emphasizes its nature as an "incarnate idea"; and finally, applied to contract, explains its true nature, shows that it is not a simple balance between two wills but that it too is institutional in nature and gravitates around an organizing idea.[6]

Law is never merely the manifestation of will. Thus, an analysis of the realities themselves, a study of the internal structure of the juridical act, definitively casts subjectivism and voluntarism outside the domain of the philosophy of law.

> Right and duty manifest themselves when reason fulfills its proper office and, considering the beings in question, *judges* what their reciprocal relationships should be in order to conform to their nature. Reason then discerns *an order of natural balance*, that is, an order of justice that is founded not on arbitrary subjective evaluations but on the objective value of beings. Law is born when reason is no longer content with simply verifying the nature of beings but draws normative consequences from them. The jurist is a sociologist who adds to his preoccupations a concern for order.[7]

Positive law, Delos explains, is the normative expression of the social order of justice and balance. The order of justice is then truly a societal order, and every act of justice performed by an individual realizes an "element" of the social order.

The institutionalized conception of law is purposeful and dynamic. It sees positive law as intent upon achieving human group aims in a process of development. The juridical rule is neither a deductive concept nor the arbitrary and subjective decision of a judge. Rule and social reality are interrelated. Law develops from the society which takes priority to it and to which it is ultimately subservient. The rule of law is not a purely formal reality; it is a social form, a social manner of behavior expressed in positively juridical terms.

This brief outline fails to do justice to the profundity of legal analysis attained by the French institutional jurists. Time and again the perceptive in-

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5. *Id.* at 233.
6. *Id.* at 252.
7. *Id.* at 261.

sight of these men rises to be captured in application to contemporary problems of right and order, due process, judicial prospectivity, and rapidly expanding vistas of domestic and international law. One senses in agreement with the editor the similarity between Myres McDougal's "goal-thinking" and Hauriou's institutional unfolding of the directive idea. One might also speculate about the influence of François Gény, Renard's dean at Nancy, on American jurisprudence through Benjamin Cardozo's frequent citation of him in *The Nature of the Judicial Process.* Beneath Renard's and Delos' use of the scholastic categories of matter and form, substance and accident, foreign to the ken of most American jurists, one discovers a concern similar to Freund's impatience with one-dimensional thinking and his aspiration that the courts serve as "the conscience of the country."[8]

The evolution of legal rights need not only mean the explicitation of new demands upon society nor even the unfolding of natural law through progressive applications as "the evolution of human life brings to light new necessities in human nature that are struggling for expression."[9] As Albert Broderick, the editor of this volume, has ably demonstrated elsewhere, the insight of the French institutionalists may well transcend the naked individualism of Locke and also the static conceptualism of latter-day exponents of an objective natural law.[10] Providing a broader empirical base of observation, it gives a more convincing legal analysis of the present scene.

The French Institutionalists appears as volume VIII in the Twentieth Century Legal Philosophy Series published under the auspices of the Association of American Law Schools. With glossary and comments by Jean Brèthe de la Gressaye, André Hauriou, Bernard Gény and Marcel Waline, it will stand as an exemplary work of comparative jurisprudence.

8. P. FREUND, *supra* note 1, at 115, 196.
9. J. MURRAY, WE HOLD THESE TRUTHS 313 (1960).
10. *See* Broderick, *Evolving Due Process and the French Institutionalists,* 14 CATHOLIC U.L. REV. 136 (1964); Broderick, *Rights, Rhetoric and Reality: A New Look at Old Theory,* 19 CATHOLIC U.L. REV. 133 (1969).