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BOOK REVIEW

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Steven D Smith, *Law's Quandary* (Harvard, 2004)

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The blurb on the back cover of this 200 page book on jurisprudence cites Dean John Garvey of the Boston College Law School as saying "This is the best book I have read in several years". John should take a trip to Gleebooks. He would find quite a few that are better. In fairness to the author, who is a Professor of Law at the University of San Diego, he would probably agree.

A good book on jurisprudence will search and probe and try to interest its reader in the central question of what lawyers are concerned about and why. That is what Professor Smith attempts.

The basic quandary that he presents is that, despite the compelling criticism to which "objective" notions of law have been subjected over the past hundred years, in practice, lawyers just go on doing and believing much the same as they did before the imperfections of their discipline were so publicly and repeatedly presented.

Smith takes to task the very notion, central to the law of precedent, that cases have "holdings" or a *ratio decidendi*, which are ascertainable by settled rules. So much depends on the interpretation of a decision by later judges (especially where there are multiple reasons) that, in the words of U.S. Justice Scalia, searching for the *ratio* is often "looking for something that does not exist".

Smith gives a hint as to why judges and lawyers have continued to shy away from the truth about law. He says that it is like a case of a disreputable secret in the family – for example, grandparents guilty of incest. Lawyers back away from the truth because it is profoundly disturbing to acknowledge the pointlessness of a lifetime's legal practice, pursued upon an assumption that is not true.

According to Smith, lawyers of the twenty-first century will just go on "doing" law. Some of them keep muttering about "strict and complete legalism". Their friends demand a return to the "former condition of things". Yet although still others acknowledge the existence, and desirability, of a degree of "judicial activism" most lawyers do not want it to go too far. Creativity, it seems, is disturbing to the average legal mind.

An author, like Smith, who draws a similarity between judicial and academic writing on law and President Warren Harding's speeches cannot be all bad. Harding's speeches were described as "an army of pompous phrases moving across a landscape in search of an idea". So, it is said, is the common law. Professor Smith, at least, is acquitted of his own accusation. It may not be the best book of the year. But it is readable. It searches for ideas and it finds quite a few.

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