

Book Review

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Book Review

MY PHILOSOPHY OF LAW. Credos of Sixteen American Scholars. Boston: Law Book Company, 1941. Pp. xii, 321. \$5.00.

Published under the direction of the Julius Rosenthahl foundation at Northwestern University, this volume contains the legal credos of sixteen leading American scholars as written in response to a letter of invitation to participate. Each writer was asked to set forth in a limited number of pages of text (no footnotes) his philosophy of the law. The idea was to produce a written symposium of contemporary American legal philosophies by having directed at the same topic the "views of American thinkers on the ultimate ideas of the origin, nature, and ends of the law". The label "philosophy of law" was used in its wide sense to include "ideas of a fundamental nature bearing on the law as an institution common to all human societies" but not including "any statement, however complete, or however well organized, of actual legal rules or doctrines". With this much direction only, the selected "prime donne" (as the preface calls them) of theoretical jurisprudence in the United States were set to their task.

The result appears as a series of sixteen essays running from nine pages of print for the shortest to twenty-two pages for the longest with an average of fourteen pages. Each essay is preceded by a full page portrait of the author and another separate page containing in the center a brief identification, setting forth the author's birthplace and date, general education, present connection, and a more or less detailed statement (varying with each author) of his other writings. The type is large and legible on cream colored paper with rough edges, and the book is attractively bound in a brown leather-looking binding with gold lettering so as to make an attractive desk or study volume. As one reviewer has commented, the gift of such an expensive looking volume makes one conscience bound to read it before reviewing it, a practice not always indulged in.

The contributing authors are composed of one law professor-practitioner, two philosophy professors, and thirteen law professors. Some lament has arisen over the absence from the work of any contribution from the judiciary. If, as was so in the case of one judge who reviewed the

book, this resulted from judicial refusal to accept invitations to participate, the publishers are not to blame; although, the lack remains and is regrettable. Perhaps it will be remedied by a companion volume of sixteen judicial philosophies of the law, if sixteen American jurists can be found willing to participate in such a work. Production of such a volume would do more than the present one in the development of abstract thought where there is at present a noticeable lack of it.

Aside from the lack of representation of the bench, the assemblage of scholars in the instant work should be enough, of itself, to recommend the book to the law reading public. It has stimulated a number of interesting reviews, some adding bits of philosophy to what is expressed in the work, some classifying or attempting to simplify the philosophies of the authors, some providing delightfully humorous reading in their light treatment of matters philosophical, and one criticizing in biting fashion the efforts of the contributors. This reviewer feels that a brief survey of each philosophy will enable the reader to decide whether or not to read further before passing judgment. The reviewer felt the book very worth-while.

JOSEPH WALTER BINGHAM, law, Stanford University. While recognizing the various possible numerous meanings of the word law, this self-styled iconoclast and realist discusses law "in the sense of the field of our professional study". As such, law consists of the concrete functioning of government; and, the lawyer's business is to forecast as accurately as he can possible governmental action with reference to his client's affairs. The cases in all their concreteness of cause and effect are the very substance of the law. One must be aware that the causes of judicial decisions are not always stated and are often inaccurately stated in the opinions. However, real ability goes beyond the pure technique of a lawyer and calls for an understanding of economic, social, and political prejudices, forces and purposes. Throughout, the emphasis is on men and not rules. As in any science, or philosophy, or art, the rules and principles are but tools of thought. "Any philosophical theory of government, any political or social tenet, any juristic postulate is especially relative and provisional."

MORRIS R. COHEN, philosophy, College of the City of New York. Despairing of referring to all the elements of a philosophy of law in so short a space, this philosopher says

he will confine himself to discussing "how the principle of polarity, of the mutual dependence of opposing principles, can help us to deal with some current dichotomies in our field". After a clear statement of the need for both induction and deduction in legal, as in other, thinking, he emphasizes that the principle of polarity means that neither the logical *vs.* the existential, nor what the law should be *vs.* what it is, are mutually exclusive. Law and justice are to be neither wholly identified or wholly divorced. The legal order, if it is to preclude violations through fraud, criminal violence, and rebellion should promote a maximum attainable satisfaction to all groups. Some determination of the problem of the ultimate aims of the law and the extent to which it can influence human fate is important (but space did not allow for elaboration).

WALTER WHEELER COOK, law, Northwestern University. The primary aim of Cook's philosophy is to examine the problems of the lawyer, the judge, the law teacher, and the legal investigator "from the point of view of the logic of inquiry developed by modern science". His "scientific empiricism" incorporates as a single method mathematics and "logic" on the one hand and experimentation on the other. Referring to his other writings for elaboration of his general point of view, Cook seeks to emphasize in this essay that his method of inquiry can be utilized in developing a theory of values. At beginning and end, he disclaims any ability or attempt to state a philosophy of law in the space provided; but he concludes that use of his scientific method can work out a better legal philosophy than most current ones.

JOHN DEWEY, philosophy, emeritus, Columbia University. Dewey starts with the assumption that an examination of the controversies of the various schools as to the nature of law reveals that the question breaks down into three issues, the: (a) source, (b) end, and (c) application of law, including under the last the methods by which law is and can be made effective. He seems to reduce all three to the problem of what the law ought to be or the working out of a theory of values. From then on the essay seems devoted to demonstrating the soundness of the same scientific approach of Cook. The source, end, and application of law are to be discovered within the system by proper methods of scientific inquiry. "The standpoint taken is that law

is through and through a social phenomenon, social in origin, in purpose or end, and in application."

JOHN DICKINSON, law, University of Pennsylvania (also general counsel of the Pennsylvania Railroad). This essay is one of the few attempts to state a complete legal philosophy and in its compactness must be read to be fully appreciated. The author traces the growth of law as one of the incidents of the growth of civilization. The friction of people living in communities is avoided only by custom and habit and the willingness of individuals to follow authority. But to avoid arbitrary control, authority must act through rules. This enables individuals to plan their transactions and subjects governmental action to the control of rational processes. Dickinson criticizes the realists for their effort to break down these processes (which many realists would claim they do not mean to do) and suggests that some recent juristic theories of "flexible intelligence" in government are but a return to the days of government by philosopher-kings. He suggests an external source for the content of rules such as custom, the law of nature, or "ideal" law. Law grows through legislation and judicial decision. Constitutional protection coupled with judicial review are desirable safeguards against arbitrary government.

LON L. FULLER, law, Harvard University. Reflecting on the difficulty of determining one's shifting philosophy, Fuller prefers to state what he dislikes about the present order. He criticizes the "literary tradition" of confining legal study to a traditionally defined body of legal materials. He would prefer more emphasis on the fields now reserved for graduate study (if any) such as the great classics of natural law, the general history of legal ideas and their relation to intellectual movements of the past; comparative law; the legal implication of psychology; economics and sociology. He also dislikes that attitude which sees salvation in the application of the methods of natural science. This leads him to a discussion of the controversy between rationalism *and* irrationalism where he reveals what Cook laments, namely that much criticism of the methods of "scientific empiricism" relates to a much narrower method than that which Dewey and Cook expound. It is easy to agree with Fuller that "we must have a good metaphysics before we can have a good politics", but the controversy (which Fuller leaves untouched) seems to be on the extent to which the former is discoverable within the social order.

LEON GREEN, law dean, Northwestern University. Dean Green postulates that the base of society is activity. Out of activity comes power, which must be controlled. Many controls exist in religion, the family, civic clubs, trade groups, etc.; but, for its more important interests, society controls through formal political government. Along with formal government comes law. While it has many phases, all of which must be embraced in a philosophy of law, there are three main elements: (1) Wisdom, (2) Power, (3) Process. Since wisdom grows out of all social activities, and power is generated through all of them "any satisfying philosophy of law must therefore be found in a philosophy of the total social organism of which law is only one phase". The social organism needs a body of highly trained men to control it,—justifying the training of lawyers. Problems of government increase with the complexities of growing society. Growth has just begun.

WALTER B. KENNEDY, law, Fordham University. This writer sees a real struggle emerging in America between two polar and antithetical theories of law which may be Scholasticism vs. Realism. Scholasticism is a way of life and law which recognizes natural law and that a Divine Being is its author, believing in universal truths and imperishable concepts, discoverable by the reason of Man. Realism is a philosophy of law which finds no place for natural law or immutable rights, which makes much of the facts of life and deems them more important than principles of law, which elevates behaviour rather than reason as the motivating factor in judicial opinions. Having established his schools, Kennedy proclaims loudly his faith in Scholasticism and his hatred for and distrust of Realism which he blasts as the stated faith of the dictators of Europe. Reconciliation of schools of thought envisaged by Cohen, Llewellyn, Radin, and others in this book seems lost in this essay.

ALBERT KOCOUREK, law, Northwestern University. After several pages spent with the mathematical and other scientific philosophers in order to prove that all is not what it seems and if it is, it shouldn't be, Kocourek informs us that the world of reality transcends our experience and the world of appearance, which we live in, is "Many". The postulates of this fatalistic belief are summarized in "There is no space, change, time, causality, or free will". The consequences for legal philosophy are that "aesthetics and

ethics are illusions built on illusions comparable in law to presumptions based on presumptions". "Natural law and an ultimate standard of justice, which even conventional reason must recognize as mere construction of practical ideals created by the human mind are examples of illusion on illusion". Belief in this may lead some to a "eudaemonistic, or perhaps hedonistic pessimism, or a kind of anarchic quietism"; but for others, "it may lead to a more understanding attitude toward the universe and a saner view of life". The reviewer must admit that he found most agreement with the author's concluding quote from the gravedigger in Hamlet: "'Cudgel thy brains no more about it, for your dull ass will not mend his pace with beating'".

K. N. LLEWELLYN, law, Columbia University. This is one of the most complete philosophies in the volume. Its wise author prefaces his remarks with what, for many years, has seemed to this reviewer to be true and which assumes increasing validity from the essays in this volume, namely that "one large portion of the disputes among jurists loses much of its meaning if the phases of law which are particularly dear to one and another of the combatants are put each into relation with law as a whole". After this he analyzes law as a going institution in society involving rules and principles, an ideology, methods, and a host of *law-men*. As such, it has two points of orientation: (1) Its job to do; and, (2) Its results in life by which it is tested. The jobs are five: (1) The disposition of the trouble case; (2) The preventive channeling of conduct and effective reorientation thereof; (3) The allocation of authority and the arrangement of procedures which mark action as being authoritative; (4) The positive side of law's work as a whole, the net organization of society to provide integration, direction, and corrective; (5) Juristic method—the task of handling materials, tools, and people to the end of doing the jobs better and better. In elaborating this, Llewellyn displays much more than the realist of Kennedy's feyns. He may be Cook's scientific empiricist?

UNDERHILL MOORE, law, Yale University. This writer seems to be seeking a philosophy of law composed of "operational" theories or at least theories from which verifiable (operational) hypotheses may be deduced. "Operational" describes a "theory every proposition of which may be verified directly, or indirectly through another proposition, either by a contrived experiment or, as in geology, by ob-

servation of a process without such an experiment". Without such precise knowledge of the effects of law on behavior "any discussion of the relative desirability of alternative social ends which may be achieved by law is largely day-dreaming and any discussion of the 'engineering' methods by which law may be used to achieve those ends is largely futile". The theory, construction and experimentation in his paper attempts to establish a method for obtaining such precise information. It is not susceptible of brief description.

EDWIN W. PATTERSON, law, Columbia University. Recognizing that traditional jurisprudence has concerned itself more with the internal order and function of law, Patterson chooses to consider it in its external relations with government, with society, and with justice. The relation with government is the only indispensable one; for, law may be unjust, and it may be ill adapted to the society it serves (at least temporarily). Patterson regrets the delegation to political scientists (or any others) of the development of conceptions of state sovereignty and government. He emphasizes that the conflicts in society set the problems of social controls of which law is only one, and that to understand these conflicts and their solution, one must be aware of all of the characteristics of man in society. Law is a useful instrument of social control largely because of man's capacity for reasoning coupled with his capacity for justice. It is difficult for the author to convey his idea of justice, however, other than as being a right way of doing things more in terms of operations and immediate ends than of any ultimate ends. This makes a well-rounded essay.

ROSCOE POUND, former law dean, Harvard University. Pound states that law may be used to describe: (1) the "regime" or "legal order" of a developed politically organized society; or (2) the rules of decision or guidance from which one predicts official action in that society; or (3) the judicial and administrative process through which the rules are applied, any of which call for system and order. Despite certain philosophies of futility, it is important to discover the task of the law. Ethics, economics, political science, psychology, sociology, history, and philosophy may be looked to for help. Nineteenth century jurists concerned themselves chiefly with the nature of law, the interpretation of legal history, and the relation of law and morals, with confusion resulting from embracing too much in the

one word, law. Today the most important problem is the theory of interests. A legal system attains the ends of the social order by: (1) recognizing certain interests individual, public and social, (2) defining the limits within which those interests shall be recognized legally and given effect through legal precepts, and (3) endeavoring to secure the interests so recognized within the defined limits. This must include working out principles for valuation of interests. Pound concludes with an expression of faith in the traditional methods of Anglo-American law, with a bow to the practitioner.

THOMAS REED POWELL, law, Harvard University. Disavowing any philosophy of law, and having no desire to acquire a formal one, Powell would never have thought to inquire as to the historical origin of law (he doesn't consider "origin" as meaning the source of its authority), and he is convinced that it has many "natures" and many "ends". His philosophy is simply realistic, as he is willing to avow if it does not exclude "that ideas general and particular are potent influences on the minds of men". Judging from the single court which he has studied most, it is necessary to know doctrine but also to be aware that it doesn't always determine the result. Some judges adhere to a consistent social pattern. Others don't. Powell wants to be broad-minded and practical, he doesn't want to be particular or rigid about legal philosophy.

MAX RADIN, law, University of California. After announcing that he proposes to discuss the science of legal values, this author confines himself considerably to a description of the factors, legal and non-legal which enter into the formation of legal judgments. These judgments are the actions of a host of judges, magistrates, and administrative or executive officials who bind others by their rulings. They are largely influenced by an attempt to conform to two things: (1) the orderly arrangement of past judgments (the legal taxonomy of statutes, judgments, past rules, etc.), and (2) accepted doctrines of social behavior in the very society from which the judge comes. Difficulty arises chiefly when there are conflicting patterns to cover an unusual act. The science of law is, therefore, "that organized examination of all the data that affect social conduct which will enable us to predict what evaluation in the sense of 'ought' or 'may' a judge will make of some conduct which is a little outside of usual patterns". We find judges in-

clined by their origin and training to disregard those elements of social life not already formulated in past doctrine, but likewise swayed to conform to changing *mores* of the community and to be guided by that "particular moral quality 'justice'". The essay concludes with interesting reflections on the opposites with which justice must deal.

JOHN H. WIGMORE, law, Northwestern University. This scholar confines his contribution to an analysis and subdivision of legal science from the point of view of "the objective of our thinking about law at a particular moment". He states that law may be regarded as: (1) A thing to be *ascertained* as (a) the actual "positive" law of a given moment (statutes, decisions, customs, etc.), (b) its history and development, or (c) its relation to other sciences; (2) A thing to be *questioned* as by a standard of (a) logic, (b) ethics, or (c) economics (or other policies of social welfare); (3) A thing to be *taught*; and (4) A thing to be *made and enforced*, as by (a) the judicial function, (b) the legislative function. He submits that clarity of thought will be materially aided by knowing which one or more of these several branches of the science is under consideration at any given moment. Perhaps one should re-read the book after this essay.

Doubtless, this book will continue to raise various responses as to the value of legal philosophy. If it feeds at all the growing appreciation in American jurisprudence of the value of abstract thought, it will have achieved a worthwhile purpose. There will be those who will be left with a feeling of futility after having read it. This feeling should be checked carefully to discern whether it is an honest appraisal of what is in the book or whether it is a retreat from the difficult task of thinking through a philosophy of one's own. We inevitably make decisions as a result of our philosophy (our personal attitude toward life). If we have that philosophy without being conscious of it, it is only a result of our own very limited experience, and may not properly weigh all of that. If we have given conscious effort to its development, it may include some of the experience and wisdom of others.

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