

BOOK REVIEWS

LEGAL PHILOSOPHY FROM PLATO TO HEGEL. By Huntington Cairns.* Baltimore: The Johns Hopkins Press, 1949. Pp. xv, 583. \$7.50.

This volume provides one with a grand tour of legal philosophy in the grand tradition and, I hasten to add, a good deal more than that. To understand Mr. Cairns' remarkable achievement one needs to observe the task that he has here set for himself. In two previous volumes he discussed the relations of law to the social sciences¹ and to logic and the empirical sciences.² Here he looks at law from the point of view of philosophy.³ The first desideratum of legal philosophy is "a systematic collection of the philosophic suppositions applicable to the legal order."⁴ That explains why he wrote the book as he did. He has presented, if not an integrated system of philosophic suppositions, at least an orderly and amazingly interesting series of critical expositions of the philosophic suppositions of thirteen legal philosophers. To this he has added three original contributions: Numerous illustrations of the influence that these philosophers have had upon positive law and of the meanings of their conceptions for contemporary American law; a critical analysis showing the deficiencies of a philosopher's ideas; and some fragments of Mr. Cairns' legal philosophy, about which we shall presumably know more in his projected fourth volume, *The Elements of Legal Theory*.

The author's purpose explains his limited meaning of "legal philosophy," and this in turn explains his selection of thirteen men, and his exclusion of others. He does not deny the name of "legal philosophy" to the general theories of law which lawyers, working upward from the concrete problems of law, have constructed. He mentions Grotius, and one might add Bentham, Austin, Pound, and Cardozo as examples. None of these men has given us a general philosophy, to which his legal philosophy is subsidiary. Mr. Cairns has selected twelve philosophers who have done this: Plato, Aristotle, St. Thomas Aquinas, Francis Bacon, Hobbes, Spinoza, Leibniz, Locke, Hume, Kant, Fichte, and Hegel. To these he adds Cicero, who was a philosopher chiefly by reflected light, but whose inclusion is necessary to represent the Stoic influence on legal philosophy. The author makes a persuasive, though not always quite convincing, argument that each of these has contributed ideas of major importance to modern jurisprudence. While each of these philosophers has a separate chapter, in chronological order, the influences of the earlier ones on the later ones are frequently noted, and a comparison of their ideas serves to clarify each. Mr. Cairns is a man of ranging imagination and genuine erudition, and one may suspect he would have enjoyed writing this book from sheer love of knowledge.

How have these philosophers contributed to legal thinking, to theories of or about law? In his introductory chapter, entitled "Philosophy as Jurisprudence," the author classifies their influences as threefold: The development of methodology, the contribution of ideals, and a "profound practical intelligence."⁵ While he does not rigidly adhere to this pattern in discussing each philosopher, it is the framework of his discussion and is worth examining.

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¹ LAW AND THE SOCIAL SCIENCES (1935).

² THE THEORY OF LEGAL SCIENCE (1941).

⁴ P. 562.

³ Preface ix.

⁵ P. 6.

The author believes that jurisprudence has been more influenced by philosophy than have the other social sciences and that this explains the advanced position of jurisprudence among them.⁶ Methodology includes not merely formal logic (which he deems indispensable, though not the whole of reasoning) but also all those methods by which philosophers have, through the ages, sought to test their premises and their conceptions: Socrates with his endless questioning, Descartes with his analysis of the way to solve difficulties, Kant's discovery of necessary truths, Whitehead's "reason" that transcends method and seeks a coordination in "the nature of things."⁷ Methodology is related to and depends upon metaphysics and epistemology. This, together with the author's manifest interest in ideas rather than (but not to the exclusion of) ideals, explains why he carefully shows the logical chain (sometimes it seems a gossamer thread) that connects a philosopher's metaphysical premises with his conclusions about law. This is one of the remarkable features of the book.

The author's conception of an "ideal" is very loose and seems at times somewhat peculiar. He gives as an example Plato's ideal of justice: "Justice is doing one's own business and not being a busy-body."⁸ But the "end" of law, he says, may be happiness, which may be attainable by pursuing other "ideals" of justice. Thus we have the conception of an "ideal" as an intermediate end, a means to some ultimate end. Do we not usually think of ideals as ultimate, even unattainable, ends? Another of his examples is the Rent Control Act (1919) for the District of Columbia, which laid it down as an "ideal" "that the Federal Government ought not to be embarrassed in the transaction of the public business."⁹ Most statutory draftsmen would call this a "declaration of policy." He concludes that neither philosophy nor jurisprudence has developed a critical theory of ideals. Indeed, they have not provided a stable terminology. Nevertheless, philosophers of law have usually (perhaps always, if one includes authority and order as an ideal of the positivists) been prolific in ideals, and some of these are influential in the judicial process and in other governmental processes.

The third kind of contribution of philosophers has been their "practical intelligence" applied to legal problems. He remarks that many of the philosophers whom he has selected possessed an extensive knowledge of law and legal history: Plato, Aristotle, Cicero, St. Thomas, Kant, Fichte, Hegel, Bacon, Hobbes, Locke, and Hume. Because Mr. Cairns believes their practical contributions are important, he has devoted much space to expounding the views of each of them on various branches of the law, or on concrete problems of the legal order. Thus he summarizes Plato's discussion of contracts, property, the sale of goods, and a penal code; Hume on property and contract; Kant on real, personal, and real-personal rights, etc. While this is thoroughly done with a wealth of illustrations, it seems that a good deal of it is not very rewarding, unless one has an antiquarian curiosity. Each of them was in his application of "practical intelligence" limited by the social conditions of his age and by the problems of the legal order with which he was familiar. Kant's theory of rights (pp. 420-437) seems to be based on the modified Roman law that Kant knew, and even if it be true that Kant was the first major philosopher who developed the notion of the real right,¹⁰ one would like to know if writers of legal treatises had not previously invented the idea. At all events, the philosophers have no doubt contributed valuable tools to analytical jurisprudence.

Two other self-imposed limitations serve as framework of Mr. Cairns' discussion of legal philosophy: The partial exclusion of political philosophy and of individual ethics.

⁶ P. 15.

⁸ P. 18.

¹⁰ P. 414.

⁷ P. 8.

⁹ P. 19.

He has given each philosopher's views as to the justification and ends of the state, as a necessary part of his philosophy of law, without developing fully his political philosophy. This is a conventional division of labor in twentieth century scholarship, and on the whole, a useful one. Specialization has given the western world two great legal systems, the Roman-Western European and the Anglo-American, and an independent judiciary which strives, on the whole successfully, to separate law from politics and thus to protect the individual in society from the Frankenstein that is partly of his own creation. Moreover, since law is only *one* means of social control, it is well that lawyers do not have a monopoly of political philosophy. Mr. Cairns' book will, I believe, tell them much that they need to know about it, and thus help to correct one of the inherent defects of specialization.

The author's exclusion of individual ethics from legal philosophy follows the Kantian pattern, though not the Kantian criterion of exclusion. Kant taught that law was concerned solely with the external relations of men, while morals (ethics) was concerned with the purity of their motives in acting. As the author points out, this is an unworkable criterion for modern law,¹¹ which does take account of the state of mind of the actor as an operative fact. The exclusion of individual ethics has led the author to give only a passing reference to Spinoza's remarkable system of ethics. In the discussion of Aristotle's conceptions of justice, the separation is more difficult, and Mr. Cairns, like others, has been baffled by it.¹² Aristotle's division of Particular Justice into Corrective Justice (for controversies between individual litigants) and Distributive Justice (for the apportionment of rewards among citizens in proportion to their merits) has had a considerable influence upon legal thought down to the present time; and yet it does not adequately account for all of the primary categories of modern legal systems.¹³ Mr. Cairns' separation of individual ethics from legal axiology, never too rigid, is justified by his methodology. A norm of conduct that ethics can urge by way of individual admonition may not be adapted to implementation by heavy-handed law. There are, as Mr. Cairns recognizes and as Pound has long ago pointed out, limits to effective legal action.¹⁴

Francis Bacon's philosophy of law, as here presented, seems worth rescuing from the oblivion to which it has been consigned by Anglo-American writers on jurisprudence. Bacon, long before Bentham, gave excellent reasons for the codification of English law,¹⁵ formulated an admirable statement of the qualities of a perfect law,¹⁶ and then developed for the imperfect qualities of English case law a theory of analogical extension that resembled Dewey's theory of logical method in law.¹⁷ The author rightly concludes that Bacon deserves more attention than he has received in modern thought.¹⁸

The inclusion of Leibniz among the world's twelve great legal philosophers seems more dubious. Unquestionably he had a topflight mind. He was a simultaneous and independent inventor, along with Sir Isaac Newton, of the differential calculus, and his philosophical writings exhibited the attempt to construct a mathematical system. His philosophy of law is a specimen of a scientific system of ethics,¹⁹ yet, as Mr. Cairns remarks, "it cannot be applied to the actual world in any meaningful sense."²⁰ That Leibniz' theory of teaching anticipated by two centuries the case method of legal instruction²¹ is not a sufficient card of admission to this select company, for the substance of casuistry is older than Leibniz.

¹¹ Pp. 404-405.

¹³ P. 121.

¹⁵ Pp. 217-218.

¹⁷ Pp. 225-230, 238.

¹⁹ P. 325.

²¹ P. 308.

¹² Pp. 118-123.

¹⁴ Pp. 75, 191, 292.

¹⁶ P. 211.

¹⁸ P. 245.

²⁰ *Ibid.*

Mr. Cairns' comments are the liveliest part of the book, and he has generally done a tidy job in discussing briefly a wide range of topics. A few loose ends may be noted. The statement that the case of *Cooke v. Oxley*²² "settled" the common law rule that "an offer must be accepted instantaneously, or it ceased to exist,"²³ seems erroneous, and the continuing power of the offeree to accept an offer is not a "fiction"²⁴ except in reference to a subjective theory of contract, such as Kant's. However, as Mr. Cairns indicates, neither the objective nor the subjective theory of contracts alone will serve to explain all the rules of contract law. Again, the parenthetical statement that Bentham followed Locke in extending the term "sanction" to include rewards as well as punishments²⁵ seems to be refuted by Bentham's cogent arguments *against* such an extension.²⁶ Furthermore, the author's statement that the efforts of modern juristic theory to employ the conception of "interest" as basic is "an effort to explain social phenomena in terms of psychic impulses to action"²⁷ appears to be a one-sided view of the interest theory, which certainly includes an external object of interest as indispensable, at least so far as law is concerned.

One surprising statement is made in the discussion of Cicero's sometimes cloudy and rhetorical theories of law:²⁸

"He saw that it was a mistake to defend jurisprudence on the ground of its usefulness to positive law, a lesson which modern jurists have even yet not learned."

A mistake, yes, to expect that any basic premise of a philosopher will solve with ease and clarity any one of the grist of cases awaiting decision in a trial court. Yet what is the purpose of Mr. Cairns' book if not to show that jurisprudence, as a body of theory about positive law, needs to be grounded in basic suppositions of philosophy? And is not jurisprudence useful to positive law?

Mr. Cairns does not overlook the desirability of an empirical method of evaluating the suppositions and objects of the legal order, but he offers only a hope that someday the methods of (natural) science will be applied to moral judgments.²⁹ He seems sometimes to imply that we have no empirical basis for legal evaluations, though at other times he apparently accepts conclusions drawn from two thousand years of human experience with the making and administration of law as having some reliability. He is not quite ready to accept a second-best legal "science," as Plato accepted a second-best state. At any rate, he seems to be right in believing that the great philosophers have contributions to make to the legal theorizing of our somewhat skeptical age, and he has produced an imaginative, learned, and impartial survey of those contributions.

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²² 3 T. R. 653, 100 Eng. Rep. 785 (K. B. 1790).

²³ P. 427.

²⁴ Cf. p. 429.

²⁵ P. 357.

²⁶ JEREMY BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* 226 n. 5 (Everett ed. 1945).

²⁷ P. 43.

²⁸ P. 131.

²⁹ P. 566; see *supra* note 2.