REVIEWS

JUDICIAL LEGISLATION. By Fred V. Cahill, Jr. New York: Ronald Press, 1952. Pp. ix, 164. $4.00.

AT the mid-century mark it seems appropriate to take stock of contemporary American legal philosophy. After fifty years of struggling with the unique American judicial system, legal philosophers, principally the realists, have succeeded in demolishing the orthodox theory that judges simply "apply" the law,[1] but have had little success in finding anything to take this theory's place. It is this failure that is of interest to Professor Cahill and that provides the occasion for his study of judicial legislation.

Professor Cahill is a political scientist, and as such he approaches American legal theory with an eye to the relationship between the structure of government and legal theory. Thus, he recognizes that the American judicial system is unique because it is given more power of government than a judicial system is normally supposed to have. The rebellion against the orthodox theory that judges do not "make" law arose, he argues, because a powerful judiciary stood in the way of a developing government. In questioning the propriety of judicial vetoes of legislative responses to popular demands, the predecessors of the realists quickly found that judges were in fact legislating.

With this beginning the later theorists picked up the ball and ran off in many directions at once. What started out as a protest against abuse of the power of judicial review became a general attack on the traditional judicial process. Some writers were content to establish the falsity of the theory that judges are automatons and then to enjoin the judges to be careful. Other, more daring writers attacked the entire system as close to fraud. All in all a happy destructive time was had, but now that the dead horse has been sufficiently flogged, it is time to produce something in the way of a theory of what judges ought to do. So far, nothing much has been forthcoming.[2]

1. Such demolition does not necessarily include the orthodox bar. Almost any issue of the American Bar Association Journal contains an article or two deploring the tendency of judges, usually "New Deal" judges, to "make" law, *i.e.*, decide cases other than the way the article's author would decide them. See, for example, the excellent footnote of Professor Cahill on Senator Bricker's fantastic blast at "judicial legislation." P. 138. Implicit in such attacks is the assumption that true judges never make law.

Also to be noted is the spate of articles by the natural law "absolutists" attacking the "relativists," with particular emphasis on the "dangerous" Holmes. Some of the more important of these attacks are noted by Cahill. Pp. 32-4. These attacks against the attackers of the orthodox do not, however, serve as an affirmative philosophy. As for "natural law" itself I have never understood it very well; the most I can make of it is that its precepts are so general that in and of themselves they provide no answer to a judge trying to decide a case.

2. I have always suspected that each realist hesitates to stick out his neck because he fears that all the other realists, being experts in destruction, would gang up on him.

The difficulty the realists ran into, as Professor Cahill points out, was that their description of what takes place in the judicial process flies in the face of the American democratic tradition. In our society the people, not the judges, are supposed to make the law—directly, through their constitutions, or indirectly, through their legislatures. So long as a theorist is content to point out that this is not wholly true in fact, he is on safe ground. When he considers what ought to be the role of the judiciary, trouble arises. The realist knows that to tell judges to stop making law is bootless. It is extremely doubtful if they ever could; if they can, they are hardly likely to do so; and if they did, the results would probably be worse than what we are now faced with, for in a dynamic society adjustments are essential and a static judiciary would make the law even more of a drag on the changing society than it is by definition. On the other hand, contemporary legal thinkers understandably hesitate to advise judges to legislate and to admit that they are doing so. Not only is such judicial behavior undemocratic, it is unsettling to the public, which likes to believe that its rights are defined and that no judge will change the rules in the middle of the game. The legal philosopher is stymied: he knows that the law is not "given," but he can find no way to regularize judicial legislation. Hence it is no wonder that American legal theory is in the doldrums.

Professor Cahill recognizes all this, but apparently finds himself equally stymied. His difficulty appears to be that while as a political scientist he can see the interrelationship between the law and the rest of government, as a political scientist he also sees that in his own profession there is considerable doubt about what to do. The realist-pragmatists, it seems, had quite an effect on government theory as well as on legal theory. Basically, Professor Cahill has done only two things: he has cleared the air, and he has pointed out where to look for a solution. But he has not looked there yet; more's the pity, for his present study reveals an ability to deal with the law incisively, an ability that would be of great value in fitting both law and judges into their proper place in the total picture of government.

Perhaps this essay is a first step toward helping legal thought get out of the doldrums. If so, it may not be amiss for a lawyer to suggest a few leads to guide the political scientist in coping with the law. Prime consideration should be given to the cultural continuity of the law. By and large we accommodate ourselves to the existing system, and proposals to change the system may meet with resistance not so much because of fear of change as because of laziness in accommodating oneself anew. This is particularly true of the legal profession, which has a vested interest in a stable legal system. If the power of the judiciary is to be lessened, or if the mode of its operation is to be changed, it will be necessary to find ways and means to do so without unduly disturbing the cultural continuity.[3]

3. Note the by-passing of the judicial system to meet many regulatory needs by use of the administrative process. Note also that the common law was changed in workmen's

Of substantially equal importance is the factor of equilibrium. In our society the judiciary is a powerful law-making agency. Traditionally, the legislatures have left much of this law-making alone.[4] One does not dare deny law-making power to the judiciary without being sure that legislatures will instantly move in to fill the void. In the constitutional field, moreover, one dares not advocate abolition of judicial review without being sure that legislatures will assume responsibility for preventing excesses in legislation. If all this is true, the political scientist is forewarned not to tamper with judicial power unless he is prepared to improve the legislative process at the same time.

A final consideration is the dearth of factual knowledge about the legal system. The judges and the lawyers deal in a verbal world, and it is not at all clear that the legal system serves our ends as well as we think it does. It may well be that if we could gather enough facts about the law—its administration as well as its substance in relation to the needs of our society—the evidence of its inefficiency might be the key that would unlock the door to a new approach to legal theory. If this is the key, Professor Cahill is probably no more hopeful than I that reform is right around the corner. When all is said and done, people worry about the things that lie behind the law; change comes in the real world, and the law, reluctantly to be sure, toddles along behind.

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SECURITIES REGULATION. By Louis Loss. Boston: Little, Brown & Co., 1951. Pp. xxvii, 1283. $17.50 (Student Edition, $10.00).*

BY any standard, including the literary, *Securities Regulation* is an important achievement and a significant contribution to the crystallization and development of the law.

Professor Loss' book is the product of three forces: his own first-rate abilities as a scholar—and a scholar of unusual perception and style; fifteen

compensation, not by substantive legislation alone but by creating an administrative agency to carry out the change.

4. Partly because, historically, common law judges in our unique system of judicial supremacy have tended to maintain their judicial preserve through the medium of judicial review; partly because lawyers, trained in the common law and its virtues, have dominated legislatures.

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*The principles of the Securities Act require the reviewer to disclose at least four reasons why he should not have written this review: (1) reviewer and author are old friends; (2) they shared together the pleasures of editing a justly celebrated volume of this LAW JOURNAL; (3) they were colleagues for a time on the faculty of the Yale Law School; and (4) the reviewer harbors some human emotions of chagrin at the energetic tactics which resulted in transporting so strong a Yale man as Mr. Loss to the banks of the Charles.