

REVIEWS

THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE. By Carl Joachim Friedrich. Chicago: The University of Chicago Press, 1958. Pp. 253. \$4.75.

As its author explains, *The Philosophy of Law in Historical Perspective* represents an effort to discuss, in the context of their historical emergence, and as they are understood today, the major problems in the philosophy of law. A "problem," according to Friedrich, is not merely a question, but a basic proposition or principle which both places law in the context of all human experience and provides the major premise for a demonstration of consequences in the realm of law.¹ The first part of the book, which accounts for four-fifths of its pages, takes the reader with breath-taking speed through the history of legal ideas, from the Old Testament, Plato, and Aristotle, up to the concepts of contemporary relativists, formalists, and sceptics. It ends with a short description of contemporary European and American attempts to revive the natural law tradition. The second, all-too-brief section of forty pages is Friedrich's exposition of current problems of the philosophy of law in the context of his own political philosophy.

The fact that this book was published first as *Die Philosophie des Rechts in Historischer Perspektive* and was written for a German encyclopædia of law and political science may account for its chief weaknesses,—for example, its invariably too telescoped treatment of, and mechanically equal allotment of pages (four to seven each) to, almost every legal or political philosopher who is dutifully noted in the standard outlines of general survey courses. Thus, problems which require detailed exposition and analysis are merely picked at. Although Friedrich himself comments upon the importance of understanding a philosophy of law in the context of its development, that is, in relation to its intellectual as well as socio-political environment, he seldom informs the reader or provides sufficient clues for him to find out whether a particular philosophy of law—as its author understood it—specifies and reflects general problems of a world view, initiates the construction of a universal philosophical system, or merely rationalizes the positive law of an epoch. The encyclopædic origin of the book is also evident in the absence of a planned continuity from chapter to chapter. It is difficult to infer, from Friedrich's treatment of his subject, how one philosophy built upon the successes or failures of another: how one answer created a new question, the answer to which in turn opened up new roads of investigation. Even the final

1. Pp. 6-7.

chapters containing Friedrich's "answers" seem tacked on, without a clear connection to the preceding historical exposition. As a result, significant questions concerning a legal philosophy's impact upon legal institutions or its failure to produce such an impact are left unexplored.² Why, for example, did the Greek concept of justice, which served to link ethics and politics (note that Plato's *State* is at the same time the soul of the good man) and the physical and social world, fail to survive the collapse of the Greek *polis*? What human needs impelled the growth and acceptance of the fundamentally different orientation of Stoic and Christian thinkers? Here, an analysis of the anti-political and hence antilegal viewpoints of the Sceptics and Epicureans might possibly have illustrated the forcefulness of the antirationalism which helped to destroy the Greek justification of human convention by focusing upon the nature of man: a nature which, in the Greek view, expressed its essential rationality through man's political inclinations and achievements.

Friedrich's exposition of the history of legal ideas is furthermore weakened by his vacillating conception of the reader's competence. As Friedrich himself states,³ every legal system implies a philosophy of law which in turn implies a general ontology. Practical lawyers, victimized by a sloppy modern education, are regrettably too often unaware of this sequence, and tend to consider law a Pallas Athena, born from the heads of jurists (or from legislative records) fully matured, self-evident, and self-explanatory. This naïve positivism which identifies as "scientific" and hence "true" anything that is merely descriptive and "value free" is also assumed by many so-called social scientists. Of course, as Friedrich points out, this viewpoint is merely the expression of philosophical ignorance: the delusion that if one is unaware of one's own metaphysical presuppositions, none needs to be posited. One function of Friedrich's book is to attack this ignorance. Unfortunately for the moderately well-informed reader, at times the attack requires statements of the obvious.

Nevertheless, even in the course of otherwise elementary expositions of much-studied political and legal theories, Friedrich ably succeeds in correcting some of the more common errors of interpretation which are perpetuated in popular textbooks, freshman "think" courses, and "Great Books" discussions. He points out, for example, that Plato's *Politeia* (misnamed *Republic*)⁴ is not a program of political action but a description both of the model of the

2. Friedrich does comment, however, that "Leibniz' great accomplishment as a metaphysician, as a mathematician, and as a statesman and organizer of science has persuaded scholars to assign him a position in the history of legal philosophy which is not justified by the intrinsic merit or originality of his contributions." P. 16. But it is his methodology rather than his substantive conclusions which have made Leibniz and his tradition influential. Perhaps, if philosophers of law were examined from the viewpoint of their impact upon legal institutions, a pattern would be found that closely resembles the conceptualization of scientific method at the time of impact.

3. Pp. 3-4.

4. P. 16.

just community and of the soul of the good man.⁵ He is also correct in indicating that Aquinas' effort to make rationalism palatable to the Church involved far more than the attempt to prove that Aristotle's failure to be a Christian was a chronological accident.⁶ The Thomistic resolution of the conflict between sacred science and philosophy produced something new, particularly in political and legal theory.⁷ Aquinas' synthesis of reason and revelation, of the law of nature and of nature's God, of eternal, natural, human, and divine law represents man's function as a dual participation in God's reason: passively, through his physical, animal and social inclinations and actively, through his understanding and voluntary acceptance of God's will. Thus, the synthesis is considerably more, and was by Aquinas intended to be infinitely more, than mere Church apologetics. It is, for example, the justification of a right to revolution.⁸ Furthermore, by pointing out that the natural law is written in the hearts of men and not in the Bible, Aquinas initiated the dialectic of secularizing natural law—a process which was to help pull the rug out from under the Church a few centuries later. Friedrich corrects other errors as well. One of these is the notion that Bodin's concept of sovereignty implies that the ruler is absolutely autonomous and above every kind of law. No. Bodin still stands with one foot in the Middle Ages. His sovereign is above only the positive law in so far as its content is morally indifferent. He is never above the moral law or the principles of equity.⁹ Strictly speaking, according to Bodin's analysis, God is the only sovereign; He alone rules absolutely, perpetually, and entirely according to His own free will.¹⁰

At times, however, Friedrich's lucid distillations of the "great ideas" which ought to be, but are not, matters of general knowledge, are so concentrated and so closely intermingled with comments and criticism that the reader at whom they presumably are aimed—the one who is unfamiliar with the texts under discussion—may be misled by the inevitable labels and classifications. In short, while Friedrich succeeds in correcting the errors of other interpretations, he fails to preclude the commission of new ones. For example, his characterization of Hobbes' legal philosophy as "radically positivist"¹¹ is somewhat startling. Hobbes was the Newton of political science. Using methods far more akin to Cartesian mathematical deduction than to empiricism (except, incidentally, when he sought a type of verification for

5. Compare PLATO, *THE REPUBLIC* Steph. 592. In the city which is within him, the pattern of which is "laid up in heaven" (*i.e.*, the intelligible world), the philosopher will be king. Here alone, political greatness and wisdom, power and virtue, will meet in one. But whether such a city exists or ever will exist *in fact* is no matter.

6. The philosophies of both Aquinas and Aristotle are all too frequently distorted, especially by Catholics who read Aristotle as though he were a Neo-Thomist.

7. Pp. 42-44.

8. P. 47.

9. Pp. 60-61.

10. BODIN, *SIX BOOKS OF THE COMMONWEALTH*, bk. I, ch. 8 (Tooley transl. 1939).

11. P. 84.

"phantasms"), Hobbes "retained the verbiage of natural law while draining it of its substance."¹² But he shared his drainage system with many of his contemporaries, such as Grotius, whom Friedrich classifies as a rationalist.¹³ Nevertheless, Hobbes was not an absolutist, nor an apologist for power for its own sake, nor a mere formalist who defines law as the unconditioned will of the sovereign. Hobbes' sovereign was not the first usurper. He was instituted by contract. The sovereign's right and power were unconditionally limited by man's fear of violent death and his consequent absolute right of self-preservation. The natural equality and liberty of man,¹⁴ man's inalienable right to life, is Hobbes' only absolute, and is as basic to his politics as the law of inertia is to Newton's physics. Friedrich himself, of course, is well aware of this. But his labels for thinkers and schools of thought, his chapter titles, and his grouping of philosophers, as well as his ambiguous use of general terms—"authority,"¹⁵ "will," "reason," "equality," "law," "nature," "right," "human nature," "natural law" and others which have very specific and often contrary meanings within diverse philosophical systems—encourage some avoidable misunderstandings. There is always the danger that the superficial reader, carried away by the nomenclature, will strait-jacket a philosopher in classifications which the author has employed merely as a device of presentation. Even as a device, most of the common-place classifications are meaningless. Descriptive terms, such as "humanist," "utilitarian,"¹⁶ or "realist," do not actually provide basic distinguishing characteristics which aid in a comparison of systems of ideas.

Occasionally, startling evaluations are left unexplained, for example, the author's comment that "the practical consequences of such a mystical idealization of reality [attributed to Spinoza!] are even more dangerous than Hobbes's outright materialism."¹⁷ How so? The final chapter of the *Tractatus Theologico-Politicus*, "That in a Free State every Man may think what he likes, and say what he thinks," which Spinoza regards as the consequence of his own system, is one of the most eloquent and convincing arguments ever stated for freedom from every kind of tyranny over the minds of men. Friedrich himself notes the comparative shallowness of the pseudo-empirical, merely rhetorical liberalism of the oft-quoted Bentham-Mill school.¹⁸

Some of these problems might perhaps have been avoided if the systematic analysis of the final five chapters had been integrated into the historical sec-

12. P. 91.

13. Pp. 64-66.

14. HOBBS, *LEVIATHAN*, chs. 13, 21 (Oxford ed. 1947).

15. See, e.g., the allusion to the "authority" of the Divine Will, at 9.

16. In discussing Bentham, Friedrich himself points out that "utility can be fitted into a variety of philosophical positions." P. 93. Some of them, I might add, are antithetical to one another.

17. P. 112.

18. P. 98.

tion. Then, at least, the reader could have been forewarned of semantic difficulty. These faults, however, are only minor and frequently inescapable in any brief presentation of a vast subject-matter; moreover, their isolation too easily becomes a pointless enumeration of personal academic preferences. The writer of any history of ideas, in whatever branch of inquiry, must face the plight of the fabled old man, boy, and donkey. However they manage their travels—whether the old man rides the donkey, or the boy does, or they both do, or all of them walk—some passerby will find fault. The fault-finder had best write his own book, according to his own criteria of selection and standards of pedantry, and for his own amusement.

The positive contribution of Friedrich's book to current literature far outweighs any of its shortcomings. This contribution consists of the manner in which the problem of fact and value, of observed social behavior and the standards of right law, is confronted. The problem, of course, transcends the realm of legal philosophy. On its solution depends the status and effectiveness of the so-called behavioral sciences.

As Friedrich states in one of the most lucid passages of his book, it was David Hume who first posited the radical separation of fact and value which has plagued the social scientist ever since.¹⁹ Hume insisted that reason deals only with the facts given by observation, that is, by sense impressions, and by the passions of men in action. Reason in itself, Hume asserted, can never move the will. Thus, the facts underlying value judgments are mere conventions validated by habit which are variable in the scope of their application. Reason, Friedrich comments correctly, is still permitted a wide influence in the determination of human affairs, but it is now robbed of its capacity to substantiate natural rights, self-evident truths, and the laws of an absolute morality.²⁰

The consequence of this radical fact-value distinction has been the myth of a "value-less" science, epitomized by the so-called social scientist who is mortally afraid of any kind of speculation. Science, he insists, must be "fact-finding" in the narrowest sense of nose counting. Any critical examination and consequent judging of "values" he regards as somehow suspect or subversive. And, while he is beginning to be vaguely troubled by the accumulation of evidence that his antirational, purely descriptive approach is sterile and self-defeating, he cannot yet liberate himself from certain conceptual dichotomies initiated by Hume.

His fear of "value judgments," paradoxically, has driven many a social scientist into the broad embrace of Karl Marx. As Friedrich notes: "[N]otions of law and government within the context of dialectical materialism become a shallow positivism which would see the science of law in analogy to natural science as a purely empirical collection of data and their analysis."²¹

19. P. 94.

20. *Ibid.*

21. P. 151.

This "shallow positivism" has permeated all of the social sciences today. Its implicit and fundamental acceptance even by those who reject its peculiarly Marxist consequences accounts for much of the impotence and practical irrelevance of the rejection.²² The error of this prevalent "positivist" viewpoint does not lie, however, in its analogizing the social and the natural sciences. Man is, indeed, a part of the world; he does have a nature, and so do his institutions, which are therefore capable of being formalized and analyzed. The mistake lies in the misconception of natural science as "a purely empirical collection of data and their analysis."²³ The naïveté of this nineteenth-century interpretation of science has long since been superseded in modern mathematical physics.

Kant's definition of science, inspired by Hume, imposes a radical separation of the "is" and the "ought" which Radbruch, Kelsen, and others²⁴ have made axiomatic in their philosophies of law. But Kant was still a Newtonian and, like Newton, could not overcome the apparently absolute qualitative difference between experience-object and concept-object. But this schism between the living world of sensation and the abstract laws of matter in motion, a schism which lies at the core of the fact-value, is-ought dualism, is a purely artificial one based on a fundamental misunderstanding of both the nature of the world and the nature of human knowledge. To state that science can only describe and codify values but cannot resolve the contradictions between them—that "ultimate propositions concerning the *ought* are capable of being confessed but not of being 'scientifically known' "²⁵—is to define science as a mere description, in some conventionally agreed-upon order, of what is empirically observable, with a naïve faith in the "truth" of the observable! This notion, as Kurt Riezler used to characterize it, is the telephone-book theory of the truth: every proposition in the telephone directory is demonstrable, empirically verifiable, and beautifully ordered according to the conventions of the alphabet. Too much of social science, including legal science, is regrettably a compiling of telephone directories.

Friedrich solves this problem quite practically by substituting good old horse sense, or less pungently, the values which "the democratic creed" embodies, for telephone numbers. Although in this he is clearly on the side of the

22. As I have observed elsewhere, "we cannot—not even by appealing to divine revelation—insist on self-evident truths and innate human rights and liberties on the one hand, and on a valueless statistics of materialized history and the existence of an anti-ethical cosmos on the other. Or—to state the issue more simply—we cannot accuse Communism of being evil and defend democracy as being good while we also maintain that good and evil are categories of the human imagination transmitted by cultural conditioning. Such inconsistencies, while possibly not evident to ourselves, are glaring to those who . . . face both views free of the institutionalization of either." VON ECKARDT, *THE PURSUIT OF HAPPINESS IN THE DEMOCRATIC CREED* 11 (1959).

23. P. 151.

24. See pp. 165-77.

25. P. 167.

angels, his is only a stopgap solution. The ultimate answer lies in applying the principles and methods of contemporary mathematical science to the whole field of human behavior.

Contemporary mathematics, which provides the apparently successful methodology of the physical sciences today, has long ago abandoned the data-collecting-and-alphabetizing notion of science. Modern mathematics takes a field or "Menge" of phenomena, which is defined according to an initially intuitive recognition of at least one common characteristic (or function) of the elements or "atoms" within the field. It then proceeds to formulate, that is to express in signs, as precisely as possible the criteria of inclusion and exclusion of elements as well as all the possible ways in which these criteria permit the elements to be related. It furthermore defines the precise operations or manipulations which transform one possible relationship into another possible relationship. In this way, the pure structure of the investigative field emerges, and this structure can then be regarded in turn as an element of another investigative field, and so on.

In this process of structuralization—and this is the decisive point here—actuality emerges as the *synthesis* of the conceptual structure and the raw process of pure (*i.e.*, as yet nonobjective) experience. "Nothing is real which cannot be measured," the physicist maintains. Precisely. It is its measurability which makes something *be*, that is, be that which, to demonstrate its reality, it is measured as being. Measurability implies, of course, the presence of a measurer, the human observer, who, in the act of measuring, imprints certain rules of structure, the "laws of thought," upon the pure given which in itself has no characteristics beyond being "there" in a generalized space-time.

Thus, modern mathematical science begins with the intuitive recognition that the actual is a synthesis, a relation between man and the world, and that neither man—as creator of concept-objects (the realm of the "ought")—nor the world—as creator of experience-objects (the realm of the "is")—are "real" independently of each other. Both are created by the coincidence of the thought-process and the there-process: a coincidence which is neither miraculous nor arbitrary, but is indeed the function of science to achieve.

Many social scientists reject the axiom that "nothing is real which cannot be measured" because they are still trapped in the quantity-quality dichotomy which the mathematician has overcome in his generalized definition of measurement. Measurement, for him, is nothing else but the imposition of order upon the *there*. But, since the *there* is infinitely given, every act of measurement makes visible the incommensurable, and this in turn requires the further formulation of another system of measurement to resolve that incommensurability. The former system is then re-interpreted as a bounded aspect of reality rather than its substance.²⁶ This process of generalization is endless.

26. Thus, contemporary mathematicians, despite their formulations of non-Euclidean systems, have not rejected Euclid. Indeed, they have a profound respect for his system "in its place."

Consequently, the modern mathematical physicist asserts not only that the universe is infinite in space-time but also that its laws are infinite as well. In other words, he asserts that, as more formulations are integrated into the body of accumulated human knowledge, more raw material of knowledge becomes visible as potentially measurable. Human thinking, therefore, is not a transcendental process, beyond the observable universe. On the contrary, reality is in the interaction between the human mind which thinks and that which it thinks about.

To use the language of the social scientist, this means that *value is itself a fact*, or that *a fact is the expression of a value*. The general investigative field of the social scientist, including the lawyer, consists of elements of facts which function as values. The "ought," in other words, is no less actual than the "is" and the "is" emerges only in so far as it can be measured in terms of the "ought." Of course, "the pure theory of the law is only a part of logic," as Friedrich quotes a Kelsenian.²⁷ But logic is not a mere chess game, as, according to Friedrich, Kelsen assumes. It is the analysis of the human structuring of experience, that is, "of the dirty concrete world."²⁸

No mathematician or mathematical physicist is disturbed by the realization—and note that "realization" is literally the act of making real: imparting reality to experience by giving it structure, order, and relationship—that the activity of human thinking, determined by the physiology of the human being²⁹ much as sensation is determined by the physiology of the sense organs, represents a synthesis of that which is capable of affecting the nervous system and the manner in which the nervous system structures it. The mathematical scientist, to put it simply, takes his humanity for granted. He does not deny the dignity of his search for knowledge because he is not God. If the social scientist could become sufficiently humble to do the same, he might stop his futile and vain search for the philosopher's stone: a "value-less" social science. Instead, he might undertake a functional analysis and comparison of the values that are operative in human society generally.³⁰

To state dogmatically that man cannot resolve a contradiction between values is the denial of science itself. Mere description and collection of data

27. P. 173 & n.10.

28. P. 172.

29. Thinking is the structuring of process, the schematic representation of identified, that is, conceptualized, relations. Thus, it is the arresting of time or the objectification of process, so that process becomes identifiable through a sign which, once posited, is assumed to remain identical in its signification. But since thinking is itself a process, that is, takes place sequentially, so that we can think only one thought at a time and therefore must, in order to give two or more thoughts simultaneity, think a third thought in which each of the former thoughts is "*aufgehoben*," the schematized representation must be broken down into process in order to be experienced. In a sense, then, the time of experience becomes the space of conceptualization, which, in order to be thought (experienced), once more becomes time.

30. I am, myself, currently engaged in such an investigation. Whether I shall be "stoned" for it remains to be seen.

is not science: it is pre-science. The subject matter of a genuine science of law, therefore, is the functioning of the ongoing interaction between "is" and "ought," between positive law and right law, as well as between the socio-political processes and positive law. When "is" and "ought" are recognized as functions, it becomes clear that positive law represents an "ought" in relation to socio-political behavior, but an "is" in relation to the standards of justice. These standards conversely function as an "is" when, in the form of constitutional determinations they set the boundaries of socio-political behavior. From this point of view, both positivism and current natural law doctrines are equally unsound.

Some of the problems raised in the final chapters of Friedrich's book can be resolved through the approach here suggested—the problem of human equality, for example.³¹ Friedrich begins with the premise that men ought to be valued as equals, that is, that all members of the legal community should control the making of laws. But this "ought" of equality before the law (*before* in the dual sense of *prior* to and *vis á vis*) is the expression of an actual equality; not, if you please, an equality of intelligence, strength, and like attributes, but an equality of the function of awareness. As "oughts," subjective human rights follow from the same fundamental recognition of awareness. Thus, the subjective, and equal, right to life is the consequence of the simple biological inclination to struggle for life, and of man's awareness of this struggle. Every man is the focal point of his own awarenesses, and since the sum-total of human awarenesses or points of view is infinite, no one focal point carries more weight than any other. In other words, whatever an individual values, he does so as much as the next fellow, and this makes both of them equal as human beings even if their value systems, as such, are not equal.

The problem of enlightenment, of harmonizing the interests of individuals and subgroups with the interests of the community, a problem fundamental to democracy, rests upon another artificial dichotomy: that of reason and passion.³² While the reasonable man places group welfare before his private interest and learns to restrain himself, the passionate man, it is presumed, must forcefully be restrained by society, to keep his self-indulgence from harming the community. But why should reason and passion be necessarily antithetical? Surely, a passion can be "rationalized" and a principle of reason can be loved or hated. Both reason and emotion, it would seem, are functions of the whole man and, as such, equally present aspects of the same events of living.

Friedrich's other observations, like those concerning the communal man, constitutionalism, and the relation of law and justice, appear eminently sensible—with one exception, his treatment of authority. "[T]he authority of a communication," Friedrich states, "be it a command, a counsel, or a thought, rests

31. Pp. 193-99.

32. P. 195.

upon the communicator's capacity for reasoned elaboration."³³ As an example of "reasoned elaboration" Friedrich gives his interpretation of parental authority: "The authority of the parents rests upon the fact that the child gradually acquires an understanding of the sense of parental commands and regulations. It finds that when it questions such an order the parent is able (and willing) to give a reasoned elaboration of the whys and wherefores."³⁴

This seems as narrow an explanation of authority as its equation with power, which Friedrich quite correctly rejects. Authority does not—despite Friedrich's contrary assertion—belong in the realm of transpersonal norms.³⁵ Authority is an interpersonal relationship in which the element of force present in the mere power relationship is transformed into the element of trust. Authority is indeed "more than advice and less than command, the kind of advice which one cannot properly disregard."³⁶ But authority derives this capacity of being voluntarily obeyed from the conviction of the one who is subject to the authority that he will not be deceived. A child will accept the commands of his parent when he is convinced that obedience is required for his own welfare. This conviction, however, is a matter of faith: the belief that he is loved and cherished as well as the belief that the parent is both able and willing to actualize, consistently, the predicted consequence of disobedience, that is, to punish. But the relationship of authority also implies that the one who possesses the authority can provide security. The desire for security lends weight to the subject's choice between obedience and disobedience. Disobedience is therefore considered as involving not merely punishment but also *peril*: the peril of isolation, of the loss of relatedness to another human being, upon the presence and awareness of which the feeling of being human depends. Thus, authority is that element of the power relationship which makes obedience voluntary. I "consent" to authority, but I "resist" brute force. Nevertheless, authority has power; but it is precisely the power to command the will which brute force lacks. Authority can thus create a harmony of wills. Mere force, on the other hand, does not have the power to command the will. It simply eliminates its operations. Force is able to bring about consequences independent of consent and therefore often contrary to it.

The authority of law, by this analysis, rests upon far more than reasonableness. It rests upon the identification of the legislator and executor of the law with those who are subject to its jurisdiction. This identification alone inspires trust. Since it is an identification of will, that is, necessarily interpersonal, the political systems which allow for the personification of the sovereign, such as constitutional monarchy, are more authoritative and thus more truly lawful and stable than republican systems. Identification is a mutual process. Hence, the political leader who fails to identify himself with his followers—to make

33. P. 203.

34. P. 204.

35. P. 205.

36. P. 200.

their "cause" his own—quickly loses his authority over his followers. They simply fail to identify with him.

It would be possible to continue this discussion for many more pages. But it would not be appropriate, for, as Friedrich might well have said, like Montesquieu, "[W]e must not always exhaust a subject, so as to leave no work at all for the reader. My business is not to make people read, but to make them think."³⁷ Those who do wish to think but lack stimulation might do well to start by reading *The Philosophy of Law in Historical Perspective*.

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37. 1 MONTESQUIEU, *SPIRIT OF LAWS* bk. XI, ch. 20, at 182 (Nugent transl. 1900).

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