

BOOK REVIEW

LEGAL PHILOSOPHY FROM PLATO TO HEGEL

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

Huntington Cairns has provided lawyers, judges, and laymen with a long-needed guide to the thinking of professional philosophers on the perennial problems of the law. I think it safe to say that no better introduction to the subject has ever been written. Indeed, the book is so good that one's chief criticism must be that there is not more of it. Thirteen major philosophers are included—if we accept as valid our author's characterization of two literary lawyers (Cicero and Bacon) as major philosophers. A good many important philosophical figures are omitted. No attempt is made to convey the philosophical thinking of jurists. The problem of integrating or interrelating the thirteen chosen philosophical perspectives on law is expressly put aside. What we have, then, is an excellent collection of essays expounding the thoughts of thirteen philosophers on legal issues. It would be captious to criticize these essays because they do not attempt to be something else.

The first character in Mr. Cairns's pageant of philosophers is Plato. "Western jurisprudence" we are told, "has consisted of a series of footnotes to Plato" (p. 76). This, perhaps, is more a statement about the making of books than about the development of ideas. Socrates and the pre-Socratics could also be comprehensively footnoted if we only had the texts to footnote. But in the chapter on Plato, Socrates appears only as a defendant in a law suit and as a character in Plato's dialogues.

A brilliant and sympathetic account of Plato's views on law and justice is marred only at one point by lack of sympathy for Plato's socialized morality. After pointing out the close parallels between Plato's and Bentham's views on the rôle of a legal code, Mr. Cairns regretfully comments that the rational theories of punishment they both profess, based on the objectives of deterrence and reform, break down because they justify the punishment of innocent persons in cases where such persons are believed to be guilty or are generally in need of social overhauling. But the fact is that any criminal code devised and administered by fallible creatures is likely to involve the punishment of some innocent people who are mistaken for criminals. Such occurrences would not, to Plato or to Bentham, afford a valid reason for rejecting a legal system as unjust. If, in the long run, the system advances human welfare, then the sacrifice of some individuals for the general welfare may well be viewed as one of the

inevitable products of human finitude. To view such cases as marking a breakdown of Plato's and Bentham's social approach is to introduce a very different concept of individualistic justice, which Mr. Cairns might well defend but which, instead, he assumes without argument or question.

Where Plato and Aristotle seem to diverge in their lines of analysis, Mr. Cairns is definitely on Plato's side. This shows itself in an inclination to find sensible meanings in Plato's words, even if it becomes necessary to give a word like "harmony" a figurative meaning, while an Aristotelian sentence is sometimes given a literal construction and dismissed as obvious error. Thus, the Aristotelian idea of "measure" in reward and punishment—one of the great humanizing ideas of western civilization—is dismissed with the rather cavalier comment: "That it was impossible to measure the immeasurable apparently did not occur to him" (p. 122). Has not the whole progress of western science rested on the development of ways of measuring what was once immeasurable, e.g., temperature, light, sound, and energy? And is there no hope that the humanitarian application of Bentham's hedonic calculus, which provided a basis for most of the legal reforms of the past century, can be pressed further as we learn more about the nature of reward and punishment, or more generally, of human enjoyment and suffering?

Mr. Cairns's effort to prove that Cicero was a philosopher with an original contribution to legal philosophy (p. 130) is not particularly convincing. The assignment of originality to any author generally tells us more about the limitations of the assignor than about the achievements of the assignee. In this case the ascription of Ciceronian and Hellenistic origins to the basic idea of human equality appears to be based upon unawareness of the pre-Hellenic development of this thought in the Judaeo-Christian tradition, and especially in the prophetic works of Isaiah, Amos, and Malachi.

With Francis Bacon, as with Cicero, Huntington Cairns does his best to make a philosopher of a lawyer, but the effort is not very convincing.

The chapters presenting the legal philosophies of St. Thomas, Hobbes, Spinoza, Locke, and Leibniz are among the most illuminating chapters of the volume.

The account of Thomistic legal philosophy is especially noteworthy because, in recognizing that St. Thomas presented "the first systematically complete philosophy of law" (p. 203), Mr. Cairns does not fall for the usual stereotypes which are so often applied to scholastic philosophers. Thus, he carefully notes St. Thomas' recognition of "the relativity of human behavior" (p. 182) and points out many ways in which the later thinking of Bentham and Von Jhering was anticipated in Thomistic realism.

The problem of civil liberties and the limits of state power over the lives and thoughts of private citizens has, in recent years, brought forth much

thinking, and even more writing. What Hobbes, Spinoza, and Locke have to contribute to our reflection on these issues is presented by Mr. Cairns with great clarity. In Hobbes is revealed (with all the charm that distance lends) the clarity that runs through the later thinking of Austin and Holmes and their followers in modern jurisprudence; out of this clarity emerges a realistic view of the evils of war and anarchy which government is instituted to circumvent. In Spinoza is revealed the complementary and equally realistic (Aristotelian) view of the evils of government itself, which Hobbes and some of his modern followers (e.g., Holmes and Frankfurter) have rather tended to overlook. Out of Spinoza's realistic recognition of the corruptibility of officials, Mr. Cairns traces the rise of the doctrine of civil liberties and restraints on government which, through the mediation of Locke, became so powerful a force in the development of American constitutional theory.

Leibniz's contributions to our understanding of legal system, legal science and legal education, and Hume's contributions to our understanding of why men obey and disobey the law, are subjects of two of the most original chapters in this volume.

The concluding chapters are particularly significant not so much for what they say about the views of Kant, Fichte and Hegel, which has mostly been said before, but for the imaginative way in which Mr. Cairns has identified the echoes of their thoughts in the thinking of our courts and legislatures.

Mr. Cairns has done a beautiful job of translating the words of his chosen philosophers from Greek, Latin and German into English. This reviewer is not part of the audience which the author has in mind when he says, for example, that his obligations to the translations and commentaries of England, Grote, Shorey, Taylor, Nettleship and Ritter will be "obvious". But two all-too-popular mistranslations deserve correction. So far as I know, Aristotle never said that man is a social animal (p. 377). He did say that man is a political animal,¹ which has rather different overtones and implications. And Kant did not say that the legislator must be "rationally viewed as just and holy" (p. 45), although these are the words of Hastie's bowdlerized translation.² What Kant said was simply that the legislator *is* holy ("der Gesetzgeber ist heilig"), a statement which goes far to explain why Kantian legal philosophy (in its unadulterated form) has made so little appeal to realistic-minded Americans and their British cousins.

That Mr. Cairns should have felt bound to end his volume with Hegel provides food for thought. "Jurisprudence," we are told, "which was at one time the daughter of philosophy, is now not even a stepchild" (p. 567).

¹ Pol. I, 2, 1253a.

² Science of Right, Part II (Public Right), see. 49E, in Kant's *Philosophy of Law* (tr. by Hastie, 1887).

Whether the lady in question was murdered or orphaned, Mr. Cairns does not say. But whatever the explanation, the fact remains that for almost a century after the publication of Hegel's *Grundlinien der Philosophie des Rechts* (1821) very little attention was paid by professional philosophers to the perennial problems of the law on which all major philosophers from Socrates to Bentham and Hegel (with the possible exception of Descartes) had centered a large part of their thinking.

One of the founders of this *Journal* undertook to trace, some forty years ago,³ the intellectual currents which diverted philosophy from its early and long-sustained concern with law and fixed its gaze on more celestial subjects, such as epistemology, ontology, axiology, and semantics. Among those currents, the rock of specialization has exercised a dominant influence. Since the years of Hegel's youth, jurisprudence (like physical science) has developed into a considerable body of specialized thinking. The mastery of its literature stands as a forbidding obstacle to the professional philosopher who would think philosophically about legal issues. It is much easier for the modern philosopher to make a specialty of things that nobody else knows much about, such as the nature of knowledge, value, or the universe, and to say, "We, too, have a specialty, on which we can speak without challenge from the uninitiated."

Some day, we may hope, a sequel to this volume may be written, perhaps by Mr. Cairns himself, to trace contributions to our understanding of the law that have come from post-Hegelian philosophers who have refused to exclude law from the field of philosophical vision. That it is possible to master the literature of jurisprudence without succumbing to jurisprudential provincialisms and without losing one's philosophic vision or logical acumen is shown by the work of Huntington Cairns himself, not less than by the work of Morris R. Cohen and T. V. Smith.

As is the custom among historians of philosophy, Mr. Cairns has portrayed a series of thirteen different views and "put aside immediately the attractive thought that the fundamental truths of the various philosophies of law should be sifted out and then combined into one harmonious whole" (p. 557). The result is to leave the reader with the impression that no progress is possible in philosophy, and that all philosophers are in perpetual and hopeless disagreement with each other. This dreary conclusion is implicit in Mr. Cairns' summary:

We have been told by Plato that law is a form of social control, an instrument of the good life, the way to the discovery of reality, the true reality of the social structure; by Aristotle that it is a rule of conduct, a contract, an

³ M. R. Cohen, "The Conception of Philosophy in Recent Discussion," *Journal of Philosophy*, VII (1910), 401; "Jurisprudence as a Philosophical Discipline," *ibid.*, X (1913), 225. The former article has recently been reprinted in M. R. Cohen, *Studies in Philosophy and Science* (Henry Holt, 1949), 33-47. The latter is being reprinted in a volume of *Studies in Juristic Philosophy* now in course of publication

ideal of reason, a rule of decision, a form of order; by Cicero that it is the agreement of reason and nature, the distinction between the just and the unjust, a command or prohibition; by Aquinas that it is an ordinance of reason for the common good, made by him who has care of the community, and promulgated; by Bacon that certainty is the prime necessity of law; by Hobbes that law is the command of the sovereign; by Spinoza that it is a plan of life; by Leibniz that its character is determined by the structure of society; by Locke that it is a norm established by the commonwealth; by Hume that it is a body of precepts; by Kant that it is a harmonizing of wills by means of universal rules in the interests of freedom; by Fichte that it is a relation between human beings; by Hegel that it is an unfolding or realizing of the idea of right (p. 556).

But why assume that any two of the foregoing statements contradict each other? If Aristotle ever said, "It is raining," and if Hegel ever said, "It is not raining," one could establish a contradiction only by reifying the "It" in each statement and assuming that there is a single and absolute "It" in the universe. May we not more reasonably assume that the field of legal activities and legal ideals is sufficiently broad and diversified so that law may be a "form of social control" and a "rule of conduct" and a "relation between human beings," all at the same time? And may we not go further and note that from different historical perspectives, different aspects of the field will come into focus and different points of heaven will appear at the zenith? Is Hobbes's explanation of the ways in which civil war and disorder may be avoided really incompatible with Spinoza's explanation of the conditions under which civil liberties may be enjoyed? May not progress in philosophy, like progress in chess or music, consist in the continued elaboration of hitherto unseen possibilities?

We are, each of us, bound to choose our own definitions and standpoints, and to see the world through our own eyes. But may we not, at the same time, make allowance for the fact that the rest of the world, poor souls, will have to see the world through other eyes and from other standpoints, in respect of space, time, and valuation? Logical contradiction can exist only within a single system of definitions. One philosopher could contradict another philosopher only if he first accepted all the latter's definitions. I do not think Mr. Cairns has established that any two of his chosen philosophers have agreed on all their definitions. It follows that he has not established any logical contradiction among the views that he characterizes as contradictory.

We are all blind men reporting on an elephant, and if each reporter, instead of contradicting his fellows, would carefully note the point and direction of his own approach, we might piece together a good over-all idea of the size and shape of the beast. Perhaps, some day, Huntington Cairns will work out the formulae of translation that will help us piece together his thirteen reports on the Elephant called Law.

Felix S. Cohen

Washington, D. C.