

REVIEWS

THE OPEN SOCIETY AND ITS ENEMIES. By Karl S. Popper, Princeton: Princeton University Press, 1950. Pp. v, 732. \$7.50.

DURING the Years of the Cold War it is well to remember the ancient Chinese proverb: the first result of any war is that the adversaries adopt each other's vices.

Today when the Open Society and its Enemies are locked in a bitter struggle, it is painful to record how, step by step, each antagonist takes on the worst features of its adversary. The Communist totalitarians who once denounced capitalism for its huge expenditures on armaments, for its imperial control of "backward" areas, for its long working hours, for its government control of labor unions, and for the wide disparities in its income structure, now copy each of the vices they once denounced. And the champions of the Open Society so quickly forget how they once denounced the totalitarianism of peace-time conscription, state control of wages and prices, government by executive order, iron curtains blocking the once-free movement of human beings across national boundaries, and all the techniques that have been developed since the Inquisition and the Star Chamber to eradicate what the Japanese Government used to call Dangerous Thoughts.

Why do so many professed champions of the Open Society rush so precipitately to embrace the weapons and the uniform of the enemy? Is it because they secretly admire the supposed efficiency of totalitarianism more than they hate its brutality? Is it because of a "treason of the intellectuals?" Have those to whom the Open Society looks for leadership and inspiration sold their souls to the Devil? And have the great idealistic philosophers from Plato to Hegel served as the Devil's salesmen to dignify intellectual treason?

It is to questions of this sort that Karl Popper has devoted the logical and historical studies that make up his 732-page treatise on *The Open Society and Its Enemies*. Whether or not one agrees with the drift of his argument one is compelled to admire the vigor and sincerity with which Popper drives towards the heart of fundamental ideological struggles in which our future is being shaped. For at least he sees, as Heine saw,¹ that "proud men of action . . . are nothing but unconscious instruments of the men of thought," the Platos, Lockes, Rousseaus, Hegels, and Marxes who stand outside the battles of their times and, in their studies, arrange the battles of future generations.

Basically, it is Popper's contention that the totalitarian assault upon the Open Society was plotted by Plato, Hegel, Marx, and their followers. By glorifying power, defending lies, and undermining free inquiry, these so-called idealists have corrupted the youth of our generation and of many generations

1. p. 301.

dead and gone. To vindicate the cause of freedom it is therefore necessary to expose these evil geniuses and to clean up the intellectual garbage dumps they have left behind; that, at least, is Popper's general thesis, which makes a reasonably coherent volume of what he himself describes, with some justice, as "merely scattered marginal notes" to a history of historicism.²

Plato, according to Popper's analysis, is the perennial enemy of progress, since he "teaches that change is evil, and that rest is divine."³ The Greeks, Popper observes, were "the first to make the step from tribalism to humanitarianism"⁴ and were thus the spiritual founders of our western civilization. At the time when Athens was at the center of the world's trade in goods and ideas, and Greek science was breaking the chains of ancient tribal mistrusts and superstitions, "Plato was longing for the lost unity of tribal life."⁵ Inspired by his "hatred of the society in which he was living,"⁶ Plato elaborated a political program which "far from being morally superior to totalitarianism, is fundamentally identical with it."⁷ Plato then "libels his great teacher"⁸ by putting into the mouth of Socrates the elaborate scheme of trickery by which the rulers of a Platonic Republic or any other dictatorship of race or class can manage to keep human masses under subjection. Inspired by his hatred of the democratic tendencies of his native land, Plato was "led to defend lying, political miracles, tabooistic superstition, the suppression of truth, and ultimately, brutal violence."⁹ "The theory of the Inquisition, more especially, can be described as purely Platonic."¹⁰

The evil influence of Plato, according to our genial author, gave backbone to "medieval authoritarianism"¹¹ but needed renewing at about the time when American and French revolutions were popularizing the idea that the people could shape their own futures if they were willing to devote lives and risk death in the cause of freedom. At this juncture Hegel appeared on the scene to give a new quirk to the philosophical defense of authoritarianism and tribalism. The reality of change could no longer be denied, but change itself could be glorified as a superhuman world-force before which human reason must abdicate.

By disqualifying human reason and rational criticism of prevailing forces, Hegel was able to discredit all criticism of his employer, the Prussian Government. The "identity of Hegelian historicism with the philosophy of modern totalitarianism"¹² thus furnishes the intellectual background for the

2. p. 443.

3. p. 39.

4. p. 167.

5. p. 80.

6. p. 84.

7. p. 87.

8. p. 148.

9. p. 194.

10. p. 220.

11. p. 222.

12. p. 272.

quick and simple changes by which Communism and Fascism replace each other in the sagas of 20th century *Realpolitik*.

Although Popper is too much restrained by modern literary conventions to express his own frank opinion of Hegel he does express enthusiastic concurrence in the comment of Schopenhauer, "who had the pleasure of knowing Hegel personally and . . . drew the following excellent picture of the master :

'Hegel, installed from above, by the powers that be, as the certified Great Philosopher, was a flat-headed, insipid, nauseating, illiterate charlatan, who reached the pinnacle of audacity in scribbling together and dishing up the craziest mystifying nonsense. This nonsense has been noisily proclaimed as immortal wisdom by mercenary followers and readily accepted as such by all fools, who thus joined into as perfect a chorus of admiration as had ever been heard before. The extensive field of spiritual influence with which Hegel was furnished by those in power has enabled him to achieve the intellectual corruption of a whole generation.'"¹³

Although Marx reacted violently to Hegel's notion of world-history as an evolutionary unfolding of ideas, and insisted that the real world was material, that Hegel had stood it on its head, and that the new philosophy of dialectical materialism could turn it right side up, Marx succeeded in copying the worst vices of the Hegelian philosophy. Thus, in spite of "his keen sociological insight into the conditions of his own time, and of his invincible humanitarianism and sense of justice,"¹⁴ Marx and his followers, Lenin and Stalin, ended up with a world-view that suppresses human reason and the rational criticism of prevailing forces.

Such is the main course of the author's diatribe; along the way he polishes off the "antidemocratic" Heraclitus,¹⁵ the "intelligence-destroying influence of Aristotle,"¹⁶ the "windbag Fichte,"¹⁷ and the "irrationalist authorities" Whitehead and Toynbee.¹⁸

It would be easy, but scarcely illuminating, to dismiss all this with the words of Emerson, "Why so hot, little man?" or with Emerson's remark to young Holmes who, sharing some of Popper's distrust of grandiloquence, polished off Plato in a student paper and received Emerson's crisp comment: "When you strike at a king you must kill him."

It is likely that Plato, Hegel and Marx will survive the Popper attack and continue, for better or worse, to give seminal ideas, insights, and quirks of

13. p. 228.

14. p. 310.

15. p. 16.

16. p. 407.

17. p. 249.

18. pp. 431-5 *et seq.*

perspective to those who seek a faint ray of light on the muddy conflicts of our world and the dark outlines of our future. For what was important about these thinkers was not the platitudes of Plato nor the mystic muddles in which Hegel's arguments generally drop out of sight nor the cocksure prophecies of Marx and his followers.

What was significant about these philosophers was the questions they formulated, questions which have given new dimensions to our thinking. It is to Plato, as Popper admits, that we largely owe "that great spiritual revolution, the invention of critical discussion."¹⁹ It is to Hegel that we chiefly owe our modern concern with the development of ideas and the meaning of history, and our emancipation from the long era in which a history of art or philosophy was a formless catalogue or chronicle of unrelated individuals and incidents. It is to Marx that we largely owe the critical question that is addressed today to every legal or social institution: How does it affect the productive forces of society and the livelihood of the common man? And having asked explosive questions that neither they nor their contemporaries could answer, Socrates, Plato, Aristotle, Hegel, and Marx will continue to challenge the thoughts and energies of generations yet unborn. And those who are anxious to understand the rhythms and patterns of ideas to which the world's hobnailed boots now move and by which atoms and governments disintegrate will have to seek out in the writings of these men something more than Mr. Popper found in them.

An inspired American philosopher and teacher of philosophers, Wilmon Sheldon, has justly observed that philosophers are generally right in what they affirm of their own vision and generally wrong in what they deny of the vision of others. It may very well be that Popper's own vision of a social ethics that frankly faces the realities of the present and the uncertainties of the future is more significant than his appraisal of the merits and demerits of Plato, Hegel, and Marx. That vision is presented with courage and patience. It reminds us that we can make our own future, and that in the process of building a better society we can pursue the methods of science if our hypotheses are specific enough to allow pragmatic tests. It shows how much easier it is to shape pragmatic tests to the elimination of specific social evils than to the creation of Utopias.²⁰ It reminds us that in the struggle to preserve and extend the moral values of the Open Society none of us can escape a moral responsibility for the consequences of our action or inaction.

It reminds us that (as Plato and Aristotle pointed out long ago) power corrupts those who wield it, and the conclusion follows that we cannot win security by surrendering our freedoms. For the state to which we sell freedom for security may take from us, along with our freedom, even that little security which we had at the start of the bargain. Thus Popper focuses

19. p. 172.

20. p. 571.

attention on a question which European political thinkers from Plato to Stalin have consistently overlooked in their search for The Perfect State, the question of how the evil that governments do, by reason of the corruption of power, may be practically minimized. That question is not original with Popper. The whole American tradition of disrespect for constituted authority makes this question central in our political thinking and this helps to explain why the United States has prospered so greatly under so many incompetent presidents and governors. But Popper writes out of the heart of the European political tradition, in which respect for authority goes hand in hand with the assumption that government is an exercise of superior wisdom or morality. That Popper and a few other political scientists, here and abroad, have come to doubt that assumption is a good sign.

It did not take philosophers like Plato or Marx to invent the theory that the state can do no wrong: this is the natural assumption of every oriental despotism. What Plato and Marx (with Hegel's unintended help) did was to develop a technique of reasoning by which any existing regime could be criticized. If we are to improve these techniques of rational criticism of political institutions, as Popper most earnestly desires, we cannot afford to ignore the forms of the dialogue and the dialectic that Plato and Marx perfected. That Plato traced the logical presuppositions of tribalism and Marx the logical presuppositions of economic dictatorship may help us to avoid the dangers of both.

Not many years ago, a materialist-minded member of the U.S. Senate grasped his Bible and thundered: "It has been said on the highest authority:

Skin for skin, yea all that a man hath
will he give for his life."

That was a bad mistake, because his adversary in the debate promptly replied that he had always suspected that the orator regarded the devil as his highest authority and that it cleared the atmosphere now to have this admission made publicly on the floor of the Senate.

If Scripture can quote Satan in a moral drama like the Book of Job without becoming Satanic, if a novelist like Cervantes can write of the hero of La Mancha without becoming Quixotic, then is it not possible for a philosopher like Plato to explore the implications of tribalism without becoming identified with one or more of the characters in his dramatic and explosive dialogues? And when Marx saw what his followers had done with his insights, did he not have every right to thank God that he was not a Marxist?

This reviewer makes no pretense of knowing enough of Greek history to criticize Popper's opinion of what Plato really thought about the characters in his dialogues and their diverging views. But is that question of any real importance? Do we need to know why Einstein turned to physics in order to appreciate the classic beauty of his mass-energy formula? To trace the

logical and historical consequences of ideas we loathe is not a loathsome task but one of the greatest services that any lover of wisdom can ever perform. Despite Popper's loathing for his predecessors he contributes most to our understanding when he walks in Platonic and Marxian paths, not submissively as some Platonists and Marxists have done, but courageously, smiling at temporarily prevailing authorities with the same smile that curled the lips of Plato or Karl Marx.

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CASES AND TEXT ON PROPERTY: By A. James Casner and W. Barton Leach. Boston: Little Brown & Co., 1950. Pp. xliii, 1326. \$9.00.

HERE is an impressive, skillfully done monument, marking with great clarity the present position of enlightened conservatives in the war between embattled teachers of property law and Professor Myres McDougal. McDougal has exacted some slight concessions from the enemy, mostly tagged on at the end of a long book. Greater concessions than actually materialize to training for policy making are implied in an admonition to law freshmen—prepare yourselves “to provide a very large proportion of the national leadership at all levels of authority.”¹ But, in his preface of shop talk for professors, Mr. Casner reassures teachers that direct training for public policy making is not his or Professor Leach's goal. “In our view”, he says, “the first-year property course is basically and primarily a private-law course dealing with the representation of private clients.”² This is definitely not a book from which to teach “the ideology of state planning”—the object, a Harvard law graduate has recently charged, of Yale's first year property course.³

What the Book Covers

This is a fat book; its coverage is tremendous. The first year student meets cases and information previously concealed from him until he took second or third year courses, (if he could work them in) like mortgages, servitudes, vendor-purchaser, and conveyancing. The best job of text writing ever done in a law student's book, and a strong-willed refusal to use cases that do not raise big questions suitable for a survey course, make this ambitious coverage possible. Whether Professor Casner covers all 1300 pages of the book with his students is not disclosed. Professor Leach, in his now mildly famous dissenting preface, admits that he leaves out the personal property material.

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1. p. 14
2. p. ix.
3. John B. Dempsey dissenting to *A Report on the Yale Law Curriculum*, 37 A.B.A. J. 655, 711 (1951).

These personal property problems take up the first four parts of the book, a total of 237 pages.⁴ Many property teachers will be delighted to meet here old friends, familiar to generations of law students, in wild animal, what-is-possession, when is a gift not a gift, and who is a bona fide purchaser cases. The real estate part of the book spreads itself over the remaining 1050 pages and proceeds, in general, along functional⁵ (though narrow) lines "to provide [the student] with a practical grasp of the law governing commercial transactions in land."⁶

In contrast personal property problems are mostly approached through the old conceptionalistic button game of possession, possession, who's got possession. There is a brief textual description of the pledge, the conditional sale and the chattel mortgage,⁷ but there is no real attempt to give the student a "practical grasp" of the wide variety of important commercial dealings in personal property. It has been left for someone else to save the hoary personal property course from ultimate ignoble burial by preparing survey materials functionally acquainting the student with the modern sale, chattel mortgage, pledge, conditional sale, trust receipt, bank transaction, and stock transfer.

The real estate materials open with readable, and, amazing as it may seem, interesting, text about the historical roots of our real property law, types of estates and future interests, and concurrent ownership. Here it becomes especially evident that this book is a far cry from the Harvard case books of old, where a case and nothing but a case would do to illustrate a point no matter how minor or outmoded. Professors Casner and Leach have brought us half way back to pre-Langdell days when law students were text trained. A major difference exists, however, between the dull, uninspired texts of old and the delightfully readable stuff Casner and Leach have concocted. They have relied on others for that part of the text which covers taxes and insurance for property lawyers and abstracts of title. But the rest of the text, hundreds of interestingly written pages in all, is their own. At several points in the book there are slugs of text 50 pages and more in length uninterrupted by a reported case. Though problems are provided, professors used to relaxing while students recite on cases are going to find it hard going to get through this material with their poise intact.

The concurrent estates material is approached intelligently, from the point of view of an estate planner. Here is the neatest application of tax law to property transfer problems in the book. The full-dress chapter on the "ABC of Taxes for Property Lawyers" is disappointingly unspecific. It might better have been called the "ABC of Taxes for Everyone with No Particular Attention to Problems of the Property Lawyer." It would have been better if most of the tax discussion, like that relating to concurrent estates, had been

4. This includes a short eight page section on adverse possession of land.

5. "Functional" in the sense of the big city conveyancer's function as conceived by the editor-authors.

6. p. v.

7. p. 184.

tied to specific transfer problems. (Professor Gardner's contribution, "Insurance for Property Lawyers" is much more helpful, because it is tied to problems with which the student wrestles in other parts of the book).

The landlord-tenant material is pretty orthodox except for an exciting chapter vividly recounting the pulling and hauling that went into the hammering out of an actual lease. The end product is then printed in full for the student to ponder. Some students may also ponder about why, since a 21 year lease was involved, data about prospects for the neighborhood, price curves, prospects for land use regulation, etc., were not presented.

The modern land transaction is largely described through clearly written text about the statute of frauds, the binder and installment land contract, marketable title and the mortgage. Cases are provided, though not in profusion, to illustrate the operation of the recording system and deed delivery and covenant problems. The HOLC, FHA and the federal farm credit agencies and their impact on real estate financing and the mortgage market are ignored. There is, say the authors, no serious requirement for uniformity in land law "for there is no interstate commerce in land."⁸ This is certainly not true of the FHA insured mortgage and the authors would have done well to describe briefly the increasingly interstate character of the mortgage market and the increasing need for uniform rules of mortgage law because of it. Besides, professors who use the book out in my part of the country will want to supplement, substantially, the skimpy treatment of the installment land contract and to throw this frequently used financing device into detailed contrast with the mortgage. This contrast should emphasize the sharp differences in remedies available to the creditor in each case, a task that the authors relegate (I suspect with their fingers crossed) to the procedure professor. Of course, professors out here have long since become accustomed to supplementing eastern case books which ignore the special property problems of the farmer, especially those of the agricultural share lease. This book suffers from the same big city myopia as the others.

Beginning way back at page 985 the authors have saluted Professor McDougal with a chapter on "Controlling the Use of Land," which consists of 107 pages on covenants and only 27 devoted to three cases on land use legislation,—the Euclid and another 25 year old Zoning case and a third case relating to the mining of anthracite coal. To call a chapter with this content, "Controlling the Use of Land" is a mite presumptuous.

The final chapters which relate to easements, licenses and rights incident to the ownership of land are orthodox and not especially noteworthy.

A very useful device is included in the book, if the students find it,—citations to articles are arranged in a table of articles under the same general headings used in the table of contents.

8. p. 612.

What the Book Does Not Cover

Whether viewed from the point of view of the authors, whose primary objective is the training of counselors and conveyancers for private clients, or from the equally valid point of view of the law teacher who believes that he has an important obligation to train also for the public service and to educate lawyer-citizens for community and law reform leadership, this book does not, by any means, sufficiently acquaint the student with "the gradual narrowing of the area in which property rights can be created and transferred solely by private agreement, and the expansion of the area in which Government either lays down certain basic rules for private agreements . . . or takes complete control of the field. . . ."⁹

Mr. Casner in his preface is just plain wrong when he says, "Perhaps it will be otherwise in the future, [and aren't we training our students for that?] but at the present time zoning ordinances and a few rules forbidding certain types of restraints and conditions are all the conveyancer has to contend with."¹⁰ Let him read, in his own book, the meticulously done section on examination of title by Richard B. Johnson, obviously, as the authors say, an experienced and highly competent Massachusetts conveyancer. Mr. Johnson, in addition to zoning ordinances, is concerned about (1) the Soldiers and Sailors Civil Relief Act; (2) tax delinquency statutes, tax titles and their inadequacy; (3) liens imposed by government for taxes and other charges; (4) the important matter of subdivision planning and approval and (5) building codes. In other parts of the country he might, simply as a conveyancer, also be concerned with soil conservation district contracts with land owners; housing codes; sanitation codes; statewide administrative regulation of building; grazing permits; water use permits; special state and local requirements for development of land along lakes and streams; increasing intervention of the federal and state governments in the water pollution field; zoning which bars practically all uses except forestry; regulation through the guise of covenants or conditions when publicly owned land is sold or rented for private use; state laws setting minimum lot sizes for the open country; policies and practices in connection with the resale for private use of tax delinquent land; government policies and trends as they affect or will probably affect parties to long term leases; constitutional restraints on the ownership of agricultural land by corporations or on the long term leasing of farm land; limited access highway laws; timber cutting regulations, etc. etc.

After one has worked with problems created by district attorneys, who, out of disinterest, flub the drafting and enactment of county zoning ordinances; after one has repeatedly heard of district attorneys who refuse to enforce forestry zoning, because a man has a "right" to live on his own isolated sub-marginal land regardless of costs to school, community or family health; after

9. *A Report on the Yale Law Curriculum*, 37 A.B.A. J. 655, 656 (1951).

10. p. ix.

one has faced blight caused by proud and brazen evasions of subdivision controls invented by otherwise reputable lawyers; after one has seen lawyers fight controls which would prevent death, economic waste and aesthetic mutilation along our highways, he should not be expected to be completely complacent about the failure of American law schools to lift their property students out of the 19th century, away from fallacious notions of absolute property rights and into the mid-twentieth century, face to face with its urgent problems of close living, land planning, disgraceful land use and industrial relocation.

But, you say, must the first year property teacher teach all of this land use stuff and the "essentials" too? True, property professors are being asked to pack more and more of their teaching into the first year. In view of this, how can they work land use materials into their already crowded courses. Maybe the property teachers need to stage a counterattack and get more time. I am sure that most of us need to take a fresh look at what we have been considering "essentials." Sitting down with Casner and Leach at the right elbow and McDougal and Haber at the left will, I believe, greatly facilitate this reanalysis. Working with a community's tough zoning, subdivision control and other land use problems will also help. Here is a final suggestion,—an expensive one for your students. Why not use both Casner-Leach and McDougal-Haber in your course? Use some of that beautiful Casner-Leach text to get quickly across what, after reanalysis, you are convinced are historical and doctrinal necessities. Probably you'll want to use some of their recording system cases too. But get to zoning, land use planning and limitations on use through McDougal-Haber.

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