

October 1961

Legal Philosophy - Recent Contributions

Neil W. Schilke

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Jurisprudence Commons](#)

Repository Citation

Neil W. Schilke, *Legal Philosophy - Recent Contributions*, 3 Wm. & Mary L. Rev. 219 (1961),
<https://scholarship.law.wm.edu/wmlr/vol3/iss1/18>

Copyright c 1961 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

LEGAL PHILOSOPHY — RECENT
CONTRIBUTIONS

THE LEGAL CONSCIENCE

By FELIX S. COHEN; Edited by LUCY KRAMER COHEN. New Haven: Yale University Press, 1960. xvii, 505 pp. \$12.50.

THE COMMON LAW TRADITION

By KARL N. LLEWELLYN. Boston: Little, Brown & Co., 1960. xii, 565 pp. \$8.50

THE NATURE OF THE JUDICIAL PROCESS

By BENJAMIN CARDOZO. New Haven: Yale University Press, 1921, as a paperbound, 1960. 180 pp. \$.95.

LAW FINDING THROUGH EXPERIENCE
AND REASON

By ROSCOE POUND. Athens: University of Georgia Press, 1960. ix, 65 pp. \$2.50.

THE LAW AND ITS COMPASS

By LORD RADCLIFFE. Evanston: Northwestern University Press, 1960. xi, 99 pp. \$4.00.

LEGAL philosophy may appear to some to be little more than a pretentious title, but when defined as theories of and about law its importance should be self evident. Every lawyer must at some time raise within himself questions concerning law, its source, its nature, its end, and numerous of its other ramifications, some as broad as these and some more specific. For what reasonably intelligent man can avoid questions concerning life, and what

member of the legal profession can fail to perceive the aspect of law in these questions? But to raise questions without seeking answers is to depict the epitome of a mentally lazy individual. Yet it is suspected that many will attempt to ignore philosophy just as many will continue to ignore classical works in literature, art, and music. Such an attempt can only result in blind futility for it was William James who wisely observed that even those to whom philosophy is anathema are ruled by it.

It is both unnecessary and unlikely that the average attorney or law student will have more than a passing acquaintance with the great legal philosophers of the past such as Plato, Aristotle, Aquinas, Kant, Hegel, Hobbes, Locke, Savigny, Bentham, Jhering, and numerous others. Likewise he may be unfamiliar with the different schools such as natural law, legal positivism, legal historicism, sociological jurisprudence, legal utilitarianism, legal realism, and a wide variety of other "isms." However, this lack of full understanding of earlier philosophers should not preclude anyone from the intellectual stimulus, satisfaction, and challenge offered by contemporary jurists. Nor should the public duty aspect of the learned profession of law be overlooked. Neither is it to be implied that jurisprudence is without value; the practical prerequisites are present, particularly on the appellate level.

The books reviewed here are all of the type that can be read critically by the well informed in this field or casually for practical benefit and general satisfaction by the more nearly average reader.

The coherence and continuity of *The Legal Conscience* almost defies the fact that it is a collection of selected papers, treating such broad areas as: "Logic, Law and Ethics," "The Indians Quest for Justice," and "The Philosophy of American Democracy." The book is superbly organized, a tribute to its editor, Lucy Kramer Cohen.

Felix Cohen has been generally associated with that school generically labeled as legal realism. Although this label, as applied to the author, is not wholly inaccurate, yet the appellation does not fit this book, for these writings do not evince an attempt to either persuade or coerce the reader into accepting any one philosophy of law. What is evinced is a clear plea for tolerance in

all areas, a plea for tolerance among philosophers with a resultant greater measure of truth, and a plea for tolerance among all men with a resultant greater freedom for our society. This, as his overriding objective, is particularly revealed in his critical book reviews included in the book. The abstract problem posed by this objective is that of applying ethical principles to legal principles so as to attain justice. This could conceivably be done by employing that method known as legal realism but there is little in these writings to suggest such an approach. Indeed by the author's emphasis on tolerance such an approach must be discarded as far too restrictive. The method enunciated is essentially eclectic. Thus Felix Cohen cannot summarily dismiss Hobbes' natural law any more than he can accept Jerome Frank's denial of absolutes or Roscoe Pound's balancing of interests. Perhaps it would be fruitful for more philosophers to stop and question the actual differences in their ideas as opposed to supposed and misconceived differences. By this type of examination Felix Cohen is able to discard settled dogma and even question the degree of actual difference between the philosophies of Plato and Aristotle. This again is indicative of his own intelligent and inquiring tolerance.

Aside from the substantive content of the book, it is written with remarkable clarity and is highly readable. *The Legal Conscience* leaves its reader with the warm feeling that the author of its writings was a great lawyer, philosopher, and humanitarian just as Felix S. Cohen is widely reputed to have been.

In contradistinction to Felix Cohen there has been no hesitancy in placing the label of legal realism on professor Karl Llewellyn; but it may be that he too has been mischaracterized, largely through misunderstanding of his earlier book, *Bramble Bush*. In *The Common Law Tradition* professor Llewellyn's differences from Jerome Frank's realism are clearly illustrated, not by comparison but by a further elucidation of his own views; this makes clear his idea of what he terms "realistic jurisprudence."

The major purpose of the book, however, is to convince the reader that appellate results are "reckonable." It would be presumptuous to attempt, in this short review, to summarize the author's proposed methods of predicting results, suffice it to say that they are adequately and convincingly presented. The scholarship displayed in this detailed study of the efflorescence of

appellate decisions is staggering; approximately six hundred appellate decisions are examined in some detail for a determination of how the result was reached.

As must be expected, a considerable portion of the book is devoted to an examination of the place of *stare decisis* in our law. Professor Llewellyn emphatically rejects the contemporary and sensational heresy that judges decide as they wish without revealing their true reasons in the opinion. Thus, *stare decisis* does have a decided import to our law, but in Llewellyn's "Grand Style" of judging, the use of good sense, wisdom and an "on-going" readjustment of prior doctrine reign supreme over the cold legal logic of the "Formal Style."

This review is one place where *expressio unius* is clearly inapplicable; the book contains a broad wealth of additional material, valuable not only to legal theorists but of practical value to practitioners as well and of virtually indispensable value to judges. In addition it should provide solace to all who have been disturbed by the skepticism aroused by the absolutists in legal realism. To these doubting-Thomases the *Common Law Tradition: Deciding Appeals* is sufficient proof to dispel any lack of respect for our judicial process.

Professor Llewellyn in analyzing the rise in reckonability of result in appellate courts finds that this grew out of a gradual transformation to the "Grand Style" of judging; he states that he does "not spot heavy influence of any particular leading figures unless it be Cardozo." This influence was made possible by the respectability of Cardozo, which made it difficult to label him an iconoclast despite his abrupt departure from the "Formal Style." The credentials and general views of Justice Benjamin N. Cardozo should be too well known to bear repetition here. His book, *The Nature of the Judicial Process*, is a work sufficiently classic in nature to merit a place beside Holmes' *The Common Law* on every lawyer's or law student's book shelf and since it is now published in a paperback edition there should be no rationalization for failure to read and reread this classic.

Cardozo concluded these Storrs lectures, delivered in 1920, with:

The future, gentlemen, is yours. We have been called to do our parts in an ageless process. Long after I am dead and gone, and my little part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping.

This reviewer suggests that a part of our "share" is to see that Justice Cardozo's "little part in it" is not forgotten.

The next writer is that current rarity in jurisprudence, a man who has not been categorized by the label of legal realism. Roscoe Pound is the leader of the school known as sociological jurisprudence, although perhaps better described as functional jurisprudence. His current lectures, published as *Law Finding Through Experience And Reason*, are no departure from his established philosophy. Especially clear in the book is his adherence to two of his long standing tenets: that it is impossible to understand what something is without studying what it does, and that decisions can only be good for the present.

In his first lecture, "Law Making and Law Finding," Dean Pound emphasizes the necessity of drawing a precise definition of law as opposed to the definition of laws. "Law is needed to achieve and maintain justice. Laws are needed to keep the peace — to maintain order . . . Law is found; Laws are made." The dearth of precise understanding of this distinction is attributed largely to vocabulary and translation deficiencies. But, despite the reason, it is essential that the distinction be both understood and made. Law must be a moral and ethical force to adequately govern life and hence must adapt to the growth and changes in life. Laws on the other hand are enunciated by the sovereign authority and are therefore basically political in nature. With this distinction clearly drawn, the law is examined as it was developed by the historical school. Pound, utilizing his functional approach, sees two primal errors in this method; first, the law tends to become frozen, and second, historical accidents tend to become established as legal principles.

"Stare Decisis," the second lecture, is a discussion of the quandary caused by the necessity that law be both stable and progressive. Here Dean Pound briefly examines the twentieth-century methods of jurisprudence and elaborates on the char-

acteristics and tenets of the contemporary sociological jurists. The lecture is concluded with a plea for his concept of social engineering.

The theme for the last lecture, "Reason and Reasoning in Law Finding," is reminiscent of the first lecture; here reason and reasoning are explained and the confusion between the two is deplored. It is clear that reasoning from analogies of the past can produce a result which might well defy reason; this is illustrated by numerous examples of such practices and their undesirable consequences in law.

Throughout the book there is concern for the necessary trend of law away from a local to a universal nature. This is an aspect of our law which cannot be emphasized long or loudly enough; far too many present members of the bar are content to rest complacently enshrouded with their own pettifogging provincialism.

Roscoe Pound has written upwards of 250 articles, in the neighborhood of 15 books and a *magnum opus*. This feat, coupled with other vast accomplishments, has established him as Dean Emeritus not only of Harvard Law School but of all American jurists as well. This pre-eminence alone is sufficient to lend authority and pertinence to the book, which is also a thoroughly enjoyable and quite readable book. Any criticisms must be minor and in the light of Emerson's advice to Holmes, "when you strike at a king you must kill him," they will be foregone here.

The final book reviewed here presents a welcome and perhaps necessary contrast to the preceding works. Lord Radcliffe, one of Britain's most distinguished citizens, poses, by implication, the question whether law can be adequately implemented by the Austinian command theory, Savigny's historicism, Holmes' positivism, Pound's social engineering, Kelsen's pure science, or the realism of Ehrlich and Frank. Is the lawyer merely a highly skilled mechanic or is he something more? Lord Radcliffe does not answer this question other than to state that the lawyer *should* be something more, something brought about through a deeply instilled faith in the attributes and purpose of man. What Lord Radcliffe is earnestly expounding is that the law "needs a

standard of reference outside itself." The author contends, and it is here conceded, that there is such a reference in natural law; the difficulty is that as yet there is no means of applying it to the present administration of justice. And since natural law is still scarcely better defined than as Holmes' "brooding omnipresence in the sky" it is impossible to test our present law by a natural law standard. There is much merit in the book's thesis but regrettably the questions inherent in any natural law concept still remain. The author's best attempt at finding the source of natural law is in his idea that law cannot be learned by learning law (here the author has, wittingly or unwittingly, accepted much of Pound's philosophy). This idea that law must be a part of history, economics, sociology, ethics, and a philosophy of life is appealing and, incidentally, a well deserved boost to the liberal arts education. Not so appealing is the author's lamentation that Christianity is no longer accepted as part of the law of the land in England; the acceptance of Christianity as law would still provide no method for determining what was accepted, for contrary to the author's quote from an 1841 English Commissioners' report, there are no "positive rules of Christianity." Thus, the necessity for some method, whether it be realism, social engineering or another must still exist. The inherent problem with natural law — how to implement it — still exists. But, paradoxically, Lord Radcliffe is probably correct in his belief that natural law cannot and will not die (the assumption that this is correct is made despite, or possibly because of, the ethereal quality of natural law); this reviewer sincerely hopes that in at least this respect the author is wholly correct.

It is interesting to note that in *The Law and Its Compass* a problem is raised that almost perfectly parallels one raised in Roscoe Pound's *Law Finding*. Dean Pound characterized it as the need to clearly distinguish between law and laws; Lord Radcliffe characterizes it as the failure to draw a distinction, such as that made in French jurisprudence, between *ordre public* and *bonnes moeurs*, — public order and the decency of private life. The requirements of the former are basically objective while those of the latter are approached subjectively with the person clearly envisaged as possessing certain inalienable rights. While the nomenclature may differ the problem is drawn essentially the same by both Pound and Radcliffe.

On the whole this is an excellent book, both thought provoking and highly interesting, it provides an idealistic complement to the more realistic approaches reviewed previously. The criticisms of the lecture are not severe but are those customarily applied to an exponent of natural law. Criticism, however, should never be equated with a paucity of admiration or respect.

To gain a comprehensive understanding of law it is necessary to make inquiry into its nature and promulgation, its end, content and source, and its sanction and the reason why it obliges. This understanding is vital both to a lawyer's practice and to democracy. What De Tocqueville said a century ago is still pertinent today: "I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people." This confidence in the lawyers' influence was not instilled by their ability to file pleadings; just as "a lawyer without history or literature is a mechanic, a mere mason" he is, a fortiori, a "mere mason" if he is without an understanding of jurisprudence.

NEIL W. SCHILKE