

BOOK REVIEWS

READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY. By Morris R. Cohen and Felix S. Cohen. Prentice Hall, Inc., New York, 1951. Pp. xvi, 944, \$8.50.

The late Professor Morris R. Cohen, illustrious philosopher, educator and humanist, had at least two great intellectual and scholarly goals. The first was to compile an anthology of appropriately arranged excerpts, selected from the works of the world's most famous philosophers and jurists. The second was to write "a comprehensive treatise on legal philosophy which would constitute a companion volume."¹ The treatise was partially written by Morris insofar as he concluded his three volumes of essays, entitled *Law and the Social Order*, *The Faith of a Liberal*, and *Reason and Law*, but it was never completed.² The anthology which Morris began as a joint enterprise with his distinguished son, Felix, likewise was realized only in part during the former's lifetime. But it has now been brought to fruition by Felix, in the volume under review, as an act of filial devotion, with the hope that it may be found worthy of his father's "comprehensive and penetrating vision."³ In lieu of the proposed treatise and by way of partial compensation, more than twenty per cent of the volume is made up of the writings of father and son, and Julius Stone's *Province and Function of Law* (1946) has been recommended by Felix as a suitable, supplemental volume.⁴

Like Jerome Hall's *Readings in Jurisprudence* (1938) and Simpson and Stone's *Cases and Readings on Law and Society* (three volumes, 1948-49), this volume makes available, in convenient form, a wide range of readings "not only for browsing but also for use as a course text and as a beginner's introduction to the main currents of legal thought."⁵ Like these two preceding works, it adopts the comparative, "case-book" method of presenting the subject. But unlike the first of these two anthologies, which makes ideal the controlling mould, and unlike the second, which regards society as supplying the dominant pattern, the volume under review has sought to arrange the materials within the ultimate framework of fact, function, and problem-solving.

While "this volume seeks to exhibit in their working clothes the ideas that compete for the future loyalties of free men,"⁶ maximum attention is

1. Preface vii.
2. *Ibid.*
3. Preface viii.
4. *Id.* at vii.
5. *Ibid.*
6. Preface iv.

directed toward the "working clothes" of the ideas, rather than to the ideas themselves. In other words, the emphasis is not so much upon the ideals which great jurists and legal philosophers professed or rejected, but rather upon the manner in which they applied those ideals, or failed to do so, in the solution of problems affecting the well-being of their own contemporary societies.⁷ Justification for this emphasis was found in the teaching experience of the co-editors. Thus the functional approach "struck sparks,"⁸ and proved congenial in the classes which Felix taught at the Yale Law School and the City College of New York.⁹

The fact-functional design of this book is manifest from the selection of the authors whose works have been included, from the amount of space which has been accorded their writings, and from the arrangement of the materials. It is further evident from rejection of the school method of presenting the subject. This method has been described as encouraging the view that jurisprudence is "a maze of inert ideas, a museum of intellectual curiosities far removed from logic or practice."¹⁰

The volume is made up of excerpts from the writings of more than a hundred celebrated jurists, philosophers, economists, political scientists, and historians, ranging from the sixth century, B.C., to the present time. Most of these authors were mainly preoccupied with the problem-solving phase of the legal order, either on the basis of a relative and mutable idealism, as Roscoe Pound, or on that of experimentation, physical power, or sheer utility, as Holmes and Bentham. Thus Pound,¹¹ the most featured author aside from the co-editors themselves, commands more than fifty pages. About twenty pages are devoted to the writings of Holmes, and approximately forty pages to the works of Bentham, both utilitarians.

Greater space and more prominent positions have been given to materials which accentuate facts (actuality) rather than principles or ideals (metaphysics). A fact-functional approach may be seen from the relative space and position which have been accorded legal-social institutions and legal-general philosophy, respectively. Thus 587 pages are devoted to legal-social institutions and only 340 pages to legal-general philosophy. A total of 366 pages has been assigned to the discussion of legal institutions including property (nature, types, origin, and justification); contract (nature, types, social roots, and enforceable promises); torts (definition, liability, damage, causation, and compensation); and crime and punishment (nature, cause, procedure, responsibility, purpose, individualization, and alternatives). This discussion takes place in Part I. The topic of social institutions comes next in importance with 221 pages, covering the subjects of history, anthropology, economics, and politics.

7. *Ibid.*

8. *Id.* at vi.

9. *Ibid.*

10. Preface v.

11. Dillard, Book Review, *Readings in Jurisprudence and Legal Philosophy* (1951), by Cohen and Cohen, 38 VA. L. REV. 703, 706, 707 (1952).

This topic is treated in Part IV, so that final position of climax is given to it. Only 160 pages are allotted to the topic of the general theory of law, *i.e.*, the nature of law, the nature of the judicial process, and legislation, which is dealt with in Part II. The topic of the general philosophy is not reached until Part III, which covers logic, ethics, and metaphysics in 180 pages.

The book does not purport to cover the whole field of the positive law. Only those areas of that law which have provoked the chief controversies over the centuries have been considered. For example, the law of the family, of the corporation, and of decedents' estates was not regarded as falling within the highly controversial category, and hence was not included.¹²

Consistent with the policy of presenting legal philosophy and jurisprudence principally from the point of view of fact and function, neither the authors nor their writings have been classified into schools, for this would imply that the most important factor was the conflict of the schools. On the contrary, Felix maintains that "the history of law, its logical analysis, the scientific study of its social consequences, and the evaluation of those consequences"¹³ should be viewed "as related problems posed by a common subject matter,"¹⁴ *i.e.*, the distinctive methods of the various schools should be combined in the search for the answers to questions presented by society.

Jurisprudence and legal philosophy should deal with the study of the interaction of four basic factors, as related to law, namely: reason, experience, function, and physical power. Each of these factors may be considered in terms of its formalistic (methodological) or substantive (idealistic) aspects. The schools of jurisprudence have correctly emerged in recognition of the existence of these four factors, the Philosophical School emphasizing reason; the Historical, experience; the Sociological and Realist, function; and the Analytical, physical power. But at times the proponents of a particular school have failed to distinguish between method and ideal, or have stressed one method or one ideal to the exclusion of all the others.

The volume under review merits unstinted commendation for insisting upon the integrative character of the methods of the schools. It is necessary for the student of jurisprudence to know that these methods are complementary and not conflicting, although at times they have been so exhibited, erroneously. But conflict does exist in regard to the substantive aspects of the schools, especially as to the nature of moral right and wrong, if any. It is just as important, if not more so, to be aware of this conflict, as it is to know that the methods of the schools do not conflict, in

12. Friedmann, Book Review, *Readings in Jurisprudence and Legal Philosophy* (1951), by Cohen and Cohen, 40 CALIF. L. REV. 325 (1952).

13. Preface v.

14. *Ibid.*

order to dispel the impression that *in every instance* "radically different views of the same fact may be equally correct."¹⁵

The book correctly rejects the school method of approaching jurisprudence and legal philosophy insofar as it has been the occasion of pinning exact and categorical labels on specific jurists. Such labels may be little more than "classificatory caricatures."¹⁶ But again it is a matter of abusing the school method, for undesirable results are not inevitable if this method is restricted to the classification of the ideas found in juridical materials regardless of their authorship.

Commendable too is the book's objective to promote good will, friendship and understanding among all persons working in a common sphere, for indeed the study of jurisprudence and legal philosophy is "a great co-operative adventure, pursued across many centuries by men of many races and many faiths."¹⁷ This conception of juridical study will provide "perspectives through which the many-faceted problems of the law may be viewed."¹⁸ But the purpose of acquiring this perspective is to enable the student to make an ultimate choice of truth, as dictated by a rightly and fully informed conscience.

Neither a spirit of professional comradeship, nor the overcoming of misunderstanding among jurists by encouraging the precise use of language and a common vocabulary can eliminate the underlying idealistic and conceptualistic differences on the substantive level. It is true that American jurists, for example, with widely differing starting points, as to man, law, and society, may often agree upon the justice, wisdom, and utility of a particular judicial decision or legislative enactment, but for different reasons.¹⁹ Although this unanimity as to result in specific instances is encouraging and should receive proper attention, nevertheless it is also imperative to disclose the conflict which may arise, functionally speaking, in extreme situations. These may never arise as long as the present postulates of American civilization remain as they are, but events abroad have demonstrated the potential fluidity of all national civilizations.

The study of the various ideals used in solving social problems should make it possible to identify those which are undesirable or dangerous, and the reasons for their being such. Juridical faith without good social works, resulting from a fact-functional approach, is dead. But there can be no assurance of the continuation of good works, especially when extraordinary situations arise, without a faith in the self-evident authority of an extra-human moral order imposing inescapable duties. When problems

15. Preface iv.

16. *Id.* v.

17. *Id.* iv.

18. *Ibid.*

19. See papers presented at symposium held on February 25, 1950, at the College of Law of Ohio State University. The speakers were: Dr. Felix S. Cohen, Dr. Brendan F. Brown and Dr. Robert S. Hartman. These papers were published in 12 OHIO ST. L.J. 1, 3-35 (1951).

are solved on the basis of intrinsic falsity, great social damage will sooner or later occur, as a penalty for doing violence to the nature of man and things, as well as to what some jurists have described, for want of a more accurate phrase, "natural law."

A jurist may admit a limited amount of absolute, immutable, moral truth, and be largely concerned with the application of that truth to facts, or he may deny the existence of such truth, or of all truth, for that matter, and stress the need of doing something about improving the institutions which serve men. Hence there are fundamentally different types of "legal realists,"²⁰ *i.e.*, those ethically uninhibited, and those morally limited, either by completely relativistic, or partly absolute norms, which may be totally subjective or partially objective. The dichotomy between truth and error would seem, therefore, to be more realistic than that between "realism" and "idealism."²¹

Brendan F. Brown.†

**POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES—
A COLLECTION OF LEGAL AND RELATED MATERI-
ALS.** By Thomas I. Emerson and David Haber, with a foreword
by Robert M. Hutchins. Dennis & Co., Inc., Buffalo, 1952.
Pp. 1209. \$7.50.

Here is an important and provocative book. The authors have crammed into its 1200-odd pages a prodigious collection of materials (both case and textual) relating to the legal devices for protecting certain political and civil rights. The problems covered are the right to security of the person and federal protection thereof, fairness in criminal procedures, the right of franchise, freedom of speech, academic freedom, freedom of religion and the separation of church and state, and racial discrimination. Materials from every conceivable source have been used and the eye of the reader is constantly directed outward from the limitations of the particular case or statute to the realities of the problem involved. The elaborate bibliographical notes are themselves a major contribution because they range far afield from conventional judicial, legislative and historical materials to bring in the literature of all the social sciences. At the end of

20. See Brown, Brendan F., *A Scholastic Curriculum and Teaching Method for The Catholic Law School in War Time*, 10 THE CATHOLIC UNIVERSITY BULLETIN 7 (1943), cited by REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS 222 (1951); also see FRANK, COURTS ON TRIAL 364 (1950).

21. This handsomely bound book has several excellent special features. At the beginning of each of the fourteen chapters, there are a topical summary of contents and an introductory note by way of a general commentary on the subject matter, therein contained. Numerous footnotes give short sketches of the authors. The material has been made readily accessible by tables of contents and cases, respectively, in the front of the book, and by a complete index at the end.

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the chapter on discrimination, for example, the authors cite almost a hundred books and articles dealing with the theory of race and caste, the history and sociology of American minority groups, the social and psychological dynamics of prejudice, intergroup relations, and the personality structure of oppressed groups. Everything in print relating to the subjects covered appears to have been at least referred to by the authors. Certainly no lawyer with a professional interest in the civil and political rights field can afford to be without this book on his shelves. Social scientists also will find it invaluable. Its usefulness as a law school teaching tool, however, is apt to be severely limited by conflicting curricular demands. Outside of specialized seminars few schools will be able to afford the time necessary to teach this much material on such a narrow, if important, range of subject matter.

Upon a first examination (the reviewer has not taught the materials) the technical execution of the book appears to be excellent. One problem of organization, however, may detract somewhat from its usefulness. The authors state in their preface: "The materials have been organized in terms of problems rather than of legal doctrine. Thus issues of freedom of speech under the First Amendment, or 'state action' under the Fourteenth, run through a number of chapters. We have used this organization in order to emphasize the concrete issues at stake and to bring to bear on those issues all relevant considerations, whether from legal or other sources. In order to facilitate use of the book along doctrinal lines, however, we have striven to make the index as complete as possible." (P. xv) The treatment of the "state action" materials highlights the problem. Intelligent understanding of the new approaches being made to finding state action requires careful consideration of a number of cases which happen to deal with different civil rights. The materials on the subject found at any one place in the book are inadequate and the reviewer doubts that a reference to the index, which refers you from "State Action" to "Fourteenth Amendment" and "Fifteenth Amendment" and there refers to 20 different portions of the book, will enable either the lawyer or the student to organize the materials for full understanding. Some compromise with the strictly functional organization on this, and perhaps other issues, would have been desirable.

More troublesome to this reviewer than such minor defects in execution are the basic assumptions which underlie the book. In the preface the authors state: "The authors confess to a strong bias in favor of political and civil rights. We have accepted throughout the assumptions inherent in a system of democratic values. Within this framework, however, we have attempted to present the materials in an objective manner. Our purpose has been to bring to the reader, so far as possible, the relevant facts and the significant points of view, leaving it up to each individual to make his own judgment." (P. xv) And it appears that they have made a conscientious effort to present the conflicting points of view. But in overall emphasis and approach the book seems to advocate a particular

point of view¹—a point of view based upon those “assumptions” which to the authors are “inherent in a system of democratic values.” This emphasis no doubt is justified by the authors on the ground that there is general agreement with their approach. Thus, they open the introduction with the following (to this reviewer highly questionable) statement: “The American people today are in broad agreement concerning the basic values and fundamental principles of a democratic society.” (P. v)

What are these “assumptions,” these “basic values and fundamental principles” upon which the book is based? Fortunately, the authors have explained them in a ten-page introduction which should be “must” reading for every user of the book. Only those portions of the explanation which most trouble the reviewer will be referred to here. At one point the authors refer to a post-World-War-II trend “in the direction of narrowing or abrogating political and civil rights,” (P. viii) and discuss the many factors which they feel have contributed to this trend. Among those factors are the following:

(1) “The principles of democratic freedom must now be applied not in a context of *laissez-faire*, a free market, and the largely unregulated competition of numerous small and independent business units, but in the context of regulated monopoly or semi-monopoly. This means that the economic forces which originally sponsored and fought for the principles of individual liberty against absolutist executive authority may find their interests today more on the side of maintaining the status quo and hence leaning toward a closed society than on the side of encouraging opportunities for change and hence fostering an open society.” (P. ix)

(2) “Far-reaching state controls, accompanied by the inevitable government bureaucracy, have become essential to the maintenance of economic order and prosperity. Hence the problem is no longer the relatively simple one of curbing unfair or oppressive actions of a state machine with narrowly circumscribed functions, but rather of accepting and using a powerful and effective government apparatus while at the same time holding it within bounds.” (P. ix)

(3) In modern society greater social values “become attached to orthodoxy and greater social deprivations assigned to deviation. Thus the majority becomes more coalesced, more demanding of unity, and the individual or the minority finds less toleration for non-conformities. Hence the maintenance of political and civil rights comes to require not only a battle against government power but a struggle against oppressive, non-governmental, majorities. In this contest the

1. This note of advocacy sounds most loudly in the chapter on Academic Freedom but appears in less pronounced form throughout the book. Thus in the chapter on Fairness in Governmental Procedures the factual background of the problems is given by excerpts from the reports of the Wickersham Committee and the President's Committee on Civil Rights; the very real problems of the police and the prosecutors are scarcely mentioned.

individual or minority group may actually look to the government for aid." (P. x)

This reviewer (while he has not yet worked out satisfactorily his own affirmative position) finds it impossible to accept the authors' conception of the proper role of government in relation to the citizen. Too much emphasis is placed upon rights²—both rights to be protected against government and rights to call upon the government for affirmative assistance. It is far too much to ask of any government that it assume the duty to feed, clothe, medicate, and otherwise smooth the path from cradle to grave and at the same time concede to each citizen the absolute right to bite the hand which feeds him. And the concession made here (as in most current "liberal" writing) of unchecked governmental power over economic affairs may easily place in jeopardy the political and civil rights so stoutly defended. Indirect control through the pocketbook can be quite as effective as direct suppression and against such control the "appeal to the ballot box" may be even less efficacious than against more forthright oppression.

A stronger infusion of old-fashioned liberalism would have made the book much more palatable to the reviewer and, he suspects, to many others. In his view the conception of "liberty against government," properly defined and limited, has far greater promise for individual freedom than the authors' conception of "political and civil rights."

Edward L. Barrett, Jr.†

DRAFTING WILLS AND TRUST AGREEMENTS. By Gilbert T. Stephenson. Little, Brown and Company, Boston, 1952. Pp. 551. \$10.00.

There are three stages in the preparation of a will. First, the process of obtaining information concerning the type and value of the client's property and his family history. Secondly, the process of determining the best manner in which the client's wishes (as developed by the attorney to cover contingencies the average client never has considered) can be carried out. Finally, drafting the necessary documents. The first two stages are generally combined under the heading of estate planning, which today is of considerable importance due to the marital deductions pro-

2. Far too little consideration is given to the fact that in all civil right situations a choice must be made between competing values. See Riesman, *The Present State of Civil Liberty Theory*, 6 J. OF POLITICAL SCIENCE 323 (1944). Instead, the impression is left that the claimant of a civil right is always entitled to protection—an assumption which appears frequently in the current literature on this subject. Thus John Frank in his annual series of excellent articles on the work of the United States Supreme Court appraises justices in terms of the number of cases in which they have voted for or against claimed civil rights. See, e.g., *The United States Supreme Court: 1951-52*, 20 U. OF CHI. L. REV. 1, 49-50 (1952).

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vision of the Revenue Act of 1948. In view of this, the attorney in search of material can readily find numerous articles, monographs, and even treatises on the subject. However, a different situation is present with respect to the subject of draftsmanship. When an attorney, completely ignorant of the field, has been requested to prepare, let us say, an unfunded life insurance trust agreement together with simple wills for husband and wife feeding into the trust, where does he commence? Form books merely provide the many varied clauses without any explanation concerning their use or their meaning. Considerable help is afforded by the increased number of lectures in draftsmanship given under the auspices of the American Law Institute and other similar groups. However, for the attorney who cannot avail himself of these avenues of education, there has been up to this time no adequate treatise he could turn to.

Gilbert T. Stephenson's book supplies this missing link. As is stated in the foreword, this is not a treatise on wills and estates, on estate planning, on taxation of trusts and estates, nor is it a form book. It is a discussion of the working provisions of wills and trust agreements. It contains some 600 forms of clauses together with five complete instruments, a will, a living trust agreement, a personal insurance trust agreement, a partner's insurance trust agreement and a stockholders insurance trust agreement. It does not contain dispositive provisions. The book is divided into separate chapters relating to the powers of executors and trustees, their appointment and succession, their compensation, investment provisions, tax provisions and the like. Since this is designed for national distribution, the author very wisely emphasizes the fact that the discussion as well as the forms are not based on the law of any particular jurisdiction and accordingly, as is true of any form book, any clause utilized should be reviewed in the light of the local laws. It is, therefore, particularly attractive to the attorney without any experience in this field.

It is stated that the author some thirty-three years ago commenced a collection of clauses of wills and trust instruments for his own use as a practicing attorney. After he had entered the trust field, he continued this collection, and this book is a result of an analysis of some 750 instruments. From this developed the course of lectures that has been given by the author at the Graduate School of Banking, where he is Director of Research, and over the period of 1937 to 1950 to more than 15,000 law students in law schools all over the country.

The specialist in this field will be interested in comparing these clauses with those he utilizes, since in some cases undoubtedly there will be an improvement resulting from the manner of expression. Likewise, the book with its excellent index may be of advantage to the specialist in permitting him to readily find a clause that is not normally used in the average will and trust instrument.

To attempt to discuss the various clauses themselves would serve no useful purpose. If any criticism is to be made, it would be based on the absence of brevity. Today we find clients insisting upon wills which are

short and are written in simple language. This often can be accomplished merely through a revision of clauses that have been used for years. Thus, the power vested in a trustee to invest in all forms of property without restriction to legal investments is to be contrasted with the clause found in the form of will in the book which requires twelve printed lines. In fact, the paragraph of the will dealing with powers contains twenty-nine separate sections and covers almost five printed pages.

In closing, note should be made of the chapter entitled "Omitted Provisions," which emphasizes matters that are often overlooked by the draftsman. Thus, for example, there is the failure to dispose of tangible personal property outright, rather than to have it included in a residuary trust, and the failure to include a minor's clause permitting the trustee to hold the share of any minor during minority, in lieu of having a guardian appointed. These could be added to the check list that should be consulted in connection with the preparation of any will or trust agreement.

Charles M. Hamilton.†

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- CASES AND MATERIALS ON ESTATE AND GIFT TAXATION. By Boris I. Bittker. Prentice-Hall, Inc., New York, 1951. Pp. 494. \$7.00.
- CASES ON ADMINISTRATIVE LAW. By Kenneth Culp Davis. Little, Brown and Co., Boston, 1951. Pp. 1031. \$8.00.
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- COLLECTED LEGAL PAPERS BY HOLMES. Peter Smith Inc., N. Y., Reprint—1952. Pp. 316. \$4.00.
- A CONSTITUTION OF POWERS IN A SECULAR STATE. By Edward S. Corwin. The Michie Company, Charlottesville, Va., 1951. Pp. 126. \$3.00.
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- WAGE-HOUR LAW. By Herman A. Wecht. Joseph M. Mitchell, Philadelphia, 1951. Pp. 499. \$15.00.