

BOOK REVIEWS

An Introduction to a Philosophy of Law. By Paul Sayre. Iowa City: State University of Iowa, 1951. Pp. 21. \$1.50.

Professor Sayre, who has recently given us a very valuable volume on Roscoe Pound, presents in these few pages the basic elements of his philosophy of law, obviously as the first statement of a later full treatment of this subject.

This small book lays down the elements of Sayre's approach and relates it somewhat to other philosophies of law. Let us, first, critically review these references to other thinkers. The author states that "right down to some 200 years ago all legal thinking was essentially analytical." However, from the Greek 6th century B.C. to the beginning of the 19th century A.D. all legal philosophy was based on natural law, although, within natural law, different schools can be distinguished. Analytical jurisprudence, the reaction against the long predominance of natural law, as the expression of legal positivism, dates only from Austin.

Then again, the author refers to natural law's appeal to reason "at least during much of the Middle Ages." But *all* natural law, that of Plato, Aristotle and the Stoics, of St. Thomas, of the "classic," "droit de la raison" and of modern Neo-Thomism is based on faith in absolute values and on the primacy of reason. Only the modern, non-neo-thomistic natural law, based on phenomenology, axiology and existentialism, connected in its origin with German romanticism, is based on irrational intuition.

We must also disagree with what seems to us the author's overestimation of Cicero's place in legal philosophy. Cicero was outstanding in many ways: as the most important legal practitioner of his time, as a wonderful orator, as the creator of classic Latin, as the author of charming philosophical books, as the statesman who fearlessly dared to attack Marc Antony and suffered death for it; but he is not an *original* philosopher of law. His philosophy is an eclectic concoction of Platonic, Aristotelian and Stoic ideas set forth in classic Latin, just as the whole so-called Roman philosophy of law was imported from Greece.

Finally, we cannot understand why the author lumps together "realists and the pure theory of law view" and also calls "realists" "the new modern expression of the extreme analytical view." Kelsen and the realists stand at opposite poles. For the "realists" analytical jurisprudence is to be totally condemned. For Kelsen, the law is norm; for the realists, law is fact. Kelsen's judge is determined by superior norms, but Jerome Frank's judge is determined, e.g., by his digestion.

The basic ideas of Sayre's philosophy may be briefly stated: "Law is action

first and everything else afterwards"; action, of course, necessarily involves morals and "experience." As law is action, it is not something else, except incidentally; law as "action in sober fact" is, thus, more than a rule. Rights, not duties, come first. A right is a legally recognized claim. There are recognized legal interests with recognized legal postulates; a "system of legal rights" is developed. Relativistically framed "assumptions in a civilized society" are given.

It is clear that this is, essentially, Roscoe Pound's "sociological jurisprudence" which, as Stone suggests, could better be called a "functional jurisprudence." Although the title of Sayre's book is "An Introduction to A Philosophy of Law," which suggests that there are other, equally tenable philosophies, the author seems, by his rejection of natural law and analytical jurisprudence, to claim that his philosophy of law is *the* philosophy of law. In his continual insistence upon the "fact" that law is action the author goes so far as to tell us that "really there can be no doubt of this." But we have great doubts. The author also speaks of the "folly of emphasizing legal rules." Why is it folly? We are told that "the normative theory is wasteful, if indeed not futile." Wasteful and futile for what? For the cognition of the law which is the only object of analytical jurisprudence?

It seems to us more and more that all three branches of jurisprudence—analytical, sociological and natural law—must be combined for a full understanding of the phenomenon "law." There is a strong trend toward an "integrative" jurisprudence. "Law," Jerome Hall has recently suggested, "is a coalescence of norm, fact and value." The same ideas have been expressed by Pound, who wrote in 1949 that

a well-rounded science of law cannot neglect the analytical nor the philosophical approach. Each is needed for an effective body of knowledge. The besetting sin has been to take some one aspect for the whole. . . . In the house of jurisprudence there are many mansions.

For us, the unilateral insistence on "law as action in sober fact" is wholly unacceptable. It is not possible to give here a full critique and refutation of this concept; that would take more pages than are found in the volume here reviewed. It must suffice to bring out some basic errors and the source of them. Like all sociological philosophers of law, especially the realists, Sayre is under the strong influence of Holmes' unhappy maxim that the life of the law has not been logic, but rather experience. In actuality, it has been logic plus experience. The reasoning of the judge or the legal scholar under any system of law must, of course, be logical; otherwise it would not be reasoning. Sayre apparently believes that he has resolved the conflict between Cooke's insistence on reason and Holmes' insistence on "experience"—by speaking of law in terms of action, by combining conscience and experience, subjective ideals and objective facts.

Sayre does not offer a philosophy of "law." He is obviously concerned only with the "common law," which, in the typically narrow, Anglo-American con-

cept of law, is considered to be identical with the decision of the court. "Law is action in the plain sense that the Courts bring the force of their power to play upon things done." He speaks "of what the Courts will do in similar cases," "of the law as sanctioned by the Courts." But, is a primitive law which has no courts not law? Is the American Constitution not law? The historical development of the common law through judicial precedents, as "judge-made law" has created this error of restricting law only to the decisions of the courts, whereas the development of the civil law through codes by legislators has created the opposite error of neglecting and minimizing judicial decisions. Theoretically, both approaches are wrong. They identify the whole of law with a mere part of it.

This error in common-law thinking has created a second and more dangerous misconception, namely that law can only be created by judicial decision, so that there are no pre-existing, general, abstract norms. Thus, Sayre writes: "Unless a nose is punched, no decision in a particular case occurs, nor is there a statement of the law for people to follow in the future." This position is obviously untenable. The decision in this particular case is only the judicial application of a pre-existing, general abstract norm, contained either in precedents or in, e.g., the Ohio Code of Criminal Law.

Kelsen has convincingly demonstrated that duty, not right, holds priority in law. Even Sayre, putting rights first, undermines his own theory by conceding that "in some cases you have to talk duties first."

In Sayre's book, one also discovers some confusion between law and legal science. "Courts," writes Sayre, "of course, intend to fix dependable assumptions and legal interests in a predictable science of law." This sentence is a hornet's nest of errors. First, courts intend to apply or to create law, not a science of law. Courts are organs of the law; the science of law is not. Further what the author means is not "a predictable science of law," but rather a science of law, sufficient to predict judicial decisions in a concrete case. First we must state that the whole idea of "predictability," so dear to sociological jurists, is nothing but a political fiction, intended to assure the public of the certainty of the law.

The fact that the superior, binding norm, in consequence of the imperfection of human language, always permits more than one justifiable interpretation makes such prediction hardly possible. Second, "prediction" lies in the realm of facts, not of law. Here again, all sociological jurists, and especially the "realists," are under the spell of Justice Holmes' unhappy, obviously untenable description of the law "as the prophecies of what the courts will do in fact." Law is certainly not a prophecy of what *will* happen in the realm of causality, but a prescription of what *shall* happen in the realm of normativity. The norm, Thou shalt not murder, does not predict that murder will not happen, but establishes the legal duty not to commit murder. He who desires to eliminate the "ought-character" from law by defining law "as action in sober fact," thereby eliminates exactly that which makes law, law. This identification of law with fact or action disregards all pre-existing, general, abstract norms, whereas it was Justice Cardozo

who emphasized that in more than 90 per cent of the cases before the courts the decision is clearly determined by pre-existing general norms. And it must be added that in the remaining percentage of cases there must at least be a pre-existing, general, abstract norm of adjective law, which gives the courts competence to create law.

As this reviewer remarked in a 1934 study, sociological jurists, especially the "realists," introduce the whole normativity of the law in a cryptic way, even if they define the law as "what the courts will do in fact." Who are the courts? How does one know that a man is a judge? Why is the decision of a judge, sitting in court, a judicial decision, whereas the decision of the same judge in the same case in a moot court at Harvard Law School is not a judicial decision? If I speak of the "observable behavior of judges," how do I know that a man is a judge? Obviously, because legal norms make him a judge with a certain competence, given to him by legal norms. This whole normativity is also seen in Sayre. "Only what the court intends is law, providing, of course, that the intent of the court is within its power." The "power" of a court is its competence, as determined by pre-existing, general, abstract legal norms. This "providing, of course" kills the thesis of law "as action in sober fact."

Sayre's "system of legal interests" and his "assumptions in a civilized society" are taken over from Pound. Pound's "system of legal interests" stems directly from Heck and the Tübingen School of "Interessenjurisprudenz." But the whole "balancing of interests" would hang in the air, if we have nothing but facts. We need not only values, but a value standard. Pound introduces the "assumptions in a civilized society"—stemming from Kohler—which constitute, as Cairns states and Stone admits, a time-place bound, relativistic natural law. That is why Pound's jurisprudence, notwithstanding all talk about facts, is bound by a strong ethical pathos of "socialization of the law," of realizing "social justice' through law," right here in these United States at this time. Pound's philosophy, heavily crossed with cryptic natural law, is not really a philosophy of law. It is a politics of law—a philosophy of making good law. This applies equally well to Sayre. He speaks of "reaching good law," of "building the law" of the "improvement of the law."

And here, we think, we are at the heart of the critique. For while we cannot accept Sayre's "Introduction to A Philosophy of Law," much of it would be acceptable, if the title of the book were instead: "Introduction to a Philosophy of Making Good Law in the United States at Mid-Twentieth Century."

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