

vate common-sense rules for evidential inferences to unyielding rules of substantive doctrine. There is indiscriminating resort to historical precedent.

The treatise has other lessons to teach. I have no doubt that the present edition of Wharton will be regarded as a useful tool by some practicing lawyers, particularly those who do not have available the resources of an adequate working library. But is it not a matter of some significance that one of the leading multi-volume works on the American criminal law is, at the same time, a work deficient in criticism and analysis and one not always reaching adequate levels of accuracy and articulation? May this not constitute evidence that the profession has demonstrated little interest in the reconstruction of the criminal law and that the administration of criminal justice is proceeding in this country with scant attention to elementary considerations of theory and analysis? No doubt, there is another side of the ledger. Interest in the reformulation of the substantive criminal law as reflected in numbers of the states and in the Model Penal Code Project of the American Law Institute is encouraging. The increasing commitment of the schools to research and instruction in the field and such ventures as the survey of criminal justice administration conducted by the American Bar Foundation are, perhaps, straws in the wind. These developments may presage a better day. It is high time.

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**Our Public Life.** By Paul Weiss. Bloomington, Indiana: Indiana University Press, 1959. Pp. 244.

Over the past few decades a conviction has grown up, particularly within philosophy and the social sciences, that traditional political philosophy has come to an end—a case, it would seem, of super-annuation, hardening of the arteries, and then merciful oblivion ushered in by a small stroke.<sup>1</sup> Apparently, however, Paul Weiss, Professor of Philosophy at Yale University, has not read the obituaries. Or to be more exact, he seems to believe that reports of the death are greatly exaggerated. Certainly, the scope and objectives of his latest book, *Our Public Life*, clearly indicate that he claims still to detect vitality in what to many of his colleagues, especially in philosophy, is an embarrassing corpse, deserving honorable but efficient interment.

What is more, this book, although meant to be comprehensible by itself, is part of an ambitious project, of a veritable “system of thought” (p. 12), of philosophy in the grand style. This volume follows closely upon Professor Weiss’s *Modes of Being* (1958), in which he attempts to show that there are “four fundamental, irreducible but interconnected realities,” called “Actuality, Ideal-

<sup>1</sup> See, for example, *PHILOSOPHY, POLITICS AND SOCIETY* (Laslett ed. 1956), especially the introduction.

ity, Existence, and God" (p. 11). Prior to this, he published *Reality* (1938) and *Nature and Man* (1946) which, taken together, show "how man knows and deals with the realm of actuality" (p. 11). There followed, in 1950, *Man's Freedom*, a treatise on ethics and values; it is now complemented by *Our Public Life*, a "systematic" and admittedly "speculative" inquiry into what constitutes a "publicly significant life" (p. 11). Both works deal with the "actualization of the Ideal." We are promised even further volumes which will treat, respectively, of the experience of existence in art and history, and of God, in private and institutional religions.

This information may give pause to the allegedly "practical-minded" student or practitioner of "the law" who has occasion to leaf through Professor Weiss's volume. Becoming aware of its place within a philosophic system of thought and then picking up a good solid textbook on Contracts, he may sigh, as Sir Winston Churchill once did: "I pass with relief from the tossing sea of Cause and Theory to the firm ground of Result and Fact."<sup>2</sup> But for the student or practitioner to do so would be to deprive himself, perhaps prematurely and without sufficient attention to the evidence, of the challenging experience of reading a book in which such provocative but by no means ungrounded statements as this abound: "It is a judge's function to look at positive law from the side of society and the state as well as from the perspective of social and Natural Law" (p. 165). Or this one: "Ideally . . . positive law guides as well as follows social law, and social law in turn sustains, corrects, mutes and transforms positive law" (p. 105). In short, Professor Weiss is not content to speak of "the law"; he wishes to place "the law" in the total context of man's "public life," and to show its dependency upon a natural order of things. That order, according to Weiss, consists in the final analysis of man's natural, although never fully realized striving for "completion."

## II

The author believes that man's public life consists, ideally—and to a certain considerable extent, actually—of experience within four concentric and co-existent circles. First and innermost, there is society, which is composed of various classes. The classes interact on the basis of "social law"—that is, a "mosaic of accepted customs, conventions, habitual ways of evaluating, responding and acting" (p. 44). Second, is the state, possessed of the characteristic of "sovereignty" and promulgating and enforcing "positive law." But the proper function of the state, and therefore the essential character of positive law, depends on whether men possess "native rights." Weiss argues most emphatically that men do possess such rights. At the core of these rights is the general and unalienable "right to be, and to be fulfilled," a right which flows from the nature of man as a being both "in nature" and "free" (p. 65). Stated more concretely, every

<sup>2</sup> The remark, made in a different context, occurs in Churchill's *The Malakand Field Force* (1898).

man has a native right to the fulfillment of the needs of his body, mind, will and emotions, even though the particular form of that fulfillment may vary from state to state and from culture to culture. Weiss then elaborates a set of seven criteria of an "ideal" positive law: "It is (a) anonymous, (b) impartial, (c) prescriptive, (d) objective; (e) it relates to public behavior; (f) it defines a set of civil rights answering to man's native rights; and (g) it matches civil rights with enforceable duties" (p. 110).

Beyond both social and positive law, however, and providing a "standard" for them, is "Natural Law." For, Weiss says, in order to understand how it is possible for men within a given society or state to evaluate and therefore to be able to change their institutions, principles and policies, it is necessary to take account of a Natural Law—a Law, that is, which consists of an Ideal, the core of which is the statement that "justice" should be done "to all always," and that "peace and prosperity" should "forever reign" (pp. 141, 168). This Natural Law is, furthermore, a "law of nature" (which is, in itself, merely hypothetical in form, an "if—then" relationship) that has been made "preferential, given the status of a norm, by the common good" (p. 156). In essence, then, the objective of the state is the production of the "common good," through the instrumentality of positive law. This is true even though in fact most states only "imperfectly" realize this objective, and in some cases may not even be conscious of its existence. It is not statistical incidence but the nature of the thing that counts. Therefore, it is not sufficient to say, as Max Weber did, that "Sociologically, the state *cannot* be defined in terms of its ends."<sup>3</sup>

The state itself, however, fails and "must fail" to do justice to the "full range" of man's "public nature, promise and achievements" (p. 177). For this full realization to take place, men must participate in the third and fourth levels of public life: culture, which is a "unit" of civilization, and then civilization itself. Related to these two stages is the final level of law under which man necessarily finds himself, and that is the Law of Civilization. It is "beyond" the first three kinds of law, and it states "the desirable relations which should hold between all public men and the common human good they ought to realize" (p. 184).

As for "cultures," Weiss speaks of different cultures, such as that today called "the West." Although such cultures are more inclusive in their range of public expression than are states, they still are partial, incomplete, and but a fragmentary expression of "civilization." Each culture possesses a complex "mythos, ideology and people," yet it lacks the universality of civilization: "To be a man is to belong to the one single public domain of mankind" (p. 238). Civilization, as so conceived, is not yet; it can be brought into being, or approximated, however, by the creation of a "single world-state" out of the fragmentary beginnings represented by the United Nations (pp. 240–41). It is then, and only

<sup>3</sup> Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (Gerth & Mills, 1946). (Emphasis supplied.)

then, that the relevant Natural Law will be applied to a subordinate "plurality of states," and men will come fully to experience a "public existence."

But this is not all. Having outlined in such breadth and depth the scope of public life—and the foregoing summary does little justice to the range and complexity of the analysis—Weiss also insists that there are ultimate limits to public life itself. In the final analysis, man has the need—therefore the right—to realize, in similar complexity, a "private life." This consists of relevant experience in four dimensions: the ethical, the aesthetic, the religious and the speculative. The common human goal is, indeed, an Absolute Good, which is simply "beyond civilization"; it is the pursuit of the "supreme goods of inquiry, virtue and art" (p. 244). Public life, it turns out, is the framework or scaffolding which supports this supreme quest. This is not to devalue public life, but merely to see it in proper perspective, which is to say in its interaction with private life.

### III

To erect his impressive, although perhaps somewhat gossamer structure, Professor Weiss proceeds throughout his book by what he terms a method of "dialectical construction." That is, he consciously presents a model or "ideal" of "how men might ideally get together and progressively fulfill themselves" (p. 18). This model is, in turn, the result of the application of a method that is a composite of other methods that have been used in political philosophy—such as the genetic, the empirical, the analytic and the paradigmatic. It incorporates yet goes beyond each of these; and "the model it offers is one that *it itself constructs* by asking what must be added if some acknowledged fact is to be completed" (p. 21; emphasis supplied). According to Weiss, his dialectic account of the achievement of civilization "supposes nothing more than that men move from society, state and culture and then to civilization for the sake of stabilizing, equalizing, and universalizing the results of socially habituated ways of acting in relation to one another." It expresses not only what might conceivably be, but what man "in fact persistently seeks and really needs" (p. 21). In application, to take an example, the method of dialectic construction moves from the observed fact that there are laws, and that these laws do specify certain rights for particular men, to an examination of what must be added to those existential rights if they are to become consistent with man's nature. In other words, positive law is itself a fact only of a certain order; it must be interpreted in the light of a more basic fact: what the essential nature of the being is for which the specific positive laws are enacted. The question, then, is whether man possesses an essential nature, and whether that nature itself supplies reliable criteria for the evaluation of the content of rules of positive law. Not law, but philosophy must supply this information.

It is precisely at this point that Weiss may seem to some readers to enter a dark labyrinth. To speak of the essential nature of a thing, it may be said, is to summon occult forces from an Aristotelian arcanum; it is to engage in the

typically Aristotelian fallacy of imposing teleological interpretations on natural phenomena. But this would be to misunderstand the relationship of Weiss's position to that of Aristotle. For although Weiss does call Aristotle the "greatest philosophical political theorist" in the Western world (p. 94), he also argues at length that Aristotle's political theory is defective on a number of critical points. The gist of his criticism of Aristotle is that the latter failed to understand—or rather to anticipate—the fundamental principles of modern political philosophy. For example, Weiss contends that Aristotle's men were "essentially public beings." Aristotle did not, therefore, "raise the question of whether or not their native rights could be alienated, how the state could satisfy those rights, whether it was able to or should add to those rights, and just how one resolved a conflict between the claims of the state and the claims of men" (p. 102). And in another context, Weiss argues that the social contract theory of the origin of government (a fundamentally anti-Aristotelian theory), while defective on some points, turns out to have "considerable power," for it rightly insists on man's possession of inalienable rights as well as on the need of men to "restrain themselves and others for the sake of a common good," a restraint performed by the "state" (pp. 85-86).

#### IV

We are, then, in the presence of a philosophical restatement of the modern theory of natural rights, a restatement which is derivative both of Hobbes' great assault on the Aristotelian citadel and of Hegel's insistence on the dialectic actualization of the right order. (It should be added here that in Weiss's opinion the other two really great philosophical political theorists of all time are, precisely, Hobbes and Hegel.) The philosophy of law embodied in Weiss's restatement is thus itself derivative of the emergence, in modern times, of "droit subjectif" as opposed to "droit objectif," as the two differing conceptions have been termed by Michel Villey, a French Professor of Roman Law.<sup>4</sup> "Droit objectif" was derived from the classical conception that jurisprudence is the attempt to describe the objective order of things and the qualities of them. If, to paraphrase Villey, the *jus* is that which is objectively just, there is a "that which is just" for each thing and each person, and this is reflected directly in the juridical statute. Consequently, the precise place that, in the general order of things, justice gives to each particular thing has nothing whatever to do with the ideas of benefit, ability or power which attach to the modern concept of "rights," and which are conceived of as belonging to individuals *qua* individuals. The idea of "rights," which is the essence of "droit subjectif," comes into being beginning with the nominalism of Duns Scotus and William of Occam; it is carried a step further by the famous and controversial second general definition of *jus* in Grotius' *De*

<sup>4</sup> See VILLEY, *LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT* (1957). The remarks in the remainder of this paragraph are drawn from Villey's analysis of the origin of the modern "droit subjectif." See especially his Chapter 14.

*Jure Belli ac Pacis*,<sup>5</sup> and it achieves its full philosophical statement in the political philosophy of Hobbes and the ethics of Gassendi. It then, although only gradually, passes into the realm of jurisprudence proper; and it forms the very foundation of contemporary jurisprudence, even though many practitioners of that art today are only dimly aware of its roots in early modern political philosophy.

One of the great merits of the present volume is, thus, to make more explicit than is perhaps usually done today, that a jurisprudence that rests upon a concept of "rights" is, in turn, dependent upon a political philosophy which asserts the *natural* right of men to be free, to have property, and to pursue happiness according to their individual lights. It points, furthermore, to the grave, even insuperable, difficulties inherent in a "legalism," as Weiss calls it, which is content to say that "the state is always right so long as it is consistent and clear" (pp. 60, 185). It points, therefore, to the incompleteness of law *qua* law, and to the necessity to understand the philosophy which has formed the conception of law as we know it. For as Weiss himself has stated, in *Nature and Man* (p. xi), "The conclusions of past [philosophical] systems are among the premises of present thought."

The question remains, however, whether the method employed by Weiss in dealing with those past philosophical systems is altogether adequate. He has written, again in *Nature and Man*, that: "No philosophy ever dies, but each must be resuscitated if its truths are to be truths for those who come later. And the best way to resuscitate a philosophy is to write it anew" (p. xi). This intention is, I believe, fairly realized in *Our Public Life*. But Weiss's restatement of modern political philosophy seems to presuppose, not to establish, the validity of the main tenets of that philosophy; or what is nearly the same thing, it accepts the early modern rejection of the classical view as having been justified. It is true that Weiss himself mounts an independent criticism of Aristotle; yet that criticism is tenuous and hardly systematic. It often distorts Aristotle's intention and meaning, no more so than when Weiss makes it appear that, according to Aristotle, "all the objectives appropriate to man" are "included" in "the state" (p. 102; emphasis supplied). Certainly, to take only one point, it is difficult to reconcile this interpretation with Aristotle's explicit statement that there is a tension between the life devoted to politics and the life devoted to philosophy (the *bios theoretikos*), a tension which Aristotle ultimately resolves in favor of the superiority of the latter.<sup>6</sup>

This leads me, finally, to an even more general criticism, and that is of Weiss's method of "dialectic construction." The method, as Weiss employs it, produces highly formal, abstract and general definitions. "Politics," says Weiss, "is the art of compromise whereby men are enabled to exercise the greatest number of

<sup>5</sup> I. i. sec. 4.

<sup>6</sup> ARISTOTLE, POLITICS, 1323a 14—1325b; ETHICS, X, vii and viii.

rights in harmony" (p. 77). The aim of the state is to produce "justice, peace and prosperity" (pp. 29, 141, 168, 172). Ideally, positive law enables men to "reach a state of affairs where they will be effective in harmony" (p. 112). One critical difficulty, as I see it, is that such definitions—and the book abounds in them—too readily take for granted either that the essential meaning of key concepts such as "harmony," "justice" and "prosperity" is evident, or that such meaning will be supplied by political action ordered according to the strictly formal principles which Weiss enunciates. What is more, the failure to engage in a truly dialectic examination of such basic concepts leads to a further difficulty—*viz.*, that precisely because Weiss is content to state the *relationship* between such terms in a purely formal way, he is also content to take for granted, for example, the desirability as well as the possibility of the actualization of a world-state which will, formally at least, "guarantee" ever wider spheres of "harmony." In this respect, Weiss's argument is less than convincing because it does not also dialectically examine the concrete conditions which are necessary to such an actualization. For example, it is indeed curious that Weiss finds it satisfactory to speak merely of "prosperity," in the abstract, as a fundamental condition of a decent civic and private life, and as an objective of a decent positive law, and yet never to treat the profound political and social *implications* of what such prosperity on a universal scale presupposes: the progressive conquest of nature, for the relief of man's estate, by the instrumentalities of modern theoretical science.

Thus Weiss's argument for the existence of a "Law of Civilization" as an ultimate standard for every system of positive law is sound in its intention and general insight, yet ultimately defective in its specific approach and in many of its conclusions. Max Weber once said that "Politics is a strong and slow boring of hard boards." And so today, it seems to me that one of the essential tasks of political philosophy—for I agree with Professor Weiss that it is still a viable form of inquiry—is a strong and slow restatement of the philosophical core of the concepts of justice, law and the state. To say that Professor Weiss's book is less than a perfect restatement of these concepts is not to deny that at least a challenging beginning has been made on a richly rewarding yet extraordinarily demanding task.

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