Notre Dame Law Review

Volume 34 | Issue 3 Article 9

5-1-1959

Book Reviews

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BOOK REVIEWS

EHRLICH'S BLACKSTONE: THE PHILOSOPHY AND HISTORY OF THE LAW UNDER WHICH WE LIVE. By J. W. Ehrlich. San Carlos, California: Nourse Publishing Company, 1959. Pp. VIII, 987. $15.00. In the Preface to this book we are told that "Blackstone's Commentaries, more than any other single book, are the codification of English and American law. . . . There is a beautiful history and philosophy of this system [*scil.*, the American common law] to be found only in the Blackstone Commentaries. . . ." This statement, aside from being quite incorrect,[1] reflects the paradoxical popularity which Blackstone's *Commentaries* still seem to enjoy among certain American lawyers.[2] "I have taken Blackstone's original editions," Mr. Ehrlich

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1 It is well-nigh impossible to enumerate the many errors of fact which mar Blackstone's *Commentaries*. Thomas Jefferson, certainly a discriminating man and himself a lawyer of prominence, had this to say about the *Commentaries*: "A student finds there a smattering of everything, and his indolence easily persuades him that if he understands that book he is a master of the whole body of law." Quoted in Goebel, *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 568 n.35 (1938). Presumably Mr. Ehrlich would not like what Jefferson had to say about lawyers who derived their knowledge of the law from Blackstone: "The distinction between these [people who rely on Blackstone] and those who have drawn their stores from the deep and rich mines of Coke and Littleton seems well understood even by the unlettered common people, who apply the appellation of Blackstone lawyers to these ephemeral insects of the law." *Ibid.* In a letter addressed to Spafford and dated March 17, 1814, the same Jefferson laments that Blackstone's *Commentaries* had "done more towards the suppression of the liberties of man, than all the millions of men in arms of Bonaparte. . . ." Quoted in PADOVER, DEMOCRACY BY THOMAS JEFFERSON 130 (1939). DICEY, LAW OF THE CONSTITUTION 8-9 (1915), had this to say about Blackstone's account of the royal power (1 COMMENTARIES* 233-280 (Jones ed. 1916). "It has but one fault; the statements it contains are the direct opposite of the truth." Jeremy Bentham writing about the *Commentaries* in 1776, observed that a "defender of the works of power becomes guilty, in a manner, of the abuses which he supports; the more so, if by oblique and sophisticated glosses, he studies to guard from reproach, or recommends to favour, what he knows not how, and dares not to attempt, to justify." BENTHAM, FRAGMENT ON GOVERNMENT 100 (1776). This rather harsh condemnation Blackstone well deserves. Dicey insists that Blackstone "perpetually plays the part of an apologist" and that "his apologetics sometimes verge on absurdity." Dicey, *Blackstone's Commentaries*, 4 CAMBR. L. J. 286, 292 (1932). Blackstone's description of the British judiciary and, especially, the manner in which it worked, is called defective by Holdsworth, usually an admirer of Blackstone. 12 HOLDSWORTH, A HISTORY OF ENGLISH LAW 735 (1938). And certainly erroneous is Blackstone's contention that "the common law of England as such has no allowance or authority" in the American colonies. 1 BLACKSTONE, COMMENTARIES* 108. For a discussion of Blackstone's views on the authority of the common law in the American colonies, see 1 BLACKSTONE, COMMENTARIES 275-285 (Hammond ed. 1890), and 1 BLACKSTONE, COMMENTARIES, pt. 1, editor's app. 381 (Tucker ed. 1803). "It is fit," Jeremy Bentham concludes, "that the student [of the law] should be again and again forewarned that whenever he finds any proposition advanced by our Author [*scil.*, Blackstone] . . . there is more than an even chance of its not being true. . . . There is such a mixture of truth and falsehood in whatever our Author has delivered . . . that the safest rule I take it a man can follow, is not to pay any regard to any part of it." BENTHAM, A COMMENT ON THE COMMENTARIES 251-252 (Exeritt ed. 1928).

2 In 1924, George Wickersham, then a leader of the American Bar, made the following amazing statement:

> The philosophy of the Declaration of Independence usually is ascribed to Locke and Paine. But it appears to me that one may clearly trace the influence of Blackstone's Commentaries on the mind of Jefferson, in the affirmations of the Declaration that all men are born with certain inalienable rights, among which are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. Wickersham, *Presentation Address to Blackstone Memorial*, 10 A.B.A.J. 571, 577-578 (1924).

Compare this highly inaccurate statement of Wickersham with what James Wilson, one of the Founding Fathers, had to say about Blackstone and his *Commentaries*: "I cannot consider him [*scil.*, Blackstone] a zealous friend of republicanism. . . . On the subject of government I think

continues in his Preface, "excised the unnecessary and confusing passages . . . and deleted all footnotes." However, Mr. Ehrlich fails to indicate which edition or editions of the *Commentaries* he used. Obviously, he did not consult the first English edition,[3] and it is very doubtful that he ever made use of any of the "original—English—editions." Hence one may speculate as to whether he relied on the (American) edition of William G. Hammond (of 1890),[4] that of William C. Jones (of 1916),[5] or perhaps some other available edition.

Mr. Ehrlich's contention that he "excised the unnecessary . . . passages" is simply spurious. Under the heading of Public Wrongs, Arraignment, And Its Incidents, he expounds in great detail what happened to a prisoner indicted of treason or felony, "if he be found to be obstinately mute. . . . [T]he prisoner was remanded to the prison . . . and put into a low, dark chamber, and there . . . laid on his back, on the bare floor, naked . . .; [and] there . . . [was] placed upon his body as great a weight of iron as he could bear, and more; [and] he [was] to have no sustenance, save only, on the first day, three morsels of the worst bread, and, on the second day, three draughts of standing water, that should be nearest to the prison door, and in this situation this should be alternately his daily diet, till he died, or . . . till he answered."[6] One may ask here why Mr. Ehrlich, who professes to have omitted all unnecessary passages, should dwell at such length upon this revolting aspect of English legal antiquarianism. Does he perhaps consider the *peine forte et dure* an effective judicial instrument that should be revived? Finally, the deletion of all footnotes, those by Blackstone himself as well as those by some of his editors and commentators,[7] is simply deplorable. It reduces the scholarly value of Ehrlich's efforts to a negligible quantity.

Blackstone's *Commentaries* are not, as Mr. Ehrlich contends, the "history and philosophy" of the common law of both England and the United States; they are, one may suggest, the particular (and peculiar) manifestations of an often highly tainted and prejudiced attitude toward the common law of England during the eighteenth

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I can plainly discover his jealousies and attachments. . . . In public law . . . he should be consulted with a cautious prudence. . . . It is of high import to the liberties of the United States that the seeds of despotism be not permitted to lurk at the roots of our municipal law." WILSON, WORKS 21-22 (1804). And in Chisholm v. Georgia, 2 U.S. (2 Dall.) 414, 458-59 (1793), the same Wilson pointed out that Blackstone's political theories constitute a wholesale defense of tyranny: "A plan of systematic despotism has been lately formed in England. . . . Of this plan, the author of the Commentaries was, if not the introducer, at least the great supporter." Thomas Jefferson observed that Blackstone had "made Tories of all England," and was "making Tories of those young Americans whose native feelings of independence do not place them above the wily sophistries of . . . a Blackstone." PADOVER, *op. cit. supra* note 1, at 130. See also Jefferson's letter to James Madison (of 1826), quoted in Lile, *The Law School of the University of Virginia*, in THE CENTENNIAL OF THE UNIVERSITY OF VIRGINIA 153 (1921), where Jefferson re-iterates the charge that Blackstone had turned the younger generation of American lawyers into Tories.

3 The first (English) edition of vol. I was published in 1765; vol. II in 1766; vol. III in 1768; and vol. IV in 1769. Between the period 1765-1769 and 1844 there were no less than twenty-one English editions. The first American edition, in four volumes, was published in 1771-1772, by Robert Bell in Philadelphia. In 1773, Bell proposed a second American edition, but apparently this plan failed to materialize. The American edition of 1799, also called the "Boston edition," was published by I. Thomas and E. T. Andrews, and is commonly referred to as the second American edition. James Wilson's lectures, delivered at Philadelphia in 1790-1791 (and published in 1804), were based on the fourth English edition, while St. George Tucker's famous edition, published in 1803, in the main followed the ninth English edition of 1783, although in some places he relies on the text of some earlier editions.

4 Hammond used the eighth English edition of 1788.

5 Jones, as he himself admits in his Preface, avails himself of the "painstaking and scholarly labors" of Hammond. 1 BLACKSTONE COMMENTARIES IV (Jones ed. 1916).

6 Text, pp. 919-920. The corresponding "unabridged" passages are BLACKSTONE COMMENTARIES* 325-327. Obviously, this was the horrible torture of *peine forte et dure* which Blackstone justifies as a vital part of English criminal procedure. Incidentially, this "penance," as Blackstone calls it, was also inflicted on women.

7 The notes in Hammond's and Jones' (American) editions are of the greatest value to the interested and intelligent reader.

century.[8] This particular attitude is well described by Jeremy Bentham, a man intimately acquainted with Blackstone's work and mentality, when he stated that Blackstone did not teach or write his subject "to make it understood," but deliberately to "leave it unintelligible," in order that his students and readers "should attribute their not understanding . . . to their own unfitness to learn." This method makes them "worshippers of the Professor,[9] whose dignity is enhanced by the mysteriousness of the science he professes. . . . [A]nother great advantage the uninstructive way of teaching has over the instructive: speaking unintelligibly, he may all along keep fair with the prejudices that are in fashion."[10]

One final question occurs to the reviewer: why should Mr. Ehrlich, a man apparently not specially trained for this kind of work, bring out in 1959 another and, without doubt, quite inferior "edition"[11] of Blackstone's *Commentaries?*[12] The only plausible explanation which this reviewer is able to advance is probably Blackstone's assertion that the judges (or the courts) are merely speaking the law; that their functions are purely passive; that they are but the mouth which pronounces the law; and that they only declare, but never make the law.[13] The judges, according to Blackstone, are "not delegated to pronounce a new law, but to maintain and expound the old law."[14] What Blackstone wishes to avoid at all cost is the incontestable fact, so "repugnant" to certain people, that courts actually make law and have done so since time immemorial. Thanks to Blackstone's inane theories, the American lawyer as well as the American public have only recently become aware of this old fact.[15] Together with other jurists, Dean Roscoe Pound, in his many writings,[16] has tellingly demonstrated the falsity and the pernicious results of Blackstone's theory that "judges do not make laws; they discover them." Perhaps Mr. Ehrlich prefers this theory which, one may assume, might possibly deter judges from reading books on sociology, philosophy, psychology, history and economics, thus preventing them from handing down "sociological" rather than "legal" decisions.

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8 Lord Ellenborough, in 1812, stated: "Blackstone, when he compiled his lectures was comparatively an ignorant man. . . . It might be said of him, at the time he was composing this book, that it was not so much his learning that made the book, as it was the book that made him learned." Quoted in WATERMAN, *Thomas Jefferson and Blackstone's Commentaries,* 27 ILL. L. REV. 629 n.7 (1933).

9 The *Commentaries,* it will be noted, originated as the "Vinerian lectures" on law delivered for the first time in 1753 at Oxford. These lectures, as Blackstone prides himself, were "favoured with . . . the attendance . . . by those of the noblest birth and most ample patrimony. . . ." 1 BLACKSTONE, COMMENTARIES *13.

10 BENTHAM, A COMMENT ON THE COMMENTARIES 253. Edward Corwin once said about Blackstone that he "is the very exemplar and model of legalistic and judicial obscurantism." Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 HARV. L. REV. 365, 405 (1929).

11 Perhaps "Eclectic Readings from Blackstone" would be a more appropriate title.

12 Blackstone's appeal to certain people is not difficult to understand. At times, he is rather "eloquent, suave, undismayed in the presence of the palpable contradictions in his work, and adept in insinuating new points of view without unnecessarily disturbing old ones." Corwin, *supra* note 10, at 405.

13 1 BLACKSTONE, COMMENTARIES*63-71. Already Cicero had referred to the Roman judicial magistrates as "the law speaking," and Coke, in 1609, had maintained *"judex est lex loquens,"* a phrase which he probably borrowed from Cicero.

14 1 BLACKSTONE, COMMENTARIES*69. Blackstone continues: Even in cases "where the former determination is most evidently contrary to reason . . . the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." *Id.* at 70.

15 Blackstone's most telling contributions to American legal (and political) thinking (and, incidentally, to the mentality found among a great many members of the American legal profession) are not perhaps his excursions into English law, but (a) a distinct penchant for "conservativism" which he seems to have made fashionable among American lawyers; (b) a distinct aversion to legislation which until very recently was considered an undesireable interference with the alleged perfections of the traditional common law; and (c) the naive belief that courts discover rather than make law.

16 See, *e.g.,* POUND, THE SPIRIT OF THE COMMON LAW 171-173 (1921).

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THE IDEA OF FREEDOM. By Mortimer J. Adler. New York: Doubleday & Co., 1958. Pp. 689. $7.50. There is a story, probably apocryphal, that Gertrude Stein, on her deathbed, turned to those gathered around, and asked "Does anybody know the answer?" Protracted silence. "In that case, does anybody know the question?" And so she died. This second query, whatever its connection with Miss Stein, is one that has come to concern us more and more in recent years; it is gratifying, therefore, to find that a substantial group of scholars headed by Professor Adler is systematically addressing it. "The Idea of Freedom" is the first publication to come out of this group—the Institute for Philosophical Research—but we may gather from the manner in which their approach is set forth that their endeavor is meant to be a continuing one from which further studies will emerge.

Adler and his colleagues—although Adler appears as the sole author, it seems that the intention of the group is to assume collective responsibility for the validity of the concepts presented—set forth the exact scope of their undertaking in Book I of this volume. The task they have set themselves is no less than that of classifying the whole body of authors[1] who have addressed themselves to the subject of freedom from ancient times to the present, with a view to determining what concepts are to be found going by the name of freedom, and what agreements or disagreements are to be discerned among the positions of these various authors with respect to these concepts. They are careful to set forth just what is and is not to be hoped for from this approach, which they characterize as "dialectical," and freely admit the significant distortions introduced by the approach—chiefly the absence of historical perspective, and the absence of the contextual factors that can only be provided by viewing the work of the given philosopher as a totality.

But granting that their work is no substitute for the philosophical works themselves, or for the historical study of those works, Adler and his associates claim for their dialectical endeavors a place of tremendous importance. They point to the dialectic clarifications of theology by Abelard and Peter Lombard as paving the way for the great theological synthesis of the thirteenth century, and suggest that a comparable dialectic clarification in philosophy (a far more difficult task because of the lack of a fixed revelation for a starting point) could pave the way for a comparable advance.

They have done their job with relentless objectivity, and, for at least some thinkers on the subject of freedom, the expected influence will no doubt be forthcoming. Indeed, it is all too easy to find the structuring of the problems in one's own mind falling into the conceptual framework set up in this volume, before one remembers that those who are giving currency to this framework have been very careful to claim no philosophical validity for the distinctions that they introduce. They claim neither that their structure constitutes a good way to talk about the topic of freedom, nor that anyone ever has talked about it in that way, but only that it is an informative way to talk about the literature on the subject. A work so modestly conceived and so ambitiously executed has its peculiar dangers. We should be warned to approach it with caution, and not to use it without devoting a good deal of thought to the question of what its proper use may be.

Turning to the structuring itself, we find that it is accomplished in two steps. First, the various conceptions of freedom are classified according to three "modes of possession"[2]—that is, according to whether their authors conceive them to be circumstantial (what a man out of jail has more of than a man in jail), acquired (what we get when we cease to be slaves to sin; what Thoreau has that his jailers lack), and natural (the inherent capacity everyone has to make choices not subject to external

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1 They use the term "author" rather than the narrower one "philosopher," perhaps because those they deal with include a number of economists, theologians, and others whom some might regard as not answering to the latter term.

2 Text, bk. II, ch. 3.

determination). After discussing this method of classification,[3] the account proceeds to a new one, according to "modes of the self."[4] These modes also are three in number: self-realization (defined as an individual's ability to act as he wishes for the sake of the good as he sees it), self-perfection (an individual's ability to will as he ought), and self-determination (the so-called "free-will"). The respective classifications in the second trio are not coextensive with those in the first, since each of the modes of the self is regarded by one author or another as having a circumstantial element, and some of those who deal with self-realization see in it an acquired element. However, since all those who deal with self-realization see it as in some part circumstantial, and all those who deal with self-perfection see it as in some part acquired, it is proper to speak of the circumstantial freedom of self-realization, the acquired freedom of self-perfection, and the natural freedom of self-determination as an exhaustive classification of the theories of freedom.

Included in the structure is a conception of freedom that recognizes both the circumstantial freedom of self-realization and the acquired freedom of self-perfection, subordinating the former to the latter.[5] By this is meant that the Thomists and certain others recognize as freedom the ability of the individual to do as he pleases (self-realization) as long as he does not please to do something forbidden by some moral principle binding on all mankind (self-perfection). The ability to do what is forbidden by such moral principles the Thomists refer to not as freedom, but as license.

The vice in the structure thus set up can perhaps best be approached through certain ambiguities in the "acquired freedom of self-perfection"—ambiguities of which Adler and his associates seem inadequately aware. The first of these is in the term "of." The dominant theme of the chapters in which the acquired freedom "of" self-perfection is discussed[6] would seem to envisage the freedom enjoyed by those *who are already perfect*—who are able to will and to do as they ought. On the other hand, certain passages seem to envisage a freedom that constitutes the ability *to become perfect*—to seek self-perfection efficaciously.[7]

Next, there is an ambiguity in the meaning of "self-perfection." At one point, it is recognized that some authors regard moral principles, even valid moral principles, as enslaving if not sufficiently internalized.[8] Yet at another point a characterization is adopted that presupposes an unqualified identity between self-perfection and conformity to law, for the position that the freedom of self-realization is limited by the moral law and by just civil laws, is called a conception of freedom of self-realization as subordinated to the freedom of self-perfection.[9] Thus, when the book speaks of an author as dealing with an acquired freedom of self-perfection, we cannot tell whether he looks on this freedom as enjoyed by all those who conform to moral principles, or only those who have internalized them.

Finally, there is an ambiguity in the content of self-perfection. We are told that one mark distinguishing the freedom of self-realization from that of self-perfection is that the former, as we have seen, is defined in subjective terms as the ability of the individual to act *as he wishes* for the sake of the good *as he sees it*, whereas the latter is always seen in terms of conformity to an objectively valid principle.[10] The ambiguity here is as to whether the objective principle is also universal—whether, in other words, it is the same for everyone (as, for instance, the principles of morality are), or different for each man (as, for instance, his vocation). This ambiguity is manifested in the lumping together of conformity to law, health (as Freud uses the

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3 Text, bk. II, chs. 4-9.
4 Text, bk. II, chs. 11, 12, 15, 20.
5 Text, bk. II, ch. 17.
6 Text, bk. II, chs. 15-16.
7 *E.g.*, text, pp. 252-53, especially n.5.
8 *E.g.*, text, p. 283.
9 Text, bk. II, ch. 17, especially pp. 318-19.
10 Text, pp. 256-64.

term), growth (as Dewey uses the term), and union with God as various principles of perfection recognized by different authors who affirm an acquired freedom of self-perfection. It is obvious that one man's conformity to law is the same as another man's, whereas health or growth for one man may be quite different from health or growth for another man. Union with God is capable of being interpreted in either way, but it would seem that the bulk of both traditional and contemporary theology would recognize that every man is called to a unique relationship with God.

These ambiguities are imbedded in the general structure in such a way as to place the major emphasis on a conception of the freedom of self-perfection which identifies it with the freedom enjoyed by those who are already perfect in that they are conformed to moral or civil law. Thus, the freedom to seek perfection, the freedom that comes only with adequate internalization of the principle conformed to, and the freedom that is seen in terms of development of the individual person, rather than conformity to a universal principle, are all lost sight of. The reader, after he has finished the chapter on "Self-Realization as Subordinate to Self-Perfection" will conclude, if he accepts what he has read, that if an author sees any kind of freedom beyond the "circumstantial freedom of self-realization" (defined, remember, as the ability of the individual to act as he wishes for the sake of the good as he sees it), such an author must needs hold that every man's freedom is limited by what the prevailing sentiment, or opinion of the speaker, characterizes as immoral.

What this boils down to on the practical level is that 2500 years of philosophizing can offer us for the solution of the problems facing our society no alternatives between moral relativism and authoritarianism. Actually, there is such an alternative, and our society has long been committed to it, as will be apparent if we consider the protection society affords us against the suppression of the written and spoken word by public authority—the most familiar of our constitutional "freedoms," that of speech and of the press.[11] It is clear that the protection accorded speech and writing in our society is limited, not merely by the exigencies of like freedom for others, but by moral evaluations of the speech or writing in question. At the same time, there are within the limits as set, utterances that the judges expressly regard as immoral (by their own standard and the community's as well) but which they protect in the name of freedom.

The law of obscenity, a constitutional topic presently in a state of flux, will give rather clear evidence for both these points.[12] It was at one time held that uttering a passage calculated to arouse sexual thoughts and desires in those whose minds were open to such influences was properly punishable under the name of obscenity. The standard that has been gaining ground since the twenties, and is now almost universally accepted, holds, however, that the passage is to be viewed in context, and that the work of which it is a part is to be considered as a totality. The general result of this test is that artistic merit cancels out salacious content. It will be noted that the artistic merit in question is not necessarily such as to render the totality of the book good or edifying. By any objective standard of morality, uttering the artistically meritorious book may be quite as immoral as uttering pure pornography—if not more so. At the same time, salaciousness for its own sake has consistently been denied constitutional protection. This denial was reaffirmed by the Supreme Court in the recent *Roth* case, against the contention advanced by Judge Frank that the attempt to arouse sexual thoughts and desires in people's minds was entitled to the same constitutional protection as the attempt to propagate other ideas.[13]

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11 U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press." It should be noted that the term "freedom" is expressly used here, and that anyone's conception of the meaning of the term is therefore relevant to the interpretation of this clause.

12 See Note, 33 NOTRE DAME LAW. 417, at 436-42 (1958).

13 Roth v. United States, 354 U.S. 476 (1957). See Judge Frank's concurring opinion in the court below, 237 F.2d 796, 801 (1956).

Another example of the same kind of selectivity in the recognition of freedom is found in the refusal of the Supreme Court to extend to commercial advertising the constitutional protection given other forms of speech and writing.[14] Here again, the principle of selection is not dependent on a moral evaluation of the speech or writing in question. A man can extol the most dangerous of political or philosophical doctrines far more freely than the most innocuous of soaps.

Nor is the principle of selection to be found in any of the equal-freedom-for-others or market-place-of-ideas formulas advanced by the moral relativists. As for equal freedom for others, the Jehovah's Witness who comes to the door is quite as detrimental to the householder's freedom as is the magazine salesman.[15] As for the market-place of ideas, if the formula were to be pursued without any selectivity either as to the ideas entitled to compete for acceptance, or the means used for getting them accepted, Judge Frank's contentions in the *Roth* case could scarcely be answered.

What appears to be the case is that a man who has something of himself to express, something in his heart or mind that he wishes to share with his fellows, is the man we regard as entitled to freedom of speech or of the press, whereas the man who has only something to sell has only such protection as we accord to freedom of economic enterprise. Furthermore, while both of these may be characterized as freedoms, it seems legitimate to say that we regard freedom of speech and the press not merely as a more highly valued freedom than freedom of economic enterprise, but as partaking more fully of the nature of freedom. This would seem to be because we perceive, albeit with an insight not fully articulated, that true freedom is bound up with a release of the creative potential in the individual. Such a conception of freedom cannot be equated with the ability of the individual to act as he wishes, because the desire for money, social approval, or anything of the kind, may dominate his mind. It cannot be equated with conformity to moral principles, because such conformity never exhausts the creative potential, and, unless the principles are adequately internalized, may actually inhibit creativity.

As we can see from the ambiguities dealt with above, such a conception of freedom lurks in the structure adopted by Adler and his associates, but it is never made clear. This is not because philosophical literature lacks clear statements of such a conception. For instance, if we were to define freedom of speech in terms of Martin Buber's conception of dialogue,[16] we would get just the results reached by our courts. But Buber has not been drawn on in the formation of the structure under consideration; the bibliography contains no references to him. Other authors of similar views, such as Berdyaev, Kierkegaard, and Heidegger, are listed in the bibliography among the works examined, but are not referred to in the body of the book. Still others, particularly Maritain and Tillich, are dealt with at some length, but their stress on the uniqueness of the individual is consistently underplayed. In this last instance, it seems highly probable that Adler and his associates have been so impressed by the Thomistic view of freedom as conformity to the moral law (which, presumably, represents the personal conviction of most of them) that they have misread as affirming this view of freedom authors who really meant to affirm something quite different. For the still more serious error of omitting almost a whole school of thought, no explanation at all can be advanced.

We are promised another volume in which the disagreements *about* freedom among authors who hold the same *conception* of freedom (in the terminology used in the book, the *doctrinal* disagreements among authors who are in *topical* agreement) will be taken up, along with the arguments advanced by the disputants in support of their respective positions.[17] Perhaps Adler and his associates intend to turn the

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14 Valentine v. Christensen, 316 U.S. 52 (1942); Breard v. Alexandria, 341 U.S. 622 (1951).

15 *Compare* Douglas v. Jeannette, 319 U.S. 157 (1942), *with* Breard v. Alexandria, *supra* note 14.

16 BUBER, BETWEEN MAN AND MAN, ch. 1, pp. 8-39 (2d ed. 1955).

17 Text, p. 101.

ambiguities discussed above into sources of doctrinal, rather than topical, disagreement, and deal with them in this second volume. This would be better than nothing, although it would by no means validate the deficient and ambiguous structuring in the first volume.

To complete our criticism of this volume, we must ask ourselves whether the defects we have discerned in the use of the dialectical technique in this instance point to any defect in the technique itself. In the opinion of this reviewer, the answer is yes. There is a defect, and a serious one, in the insistence of Adler and his associates on the empirical character of what they are doing. Classification of views is a philosophical technique of long standing, and of no small importance in clarifying problems. But the typical classification differs from the work under review in two highly significant respects. First, the typical author who classifies will first state his problem or the subject-matter with which he wishes to deal, and will then attempt to formulate the *possible* alternatives for approaching the problem, and only then will attempt to classify the existing literature—in accordance with the positions he has previously set up as exhausting the list of possible alternatives. Second, because of the way he has approached the problem, he makes himself responsible for holding, *as a philosophical position,* that his formulation of the problem is a good one, and that the possible alternative lines of approach he has set up are exhaustive, and are classified in accordance with a methodologically sound way of dealing with the problem.[18] One cannot help thinking that had Adler and his associates followed in this pattern by attempting a logically exhaustive and philosophically valid classification instead of trying to find a classification imposed by the literature itself they would have avoided the omissions and ambiguities that rob their work of so much of the utility it ought to have.

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18 For an example of a classification undertaken in this fashion, see COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933).

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BOOK NOTES

ARMS CONTROL AND INSPECTION IN AMERICAN LAW. By Louis Henkin.* New York: Columbia University Press, 1958. Pp. xii, 277. $5.50. This work represents one of the first attempts to define and explore the probable impact of this country's law — federal (especially the Constitution), state and local — on any scheme of international disarmament. In the years since World War II, with an added impetus from the Korean conflict, there has been considerable effort among many nations of the world to effect some such plan. Rapid progress in the field of guided ballistic missiles and the probability of nuclear attack in the event of war have made the present world emotionally susceptible to disarmament proposals. The purpose of Professor Henkin's work is to point out that if such a plan is adopted, a variety of legal problems will have to be considered and met by the framers of the agreement.

Though consisting of eight chapters, the book can be roughly divided into four parts. Part one is a consideration of the history of disarmament proposals. The concept of disarmament is, of course, nothing new. A kind of disarmament is effected in most conflicts, when the victor relieves the vanquished of his weapons. The League of Nations was one of the more notable attempts at self-enforced disarmament, although at the time it was neither novel nor sensational as an idea. The idea of multilateral disarmament, however, in the field of conventional as well as nuclear weapons, has never before presented the unique problems of supervision and enforcement that it presents today. Atomic and hydrogen bombs, guided missiles, remote control aircraft and nuclear-powered military vehicles, all present new difficulties to the would-be disarmer. Thus, while the concept of disarmament is not new, the *methods* of disarmament chosen today will have to be new. Part one thus sets the stage for the legal discussion of these novel provisions, whatever they finally come to be.

Since the application of law to a disarmament plan cannot be discussed until the details of the proposal are known, Professor Henkin, in the second part of his work, attempts to postulate some of the specific provisions which a plan of disarmament must or will probably contain. A plan of disarmament will have to include a list of the arms prohibited (*e.g.*, will only nuclear weapons be outlawed, or will all arms, including the hunter's deer rifle, come within the plan's prohibition?). The plan, however, cannot possibly succeed unless something more is controlled than the arms themselves. The manufacturing of arms will be banned (implying inspection of factories); raw materials will be controlled (implying inspection of uranium, steel, and most other mines and processing stations); research will be eliminated (implying not only inspection for enforcing the prohibition of tests but also for the supervision and control of scientists and laboratories), and finally, ideas for new kinds of weapons will be ferretted out (possibly implying a house-to-house inspection). Enforcement will presuppose detailed surveillance, the use of physical inspection, aerial inspection, seismic and radioactivity tests, the interrogation of scientists, businessmen, government officials, workers, and even housewives, the accumulation of written reports and records, and finally, the institution of international agencies for the supervision of the inspection. The plan will contain penalty provisions for breaches of the agreement, and some sort of cancellation provision in the event of a total breach by one of the parties signatory.

Part three of the work considers the general application of the Constitution to such a proposal. To say that a federal treaty supersedes all inconsistent federal, state and local laws, does not provide as ready an answer as it would seem to at first glance. Underlying the entire area is the question, Can the executive branch, even with the consent of Congress, enter into a treaty or agreement which might abrogate rights secured to the people by the Constitution? For example, a provision permitting agents

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of an international body to interrogate scientists and compel incriminating testimony might contravene fifth amendment guarantees. Or, the agreement might outlaw all forms of nuclear power, including privately-owned nuclear power plants. Would such a provision constitute a deprivation of property without due process of law? The author concludes that although the possible constitutional objections to such an agreement are substantial, constitutional history indicates that the arguments would probably not prevail in our courts.

In the fourth part of the book, Professor Henkin justifiedly enters into a lengthy discussion of the plan's "police" provisions. He considers first the probability that international agencies and tribunals, rather than national groups from each of the signatory nations, will constitute the investigative and regulative body. These agencies would have broad powers to cope with any situation which might arise. Their work might conceivably require federal, state and local implementing statutes. Here, another constitutional question arises: Can the executive branch *require* such implementing legislation in the face of opposition and unwillingness by the groups concerned? The author concludes that the Constitution probably admits of an affirmative answer, although this is speculative.

This work is by no means light reading. It is a well-written, highly-documented, authoritative, textual work in an area where real problems abound. It serves as a sharp warning to the advocates of an international disarmament agreement that there is more to such a plan than persuading the Eastern bloc to sign and to permit inspection. The major weakness of the book is that it concerns a hypothetical area, one which may never come into existence, and one which the great majority of lawyers will probably never have to enter. By virtue of its subject matter, the book will undoubtedly evoke little more than academic interest. But for those who are interested in the practical legal problems of our foreign policy, the work is highly recommended.

Richard D. Schiller

FREEDOM TO TRAVEL. Report of the Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York. New York: Dodd, Mead & Company, 1958. Pp. xxv, 144. $4.00. This book, authored by a special committee of the Association of the Bar of New York, proceeds along lines strikingly similar to the oft-cited and well-received Federal Loyalty Security Report,[1] written by another special committee of the New York Bar. Although the conflicts apparent in the field of passport procedures perhaps are not so notorious as in loyalty and security programs, the dispute engendered is equally controversial. The special committee, chaired by Mr. Fifield Workum, presents what it believes are the basic trouble areas in the present passport procedures, and attempts to resolve these conflicts by a series of suggestions concerning the principles, societal as well as legal, that should guide the Department of State and the courts in attaining a just solution of the problems besetting both of them.

The report is divided into six chapters, each of which is intended to focus attention on the general theme of the report, *i.e.*, that the current method of granting or denying passports is defective in several major respects, all of which can be remedied without needlessly sacrificing national security. The first two chapters review the history of passport procedures in the United States, and the important court decisions in this area. Such cases as *Bauer v. Acheson*,[2] *Dulles v. Nathan*,[3] and *Boudin v. Dulles*,[4] which defined the requirements of procedural due process in passport hear-

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1 *The Federal Loyalty Security Program*, REPORT OF THE SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. New York: Dodd, Mead & Co. (1956).

2 106 F.Supp. 445 (D.D.C. 1952).

3 225 F.2d 29 (D.C. Cir. 1955), *dismissing appeal from* 129 F. Supp. 951 (D.D.C. 1955).

4 235 F.2d 532 (D.C. Cir. 1956).

ings, are fully discussed to provide the reader with a solid foundation on which to judge the judicial temper in this area. Additionally, the report pays due homage to the now famous Supreme Court decisions of *Kent v. Dulles*[5] and *Dayton v. Dulles*,[6] where the Court struck down the Department of State's refusal to grant passports to the petitioners because of their alleged communist activities. Although neither case reached a constitutional issue, they are highly important in the committee's scheme because they clearly indicate that in the absence of specific congressional approval, Section 51.135 of the Passport Regulations,[7] upon which the refusals were based, will no longer be sufficient grounds for basing a refusal to grant a passport. Thus, since further legislation is needed to implement present State Department policy, the committee feels it has a practical solution to offer.

The remainder of the report deals with the committee's recommended changes in the standards and procedures governing the issuance of passports, especially when the passport applicant is a known communist or sympathizer. Much of the support for these recommendations is derived from the committee's oft-repeated statements that the well-being of the nation will not be endangered (at least not seriously) by permitting American citizens, whatever their ideological tendencies, to travel abroad with a minimum of restraint, and that whatever danger does exist is over-balanced by the benefits available to the country as a whole under such a travel policy. But despite these constant assurances, which occasionally approach solicitousness, little in the way of digestible fact-finding is offered the reader to support the committee's stand. Legally, much can be said for such a position, since communists are not subject to criminal prosecution, short of a Smith Act violation, and any restraint on travel under a congressionally-approved section 51.135 undoubtedly will raise the very constitutional questions skirted by the Supreme Court in *Kent v. Dulles*. But instead, the committee chooses to base its recommendations on a somewhat tenuous value judgment: "It is anticipated action rather than contemplated speech which should serve as the basis for restricting such an important freedom as that of travel abroad."[8] If this standard has a familar ring it should not be surprising, for the committee has adopted the identical standard which now guides courts in resolving the conflicts in the first amendment area of freedom of speech, and gives complete approval of Judge Hand's test in *Dennis v. United States*.[9] That the "freedom" to travel can be equated with the long-recognized freedom of speech is arguable. If the equation is justified, it does not necessarily follow that principles governing the ultimate resolution of the problem need be identical. The committee's dissatisfaction is with the regulation itself, regardless of its constitutional or ideological permissiveness.

The service performed by a book of this nature cannot be gauged solely, or even primarily, by the measure of agreement which the recommendations foster among its readers. Rather, by venturing into a highly controversial area, the committee has served notice that the legal profession is deeply concerned with the real conflicts apparent in the passport area. And regardless of the ultimate rightness of its criticism and recommendations, the problem is now isolated, and the challenge for further refinement and final reconciliation is squarely presented to both lawyers and legislators.

Daniel W. Hammer

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5 357 U.S. 116 (1958), *reversing* 248 F.2d 600, 561 (D.C. Cir. 1957).
6 357 U.S. 144, *reversing* 254 F.2d 71 (D.C. Cir. 1958).
7 22 C.F.R. § 51.135 (1952).
8 Text, at 42.
9 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

BOOKS RECEIVED

ADMIRALTY

THE UNITED STATES AND THE TREATY LAW OF THE SEA. By Henry Reiff.

Minneapolis: University of Minnesota Press, 1959. Pp. 375. $8.00. A systematic and analytical account of America's international relations of the sea, with particular emphasis on atomic and oil pollution of the sea, sea traffic and communications, and the report of the United Nations International Law Commission.

CRIMINAL LAW

EQUAL JUSTICE FOR THE ACCUSED. The Association of the Bar of the City of New York and the National Legal Aid and Defender Association.

New York: Doubleday & Co., Inc., 1959. Pp. 144. $3.50. A comprehensive analysis of the appointment and compensation of counsel for indigent defendants, with recommendations based upon extensive empirical data.

CRIMINAL PROCEDURE

THE CRIMINAL PROSECUTION IN ENGLAND. By Patrick Devlin.

New Haven: Yale University Press, 1958. Pp. 141. $3.50. A justice of the High Court of England examines the pre-trial process of the United Kingdom for an American audience at the 1958 Yale Sherril lectures.

FROM ARREST TO RELEASE. By Marshall Houts.

Springfield: Charles C. Thomas, 1958. Pp. xii, 169. $5.75. A comprehensive study of criminal procedure and a plea for remedial changes to attain the fullest potential of the common law in this area.

INTERNATIONAL LAW

ESSAYS ON FRENCH LAW. Washington Foreign Law Society, 1958.

Washington Law Society: Pp. vii, 96. An authoritative exposition of the French legal system by recognized authorities in the area.

LEASES

SALE-LEASEBACKS AND LEASING IN REAL ESTATE AND EQUIPMENT TRANSACTIONS. By Harvey Greenfield and Frank K. Griesinger.

New York: McGraw-Hill Book Co., Inc., 1958. Pp. 102. One in the excellent series of Consultant Reports on Current Business Problems enumerating the pros and cons of current leasing methods for the purpose of forming executive judgment.

PATENTS

PATENT OFFICE PRACTICE. By A. R. McCrady.

Pasadena: Margit Publications, 1959. Pp. 471. The procedural law relating to the processing of patent applications. Particular emphasis placed on the case law under the patent Act of 1952.

PENOLOGY

THE PRISON COMMUNITY. By Donald Clemmer.

New York: Rinehart & Co., Inc., 1958. Pp. xvii, 320. $3.00. A sophisticated statistical study of the prison as a social microcosm under the influence of modern legislation.