BOOK REVIEWS

Law and the Social Order, Essays in Legal Philosophy. By Morris R. Cohen. New York: Harcourt, Brace & Company, 1933. Pp. 403. $3.75.

This volume consists not only of "Essays in Legal Philosophy" but of essays toward a philosophy of law. Based on a long and critical study of the recent developments in legal theory and on a thorough knowledge of logic and ethics, Professor Cohen's attempt to formulate the guiding principles of legal order promises to be a work of major significance for American jurisprudence. It is not the work of a lawyer, nor of a judge, and is free from preoccupation with those technical and methodological considerations that, though of professional utility for the makers and wielders of the law, are intellectually subordinate to the philosophical principles and moral ideals embedded in society. Professor Cohen can speak as a philosopher and a layman who has not lost sight of the morally fundamental problems of law and the social order in spite of his familiarity with the professional work of Justice Holmes, Professor Pound and a score of other pioneers of American jurisprudence. His aim is to formulate a reasonable man's attitude toward law. The attempt to be reasonable about law at once provokes the scorn of two kinds of experts in the business of law. On the one hand are the legal positivists, who appeal to hard-boiled lawyers and whose whole interest is in the so-called "science" of law. They will have nothing to do with *a priori* principles, with jurisprudence, with morality, with natural rights, with rules of interpretation, or with anything but the formulation of those concepts which emerge from the actual operation of law in the courts. To them the study of law is a strictly descriptive, if not behavioristic, science. On the other hand are those defenders of the ancient faith in pure logic, who hold what Professor Cohen calls the phonograph theory of the administration of law. They believe the law is *given* completely by the legislator and that the lawyer and judge need only logic to "declare" its meaning in any particular case. To avoid both these extremes, to attempt to be reasonable without being a mere scientist or a mere logician, is a delicate and difficult task to which neither the dicta of philosophical absolutism nor the limitations of disinterested observation are appropriate. And one suspects that Professor Cohen, being a philosopher, would not enjoy the patient and discerning work of such detailed criticism did it not illustrate to his mind the basic metaphysical principle of polarity. All reasonableness involves continuous, delicate adjustments between the poles of pure reason and hard fact, the ideal and the actual, the possible and the achieved, will and rule, freedom and determination, change and order. Law is reasonable, according to Professor Cohen, when it acknowledges frankly its normative function. It is neither merely a body of *social* rules embodying public opinion, nor merely a body of *jural* rules embodying judicial decisions. It is both; and to discriminate between them and mark their correlation is, as Professor Cohen puts it, "the beginning of logical sanity" (p. 354). "All the controversies between those who hold the imperative theory and those who hold the declarative theory of the law may be traced to an overemphasis of what we have called the regulative and motive forces. When we come to consider the law as a regulative force and the factors

that make it what it is, realistic jurists rely on political or economic power—the idealists on reason and justice. Now it ought to be clear that these factors cannot be mutually exclusive, since they move on different levels. Moreover, in the absence of a quantitative social science enabling us to measure in some definite way the relative weights of different factors, it seems as futile to discuss which is more potent, economics or ethics, as it would have been to discuss the question which is more powerful, heat or electricity, before the discovery of the correlation of energies" (pp. 251–5). In this spirit of reasonableness Professor Cohen undertakes a critique of the various current theories in order to discover what positive value each contributes to a comprehensive philosophy of law.

No systematic exposition of such a philosophy is attempted in these scattered essays and reviews. The author states that he has "not yet abandoned the hope of completing a systematic exposition" and every reader of this volume will certainly welcome the realization of this hope when it appears. In the meantime the reader must seek to extract from the present volume the dominant themes and concepts that presumably will compose the skeleton of the systematic philosophy. Without attempting here to review the many particular legal ideas and problems discussed by the author, the reviewer can at least indicate the general emphases which make this critique of the law genuinely philosophical. First of all, Professor Cohen reveals a persistent interest in the *principles* of law, not as starting points of legal theory, for he cares as little for dogmatism and absolutism as do the legal "scientists" to whom all principles are anathema, but as aims or goals of inquiry. To understand the law is to discover scientifically its guiding principles. But just what he means by legal principles is not always clear. He seems to have at least three kinds of principles in mind: principles of method, or rules of procedure whereby the meanings of laws may be determined with reasonable precision, order and predictability; principles of morals, or social purposes and goods which law aims to achieve; and legal principles in a narrow sense, foundations of social order, or universals of reason in the realm of government. Professor Cohen evidently believes in all three kinds of principles, which we might characterize roughly as logical, teleological and rational principles. But how they are to be discovered and how they are related are questions on which the author's future exposition might well throw more light. In the meantime we must be content with the statement that these principles are "practically or quasi *a priori*" (p. 174).

Secondly, Professor Cohen confesses allegiance to a theory of natural rights, not to the traditional theories, for they usually assume what remains to be proved, but at least to a belief that some rights must be discovered ultimately to be grounded in nature, because reason itself is so grounded. These rights are not embodied in the traditional bills of rights, for which the author finds little excuse. Apparently they are not derived from experience, neither are they wholly independent of it. Are they empirical absolutes? Or are they merely ultimates? Are they immutable, or are they the particular dictates of nature for particular occasions? That right, like reason, is found in nature and not imposed upon it by the mind of man, is naturally enough an article in a realist's creed. But how rights, in the plural, are actually to be discovered in nature, remains to be explained.

A third characteristic of Professor Cohen's philosophy of law is its humaneness. Law is put by him in its place within the social order. It is subjected to moral criticism without being identified with it. The legal order is not the moral order, but neither can

it be divorced from moral issues. This principle Professor Cohen has learned well from Roscoe Pound, and he applies it skilfully. To take only one illustration, the law of contract. Professor Cohen shows admirably how the moral status of contract has been altered by judicial interpretation. The right *to* contract became the right *of* contract, and this in turn became a form of property. The social and moral implications of such interpretation are only too evident, and their disastrous consequences are now patent. For this reason Professor Cohen pleads that contract should really be a part of *public* law, not private, and that it should be administered frankly as an important element of political policy. Similarly in the other reaches of the law, Professor Cohen is always alert to the demands of social justice and to the legalistic subterfuges by which lawyers evade moral issues. He does not even wish to be hard-boiled, and, not being a lawyer, is not compelled to be so.

Lastly, his philosophy shows a keen appreciation of jurisprudence in its most literal and personal sense. He admires wisdom in a judge. This is evident in his appreciation of Justice Holmes, for though he has a high respect for Holmes' contributions to legal philosophy, he sees his true eminence both as man and as judge in his mature wisdom or practical insight into the fundamental issues not only of law but of life in general.

These characteristics of Professor Cohen's philosophy of law make it evident that above all he is interested in placing law in its proper perspectives within the larger social order. The law is not isolated as a separate datum of an independent science; it is treated consistently as one instrument among others of human happiness (or misery, as the case may be), to be evaluated in terms of the principles implied by this absolute fact of social relativity. To complete the task set by this endeavor, Professor Cohen is faced with several large and basic issues, which are not adequately defined in the present volume and which may, for that matter, eternally haunt the social philosophy of law. It may be worth while to suggest several of these, in the hope that Professor Cohen will deal with them critically in a more systematic treatise. In the first place, the whole subject of legislation, apart from judicial legislation, is practically ignored. Such neglect may be as expedient as it is traditional for a technical science of the law, but it is impossible in a social philosophy of law. Professor Cohen's essays make it abundantly clear that a philosophy of the administration of the legal order cannot be be divorced from a philosophy of the aims and modes of legislation. A more detailed elaboration of this interdependence would be desirable for both practical and theoretical considerations. But even more fundamental is an inquiry into the nature of "the social order" in which law functions. It is often disconcerting to see how readily even a critical mind uses so question-begging a term in evaluating the law. For many of the legal issues debated are obviously insoluble until some agreement is reached about what kind of an order the social order is. Usually Professor Cohen speaks of society in a neo-Kantian vein: the "legal order," consisting of "a régime where every one has a definite sphere of rights and duties" must be continually revised in terms of the social order, whose members "spiritually identify their good with that of the larger life" (p. 54). Is "the larger life" an order, a spiritual or moral unity? Or is it merely, as Professor Cohen also suggests, a practical modicum of stability insuring continuity between past and future and thus insuring orderly conditions for individual lives? In other words, is society morally monistic or pluralistic? Is the *imperium* exercised by the state instrumental to the *dominium* exercised by the individual citizen, or *vice versa?* The answer to such questions is not clear in these essays, for at times the au-

thor's idea of the social order approaches the minimum of a legal order, and at other times it seems to imply an "order of common goods or aims," a "spiritually" unified whole. That such considerations are not foreign to legal problems might be illustrated by the limitations of Professor Cohen's critique of property. He begins with admirable precision to define the essence of property as "the right to exclude others" (p. 46) and argues that this confers on the owner a type of sovereign power over others. Property rights do not enable me to use my property as I please, for there have always been restrictions on its uses, but they guarantee my power to prevent others from using it. He has little difficulty, therefore, in rehearsing the now familiar arguments proving that "the ideal of absolute laissez faire has never in fact been completely operative" (p. 58). He fails, however, to undertake the more positive task of a philosophy of property, namely, that of distinguishing between "justifiable and unjustifiable cases of confiscation" (p. 63) or use of private property, and of studying the actual restrictions less for the purpose of disproving a false theory of property than for the purpose of discovering the principles of the legitimate uses of property. What light he throws on this problem comes incidentally from his examination of the various theories of property, in the course of which he suggests that "possession as such should be protected," that "labour has to be encouraged," and that real freedom (or rational obedience) must be promoted. How easy it would be for our capitalistic sovereigns to exploit such principles! A more detailed study of the actual practice of the courts in regulating property would probably supply better principles than can be inferred from the critique of false theories. All this is in the spirit of Professor Cohen's own theory of what the philosophy of law should undertake and serves to suggest the more positive problems and principles for which the present essays have cleared the way.

HERBERT W. SCHNEIDER*

The Law of the Press. By William G. Hale and Ivan Benson. St. Louis: West Publishing Co., 1933.

As stated in the preface to this work, the authors' purposes are to develop a book not only for use as the basis of a course in the law of the press in schools of journalism, but one which might serve as a manual for active journalists.

In form they have combined hornbook text with "principal illustrative cases," some of which are voluminous in extent (pp. 253–265; 265–282).

Since I am neither teacher nor practicer of journalism this review must be made rather from the standpoint of one who has had some occasion to give legal counsel to a large metropolitan newspaper and from that vantage ground to consider the legal needs of the newspaperman. So considered, the work under review is neither adequate textbook nor comprehensive casebook, and I seriously doubt if it can be of much practical service to a newspaperman in practicing all the affairs of the fourth estate.

However firm a believer one may be in the Langdellian case system for law schools, it is hard to believe that the smattering of law which a journalist needs can be better served to him by the case method than by text. Would that the entire work were written in half the number of pages or less and in the refreshing running style of the chapter on the freedom of the press.

My chief criticism of this book, however, is more fundamental than its form, and is

* Professor of Philosophy, Columbia University

a criticism that is imposed by the march of "progress" rather than by the omissions of the authors. The authors have, in my opinion, attempted the impossible. A modern newspaper, especially a large city daily, is not a profession—it is a business with as many ramifications as the most complex modern industry. The editorial, the news-gathering, and the news publishing departments are, after all, but departments, whose legal requirements and legal problems are but a fraction of the legal requirements of the paper as a whole.

The lawyer for such a newspaper is called upon at least twice as often to advise the advertising department whether this or that advertisement, particularly those of "prize contests," is that of a lottery, as he is to advise or defend a suit because of a libelous news story; yet there are 253 pages on libel, and 7 pages on advertising lotteries. To the one case on lotteries there could very well be added a reference to the comprehensive article on the subject by Charles Pickett, Contests and the Lottery Laws, 45 Harvard Law Review, 1196 (1932).

The business of distributing the newspaper through all the complexities of wholesalers, retailers, interstate commerce, airplane distribution to outlying areas, and controversies with competitors in such distribution creates many more problems for the publisher and his legal adviser than do contempts of court.

In the physical publishing of the paper there is involved a manufacturing business with all the problems of patents, contracts, labor disputes, group insurance on employees with which a hundred other manufacturers in a hundred separate fields daily are concerned.

The modern newspaper is a publicity seeker of the first rank and hence must be an accomplished showman and promoter. Boxing contests, cooking schools, flying meets, football games, balloon ascensions, and what not bring over the lawyer's desk an avalanche of interesting contracts and problems.

Nearly every large newspaper either runs a radio station itself or has some sort of radio connection or facility. The newspaperman and his legal adviser must know a good deal of radio law.

These examples at least indicate that to one who counsels a newspaper the task of putting into one book even the chief legal problems met in running a newspaper seems well nigh impossible, and that the authors have missed the mark when they devote nearly one half of their work to libel.

The chapter on libel is fairly complete and should be of value to one desiring a general view of the subject in the newspaper field. It is to be regretted that the book probably went to press too early to include reference to the recent interesting case of *Layne v. Tribune Co.*, 146 So. 234 (Supreme Court of Florida, February 3, 1933), holding that a newspaper publishing in good faith libelous matter furnished it by a national news service could not be held for libel in the absence of a showing of "either wantonness, recklessness or carelessness." Since the publication of the book the Circuit Court of Appeals for the Tenth Circuit has held the contrary. *Oklahoma Publishing Co. v. Givens*, 67 F. (2d) 62 (1933).

DAVID A. WATTS*

* Member of the Illinois Bar.

Accounting in Law Practice. By Willard J. Graham and Wilbur G. Katz. Chicago: Callahan and Co., 1932. Pp. 444. $6.00.

For a long time it has been apparent to those engaged in the practice of the law that an understanding of the fundamentals of the customary method of recording financial transactions and of the analysis of such records is essential to the practicing lawyer. This one volume work is a distinct addition to the lawyer's working library. It is even more valuable to the law student bent on entering the (now generally considered) lucrative practice of corporation law. I am bold enough to say that many accountants would profit from a study of the first few chapters of the book. The style is simple and intelligible and the index is excellent. It may be read as a whole for a comprehensive but simple statement of accounting or consulted for information on a specific question.

The work commences with a short but cogent statement of the functions of bookkeeping and accounting, followed by a discussion of the balance sheet and profit and loss statement. The theory of the double entry system of bookkeeping is then explained. By this arrangement the reader is made familiar with the results to be accomplished by the use of the mechanics of bookkeeping before his attention is engaged by the mechanics themselves. The methods used in recording specific financial transactions, the preparation of balance sheets and profit and loss statements, and a general but competent discussion of Federal income tax is followed by a very illuminating chapter on analysis of balance sheets and profit and loss statements. Holding company accounting and the preparation of consolidated balance sheets and profit and loss statements are treated at some length. Two chapters are devoted to fiduciaries, including executors, administrators, trusts and receivers. There is also a chapter on law office accounting which is a reprint (with permission of course) of an article by John L. Harvey.

The text is quite profusely illustrated by the entries, statements, accounts and procedure under discussion so that practical application may be visualized. In addition at the end of many of the chapters problems are presented for solution by the student and solution given.

References to opinions of reviewing courts are necessarily limited in number, but have the virtue of sustaining the text in support of which they are cited.

While the authors have very carefully explained that bookkeeping and accounting respectively concern themselves with the recording of financial transactions and checking and analyzing of the records, in several instances they have fallen into the very common error of considering the record as of more importance than the actual transaction. This is particularly apparent in the discussion of reserves for dividends and for special purposes and in connection with the division of cash items, segregated only by book entries. The setting up of a reserve for a specific purpose or the division on the books of cash for short time and long time purposes does not as a matter of law effectively segregate the particular assets for the particular purpose. Something more than a bookkeeping entry is necessary to accomplish the desired result.

The explanation of the debit and credit mechanics is worthy of special mention. There may be more than one theory on which the debit and credit system can be explained. The one advanced is entirely understandable once the authors' definitions of 'debit' as the left side and 'credit' as the right side are accepted.

The recognition of the differences in law between receivers appointed in different classes of cases would have added to the value of the book. The powers and duties of

receivers appointed in foreclosure cases and of those appointed in general equity suits and bankruptcy differ considerably, and the methods of recording transactions by such receivers should differ with the legal situation. Depreciation, for instance, properly should be recorded on the books of a receiver in a general equity suit, whereas in a foreclosure it should not. In this connection I differ with the authors on their statement that the usual practice in receiverships is to disregard the corporate books.

It is probably a carping attitude to refer to the few instances of alleged errors, and the reviewer mentions them very humbly in the hope that he is right, giving full credit to the authors for the knowledge that enabled him to recognize the errors if they be such.

From the point of view of the practicing attorney a discussion of the admissibility, as evidence, of audits, accountants' compilations and summaries, the competency of accountants' appraisals of accounts receivable and similar assets would have been helpful. At least one reviewer has complained of the authors' failure to discuss substantive rights and legal consequences of acts which it is the bookkeeper's duty to record and the accountant's duty to analyze. I think one of the outstanding merits of the book is the consistency with which the authors refrain from embarking on any discussion of the material with which accountants work but which is not a matter of accounting.

DAVID LEVINSON*

* Member of the Illinois Bar.