

## BOOK REVIEWS

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*Legal Realism and Justice.* By Edwin N. Garland. New York: Columbia University Press, 1941. Pp. xii, 161. \$2.00.

*The Theory of Legal Science.* By Huntington Cairns. Chapel Hill: University of North Carolina Press, 1941. Pp. x, 254. \$2.50.

*Studies in Legal Terminology.* By Erwin Hexner. Chapel Hill: University of North Carolina Press, 1941. Pp. vi, 150. \$1.50.

These three brief volumes by Edwin N. Garland, Huntington Cairns, and Erwin Hexner are a reassuring demonstration of the vitality and breadth of contemporary legal scholarship. Each treats of legal problems in a context that proclaims vivid awareness of the social significance, the scientific presuppositions, and the philosophical implications of legal concepts and legal inquiries. One cannot imagine any of these volumes written a generation ago. Their appearance now suggests that the long struggle to demonstrate that law is not a self-sufficient system of autonomous principles, concepts, and deductions, unrelated to the soil of social facts or to the atmosphere of ethical values, is over. That battle has been won. Not one of these writers feels called upon to argue the relevance of ethics, logic, economics, sociology, or scientific method to legal problems, and each of them draws freely upon these allied disciplines in making a contribution to legal understanding.

The volumes by Huntington Cairns and Edwin Garland make full use of the techniques of realistic jurisprudence, which turns out in these works to be very much alive despite the tears that have been shed, in the last two or three years, by such premature pallbearers as Professors Kennedy, Nussbaum, and Fuller. The third volume, that of Erwin Hexner, is less closely related to the currents of American legal scholarship but represents perhaps the beginning of a new current.

From the fact that most of Professor Hexner's footnote references to works published before 1933 are to German sources, that between 1933 and 1935 his chief source materials are English publications, and that the American legal and political writing dealt with consists primarily of material published since 1936, I surmise that Erwin Hexner is one of the small band of believers in democracy who have fled from Nazi degeneracy and who are now seeking to inoculate our political and legal thinking against the virus that destroyed free legal and political thinking in Europe. Much of this effort, of course, does not make sense to the jurist whose vision has been limited to the American scene. American jurisprudence has been faithful to American public opinion and to the tough tradition of the common law, in focusing its vision upon what courts do. Continental legal thinking has focused on a number of other problems which have only tenuous roots in American soil. The transition of intellectual climates may result in some spoilage of cargo. At the same time our own legal thought is bound to be enriched by the closer contact between legal and political studies which characterizes modern European juristic thought.

Mr. Hexner's work is a series of studies of such basic legal concepts as *legal rules*, *legal systems*, *administrative law*, and *legal security*. The author is largely concerned with problems which, to an operational or functional jurisprudence, will be meaningless or ambiguous: such problems, for instance, as the difference between heteronomous and autonomous rules, the legality of different kinds of state, the limits of codification and of systematization, and the possibility of unformulated law. Answers to these problems are called for, not in terms of empirical description of official or unofficial conduct, nor in terms of open ethical evaluation, but in terms of what "may" or "may not" be done. There must be some scheme of logic, etiquette, grammar, or ethics to which these concepts of "may" and "may not" relate, but where that scheme exists is not made clear. Despite this lack of clarity in fundamentals, the volume makes an important contribution in its application to legal problems of the categories of probability, degree, and connectedness derived from Reichenbach and Whitehead. Extensive footnote references to relevant philosophical and juristic writings lend a special value to this work.

Huntington Cairns' volume, *The Theory of Legal Science*, is a persuasive plea for the scientific study of problems of social order and disorder. Jurists may object to the claim that such a study would amount to legal science—and indeed the author's definition of jurisprudence or legal science as "the study of human behavior as a function of disorder,"<sup>1</sup> would cover such extra-judicial affairs as the rules and practices of warfare, ping-pong, and etiquette. It would be futile, however, to argue about the correctness of the author's definition, particularly since he pays very little attention to this definition himself. The focus of his study is law rather than other remedies for, or causes of, human disorder. What is important about Mr. Cairns' approach is its insistence upon the legal importance of problems that are broader than law, the problems, for instance, of how techniques of social control are invented and how they are distributed and inherited, of the relationship of fact to value, and of the nature of scientific propositions and scientific inquiries in fields social.

The central problem that Mr. Cairns faces is: "What are the starting points and the directions with which we may hope to develop the scientific study of law as a social technique for dealing with disorder?" Essentially the starting points and directions which Mr. Cairns accepts are those developed by Holmes, Oliphant, Cook, Llewellyn, and other American realists, notably the recognition of a distinction between the law that is and the law that ought to be, the focusing of legal analysis on decisions of courts rather than on legal texts or legal systems, the insistence on verifiability as a test of meaningfulness, the recognition that classification is relative to purpose, and the logical perception that particular decisions do not strictly determine, or logically flow from, general principles. Mr. Cairns takes the realists over the coals for putting technology above pure science and for subordinating the disinterested search for truth to the mundane objectives of law reform, but even on this point he writes like a good realist: It is obvious that the law itself must be modified to meet the forces of the new society. What are the principles which should guide us in that task of modification? . . . A social science jurisprudence aims at revealing to us the consequences of the various courses of action open to us. It aims to tell us in advance the perils which attend our various programs; to tell us which is the rational and which the irrational course.<sup>2</sup>

<sup>1</sup> Pp. 1, 9, 12.

<sup>2</sup> Pp. 9-10.

I suspect that what Mr. Cairns really objects to in the realistic jurisprudence that he criticizes is the uneconomic narrowness with which some realists have focused upon certain current legal issues that will probably be quite unimportant a century hence. Mr. Cairns' appeal is really for a long-range study of civilized disorder, its cause and its cure. Surely that need was never greater than it is today.

Mr. Cairns leaves his readers with a network of problems unsolved but clarified and with a series of current terms, such as *social order*, *causation*, *force*, *equilibrium*, and *social heredity*, undefined but clarified by a sensitive and tolerant critique that emerges from an amazing range of familiarity with social, historical, and philosophical studies. The volume is the work of a civilized man (in the Holmesian sense) and no lawyer can follow Mr. Cairns as he wanders through the corridors of anthropology, psychology, epistemology, metaphysics, and history without losing something of a lawyer's provincialism on the way.

For the philosopher and for the jurist, Edwin Garlan's volume is far and away the best introduction that has been written to contemporary American legal thought. It is also a definitive answer to those who argue that realists who distinguish between what judges do and what they ought to do cannot be interested in justice.

It is a fact, as Mr. Garlan notes, that some realists have insisted that only the question of what courts actually do is significant and a fit subject of scientific study, thereby excluding from legal science the normative problem of what they ought to do. Other realists, however, like Holmes himself, have insisted that both problems are significant and deserving of study, while insisting that different considerations are pertinent to the two inquiries. Garlan's volume is primarily an analysis of this agreement and this difference among legal realists. In the course of the analysis, he subjects to a functional or operational examination the ideal of justice in its bearing upon the inquiries of realistic jurisprudence. Garlan recognizes that in dealing with "justice," as with "first principles" in any science, we are dealing with the direction or organization of inquiry. Specifically, the author finds that the ideal of justice operates as a loosening factor that prevents the hardening of legal systems and permits the constant introduction into the legal process of extra-legal considerations. Again, it operates as a reminder of the broader social interests that appear in every legal case, albeit often more dimly than the immediate and obvious demands of the litigants themselves. Temporally, "a generic formula of justice is used to bridge the change from the established to the new."<sup>3</sup> Finally, the ideal of justice operates more broadly than conventional rules for umpires, and is yet something less than the ideal of the *summum bonum*. The various attempts that have been made to define justice in terms of such relatively specific concepts as *impartiality*, *equality*, and *peace*, are critically appraised with philosophic vision and with a persuasive grasp of the workings of the judicial process. Garlan gives the legal realists the benefit of the doubt when he suspects them of original thoughts, and his charting of realistic literature is the best extant, but some of the most penetrating insights set forth in the volume are the author's own.

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<sup>3</sup> P. 72.

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