

BOOK REVIEWS

The Philosophy of Law in Historical Perspective. By Carl Joachim Friedrich. Chicago: University of Chicago Press, 1958. Pp. x, 253. \$4.75.

Professor Friedrich's new work is an ambitious attempt to survey the evolution of Western philosophy of law from ancient Judaism through the mid-twentieth century and to formulate, against this historical background, his own comprehensive philosophy of law. In achieving the first of these goals, the book proves to be singularly successful despite the monumentality of the task and the comparative brevity of its treatment. No significant purpose would be served by a detailed review of this synoptic historical presentation which occupies approximately four-fifths of the book. Suffice it to say that with a few reservations concerning the treatment of recent developments, this reviewer found the author's presentation to be accurate and complete in its descriptive aspect and lucid in its critical aspect. Such praise must be qualified, however, with respect to the concluding two chapters of the historical presentation which discuss, respectively, the positions of the modern skeptics (relativists, formalists, realists) and what Friedrich describes as the current revival of natural law notions. The exposition of modern skepticism is devoted largely to a refutation based upon the author's philosophical position (thinly disguised, in some cases, by utilizing the adverse commentary of others), whereas the discussion of modern natural law notions is thoroughly interlarded with and to some extent distorted by the author's ideas, which he ascribes to the natural law tradition. Despite these deficiencies, the historical section could prove extremely useful as a correlating or "background" text for a fundamental course in legal philosophy.

The controversial, if not unique, contribution of the book is to be found in its concluding chapters where the author's views are expressly propounded. Starting from the premise that every ". . . philosophy of law is part of a particular general philosophy . . ." (p. 3), Professor Friedrich opens his book with a very terse sketch of the general philosophical framework within which he intends not only to construct his own philosophy of law but also to determine the validity of other philosophies. This general philosophical position is derived from an essentially Kantian epistemology. Scientific knowledge may be derived only from human experience. Such experience is not, however, confined to sense perceptions, as the empiricists erroneously contended; it also embraces thinking, willing, feeling and creating, all of which play significant roles in the formulation of laws. It is impossible to organize all experience into a philosophically or logically coherent unity; all attempts to do so have ultimately resulted in the rejection of basic postulates derived from one or more realms of experience.

For example, the human mind cannot consider the data of sense impressions except within the framework of the law of causation which, however hypothetical such law may be when measured against a standard of reality, is part of the very mechanism by which we experience sense data. On the other hand, the experience of willing presupposes freedom of choice, which, however hypothetical it too may be, is an integral part of experiencing the act of willing. Causation and freedom, fundamental principles derived from two realms of experience, are logically contradictory. Any attempt to subsume them within a unitary philosophical framework ultimately results in a denial of one or the other—determinism results from rejecting freedom and voluntarism, from rejecting causation. Professor Friedrich categorizes all existing monistic philosophical systems as either deterministic or voluntaristic. An alternative is a dualistic system, such as that of Kant, hypostatizing separate cognitive worlds in which the contradictions do not occur. Other difficulties arise if one attempts to correlate or equate the other human experiences—an observation which leads the author to espouse an essentially pluralistic philosophical system which he describes as a “radical philosophy of experience.” Such a philosophy “stresses problems” (i.e., obstacles) which inhere in the diverse kinds of experience. No comprehensive philosophy with respect to a particular object of knowledge, such as law, is possible without a complete grasp of the problems of all human experience. Only by taking all experiences into account can we arrive at an idea of law which is general in form and nevertheless corresponds to reality.

Turning from this general philosophical position to the author’s particular philosophy of law, one is told that the central problem of law is its relation to justice. Justice is a “state to which the law is oriented as an approximation” (p. 191) or, to paraphrase the poet, law never is, but always seeks to be just. Thus, justice is an objective reality independent of those who conceive it and of the positive laws which should be intended to achieve it.

The function of justice as a standard for evaluating positive law is also a central theme in the descriptive or historical portion of the book. Indeed, Friedrich rather neatly classifies most antecedent legal philosophy as either positivistic (a view which he believes leads ineluctably to rejection of norms and the totalitarian conclusion that might is right) or based upon natural law notions (into which category he groups all conceptions of law as having a normative content not derived from observable phenomena). Friedrich’s view of positivism, of course, can be identified with the philosophical determinism of his earlier dichotomy among monistic philosophical systems. To Friedrich the salient error of positivism, as well as of determinism, is the equation of moral experience with sense experience and the consequent attempt to formulate a science of morality along the pattern of natural science free of value judgments or, as Friedrich might put it, divorced from “historical, sociological, and political realities . . .” (pp. 174–75).

What then is this objectively real justice toward which law should be

oriented? This is an essentially political problem, says Friedrich, focused primarily upon the relationship between justice and equality and resolving itself down into the fundamental issue of Aristotle's distributive justice: Who is equal to whom? Rejecting again the positivist position that the question of equality is inscrutable from a philosophical standpoint, Friedrich insists that much can be said with a high degree of probability regarding equality, e.g., that inequalities based upon birth or wealth are unjust because based upon biological or economic misconceptions. Seizing upon the premise that men ought to be equal before the law, he deduces that the critical problem in this matter of equality is who makes the laws. His answer seems to be that fundamental law-making should be done by all members of the legal community because this is an essential attribute of their basic equality. Such highly circular demonstration is fortified by the author's example of Western political development, as having evolved an almost universally accepted solution to this problem in the form of the political organization described as constitutional democracy.

But resolution of the central problem of distributive justice is not answered simply by providing the policy-making machinery. Those who make the decisions must themselves have certain characteristics in common, lest the process of distributive justice become nothing more than, to use Friedrich's metaphor, "finding the diagonal in a parallelogram of forces in the political arena which would decide what is equal and what unequal," which would amount to no more than a "naked positivism" (p. 194). It is common men—"community-conscious citizens"—who cause a democratic community to prescribe laws which are more than a mere amalgam of interests. The common man, as Friedrich sees him, is neither "the average man" nor "the mass man" (the latter is characterized as being devoid of communal values); nor is he a member of an elite. Instead, each of us is a common man insofar as we participate in decisions about matters of common concern. Friedrich's doctrine of the common man must not, however, be confused with the purely rational conception of justice inherent in the views of the English utilitarians and in Kant's idea of a community based upon the categorical imperative. Modern social science has established incontrovertibly that man's social relations are largely determined by his interests and passions. Friedrich accepts this and formulates his idea of justice in terms of the achievement of common values.

Many human values are, of course, not a proper subject of legislation. Government must be confined to "questions of external order which are common to all citizens" (pp. 195-96), as distinguished from the private sphere which encompasses religion, art, etc. In addition to providing a democratic policy-making framework based on separation of powers, the democratic constitution prescribes "basic rights" which delimit a private sphere into which governmental authorities may not ordinarily intrude.

In the communal sphere decisions of common men are more likely to be right than those of an elite which is not responsible to the community. Indeed, if

human nature did not exhibit "certain traits essential for communal life" (p. 197), constitutional democracy would not be workable. Without further elaboration, Friedrich asserts that history, sociology and psychology reveal considerable regularity in human behavior in the very sphere of external legislation where government may properly act. It is this notion of the common *in* man which causes Friedrich to label the doctrine of the common man as a natural law notion. The common man can be effectively activated and the common *in* man thereby realized only if common men are given an opportunity to participate in the creation of law. Such is Friedrich's second circular demonstration that the democratic form is the only method for arriving at just laws.

Friedrich's conception of justice, then, has a changing substantive content. Although it is an external standard, existing apart from the wills of particular individuals or even the arbitrary preferences of the community, it continually evolves out of changes in the common values of the body politic. If this view is to be more than a modified positivism, however, it obviously must require something more for a law to be just than that it relate to the proper sphere of government and receive the approval of common men acting within the framework of a constitutional democracy. Having expressly rejected possible solutions to this problem suggested by Rousseau's "general will" and Kant's "categorical imperative," Friedrich espouses, instead, a requirement of authority. To be just, a law must have (or communicate) authority, which, too simply stated, means that it must be reasonable. By this Friedrich does not mean that a law must have or partake of absolute validity, i.e., a relationship to reality, which, of course, Friedrich does not believe to be cognizable. Rather, the reasonableness of a law is determined by its susceptibility to reasoned elaboration within the metarational framework of the system of ideas, values and beliefs (the "transpersonal norms") accepted by the community. The naked exercise of law-making power, therefore, must be reinforceable by reason," as such reason expresses itself in the judgment of the old, the learned, and the wise" (p. 204).

This reader has been unable to discern Friedrich's answer to the obvious problems which flow from his doctrine of authority. For example, how do we identify the "old, the learned, and the wise" persons who test the laws by their capacity for reasoned elaboration? Who selects these arbiters? One suspects that Friedrich has no better answer than the skeptics whom he censured for turning to common sense in his chapter on modern skepticism which is entitled, innocuously enough, "The Decline of Legal Philosophy." He there states (p. 165):

These variations of common sense, like formalism itself, hide rather than solve the philosophical problem because the question is precisely where the standards for evaluation of the common men whose common sense is being acclaimed come from?

What, indeed, is the source of standards for evaluating the work of the reasonable elaborators of Friedrich's "just" laws? If the answer is that the com-

munity's system of values provides such standards, then who, other than the reasonable elaborators, may apply such standards? If it is the people who are the ultimate judges, then, in the crucial cases where community values are in doubt, we are left with the will of the mob. If, on the other hand, there are no "judges of the judges," how shall we escape the tyranny of the elite?

How then is justice to be determined when value systems are in doubt and when controversy rages among powerful elements within a legal community? The serious political and philosophical problems posed by such a situation, problems inherent in a conception of justice as changing with changes in value systems, are directly confronted by Friedrich in Chapter XXII, entitled "Law and Order." Again, however, the problem is only further delineated, not answered in any definitive sense. In such times of stress the proponents of one value system commonly assert that other value systems are unjust and therefore threaten attainment of a just order. The values of justice and order, toward which all laws must be oriented, become identified; and anyone challenging the existing legal order is guilty of injustice or lawlessness in the eyes of proponents of the existing order. Although at various points in his analysis Friedrich appears to assume that justice and order are distinct values, he concludes that society can realize them only concurrently and that it is erroneous to give one a priority over the other—especially to make order the principal goal, an error which he attributes to positivism. But a social, as distinguished from an individual, conception of justice which is not inextricably bound up with the value of order is an obviously useless abstraction which the author apparently recognizes in rejecting the philosophical radicalism of Godwin and Thoreau.

Friedrich's discussion of this point might have been considerably clarified if he had articulated the implications of his position. He seems to be saying that justice is founded upon the underlying value complex of a community of which order must be a part. During times of particularly rapid evolution of values it often happens that one or more values are considered paramount by proponents who are willing to overthrow the existing order rather than tolerate a denial of their favorite value; any such emphasis, however, on a single value or group of values is inevitably totalitarian and hence, fundamentally unjust.

At bottom, Friedrich concludes, breaches of law "in the fully developed legal community" (p. 212) arise out of rejection by the violators of the value judgment implicit in the violated law. To a greater or lesser extent such violations reflect a breakdown in the law's authority, either because the law itself is not susceptible of reasoned elaboration within the accepted value system of the community or because the violator is unable or refuses to accept such reasoning or the underlying value judgments. In such a view of breach of law, the just function of punishment is to control and perhaps dissuade those who would not otherwise accept the value judgment underlying the law. There are manifold aspects of this function, all of which have received historical recognition in the form of one or another theories as to the purpose of penalties, e.g., consent,

retribution or retaliation, deterrence, rehabilitation, and coercion. Friedrich contends that a composite of these notions constitutes a more valid explanation of the function of punishment which may operate in different ways upon different individuals, even in the same fact situation. He does, however, express considerable reservations concerning the direct coercive power of penalties, as distinguished from deterrence, and concludes that the extreme penalty of death is unjustified in a modern democratic society.

It follows from Friedrich's dialectic view of justice that positive laws often are or become unjust and, consequently, that punishment for violation of such laws may be unjust also. Situations of this type ordinarily arise in a democratically organized community when the value judgment upon which a positive law has been based ceases to be accepted by the community at large. Friedrich recognizes this recurrent phenomena and offers the usual well-worn examples—prohibition, fornication, adultery, election laws, pre-Civil War abolition—all of which illustrate laws nullified by popular "honoring in the breach" prior to their formal repeal. Implicit in Friedrich's approach is the conclusion that this process of popular rejection is a natural and defensible part of the law-making process in a democratic society. Yet the occurrence of these popular revolutions, bloodless or otherwise, casts serious doubt upon the validity of Friedrich's doctrine of authority. Many of the laws so repealed are amenable to some sort of reasoned elaboration within the value system of the existing community, whereas the common disobedience to such laws in many instances has only a negative relationship to the community's system of ideas, values, and beliefs and certainly would not be amenable to reasoned elaboration. Yet such irrational disobedience effectively nullifies positive laws long before they disappear from the statute books. The existence of such situations suggests that the authority of law has considerably less to do with its susceptibility for reasoned elaboration and bears a considerably more direct relationship to the irrational motives of members of the community than seems to be admissible under Friedrich's doctrine of authority. It must be borne in mind that this doctrine of authority is the keystone in the structure of Friedrich's non-positivistic philosophy of law. To remove it would crumble the edifice into a morass of concepts indistinguishable from the views of many modern realists whom he so thoroughly criticizes.

Perhaps the most critical deficiency in Friedrich's personal philosophy of law, however, is the absence of any definitive principle to aid in answering the problem of when a breach of positive law is justified. Some such breach may be justified within the framework of Friedrich's philosophy. There are, however, breaches of law in the name of justice which attack the fundamental constitutional organization of the community, i.e., basic individual rights and the separation of powers. Although Friedrich never quite expresses the idea, it seems evident from his emphasis on the constitutional form and his comments upon the dangers to this form resulting from the spectacle of international

anarchy that he considers democratic constitutional order a paramount and virtually inviolable value. Moreover, one might fairly surmise that Friedrich feels there is a right of revolution—a right to challenge the existing order as unjust—except in a constitutional democracy. Friedrich's obvious retort would be that revolution is unnecessary in a constitutional democracy because the unique achievement of Western constitutionalism is to legalize the struggle over what is just—to divert controversies over values into legal channels which make revolution less necessary.

In view of the foregoing, it is not surprising that the two concluding chapters of the book are devoted to constitutional law, first in its national and then in its international aspect. To Friedrich the constitution is a means by which the essential pluralism of social values is preserved by assuring participation of the people in law-creating processes. Without the limitations which a democratic constitution prescribes, totalitarianism would necessarily result. The identity of the people, i.e., their plural value system, would then be sacrificed to particular social, economic or political values. Science, we are told by Friedrich, teaches us that no people is willing to make the sacrifice of subordinating conflicting personal values to the ascendant values of the totalitarian ideology. Thus the essential prerequisite of a just legal system is the formal participation of all the people in the process of law-making. To Friedrich, "law is seen as propelled by its own inner dialectic, as becoming more nearly true law the more nearly it is a creation of the citizen-members of the legal community . . ." (p. 223).

So strong is this notion that Friedrich accepts the proposition that a just international law cannot exist without a world constitution and world citizenship. Genuine international law could, however, conceivably antedate a world constitutional order if a large majority of the peoples participating in the creation of such world law were themselves members of constitutionally organized legal communities. A just international law among totalitarian states or among states most of which are organized upon a totalitarian basis is not possible. The somber implications of this conclusion for current international affairs is inescapable. It is perhaps offset by the author's sanguine view of the potentialities of the European Coal and Steel Community as the beginning of a European political community organized on a constitutional basis.

It would not be practicable to attempt a comprehensive critique of Friedrich's personal philosophy of law within the confines of an ordinary book review. Suffice it to suggest a few of the difficulties which this philosophy raises and some questions concerning the fundamental philosophical premises upon which it is based. Most of the unsolved practical problems of Friedrich's philosophy center about the content of the constitution in his best of all forms of government. What, for example, are the basic individual and subgroup rights which are to be preserved relatively inviolate from community encroachments. Are they immutable and eternal or do they too evolve with the value system of

the community? Friedrich's position that community values must be determined by the members of the community and that the most accurate method of doing so, the democratic process augmented by authority, is confined to the communal sphere. He does not suggest that these ideas or democratic process should operate in the sphere of basic rights (the areas of religion, art, etc.). Yet one of the most significant political acts is the formulation of the constitution itself, at which point the community value system must perform the function of delineating the communal sphere of government. What is to prevent the community from constricting the private sphere into nothingness? At best Friedrich's answer is an unsupported generalization—palpably contradicted by history—that the nature of human psychology forbids so thoroughgoing an intrusion into an individual's privacy, and that a free society would not permit such an invasion of individual rights. But this is the acme of circular political reasoning; it demonstrates that a totalitarian system contravenes human nature because the members of a free society do not desire totalitarianism—a premise which follows from the definition of a free society as one in which the value system rejects totalitarianism. To establish the validity of his conclusion with any high degree of logical cogency, Friedrich must prove that a majority of the individual members of any totalitarian community desire freedom for themselves and others. His proof on this point really amounts to no more than a bald assertion that "the findings of history, psychology, sociology, and political science enable us to demonstrate the propositions with a high degree of probability" (p. 220).

It is submitted that there are no such findings worthy of being described as scientific. History and psychoanalysts' notebooks contain a plethora of evidence that human beings generally are quite willing to sacrifice their self-identity (their pluralistic being) and the freedom of others to religious, socio-economic and other unitary ideals. Political and social existence within a free society, whether in classic Athens or modern America, has been and is a constant struggle among the few who wish to remain autonomous and the multitude who would adjust everyone to the "norm." This problem is one of the most critical in modern law creation and enforcement, and a philosophy of law which merely describes the problem without suggesting the outlines of a solution has little of practical value to commend it.

Some may urge that it is inappropriate to test a philosophy by practical standards, but in philosophy of law the realms of the speculative and the practical necessarily coincide to a large extent. Indeed, at numerous points throughout his book, the author himself applies a standard of practicality to the ideas of others and often uses it as an excuse for the absence of less rigorous or scientific demonstration of his own postulates.

A fair appraisal of Professor Friedrich's position on purely philosophical grounds must be left to more competent and experienced hands. Perhaps, however, the reviewer may suggest that there are some defects in the fundamental

philosophical position from which the author's philosophy of law is derived. Like all thinking rooted in the Kantian tradition, Friedrich's philosophy of experience stems from a strong reaction to the skeptical critique of human reasoning and cognitive powers so persuasively propounded by David Hume. Rather than accept the skeptics' conception of the fundamentally hypothetical nature of all human knowledge and the fairly self-evident psychological propositions upon which this view is based, Kant and his followers have attempted to map out areas of human knowledge and cognition having varying degrees of certainty and validity. The result has often been a series of highly abstract propositions, largely concerning conceptual relationships, virtually devoid of substantive content and impregnated with the philosopher's personal prejudices. This has been especially true of those Kantians (including Kant himself) who have sharply distinguished the foundations of knowledge in the natural sciences from the bases of knowledge in the social sciences and the arts, a device which facilitates the interjection of subjective elements into the discussion of ethical and esthetic problems. Friedrich seems to have carried this development to an extreme, as demonstrated by the following remarkably candid passage from his discussion of authority:

For critical rationalism has taught us that all comprehensive systems of thought possess a metarational basis. It is not possible for finite human reason to grasp, let alone understand, the infinite reaches of the real world. But within the limits set by such a metarational framework of ideas, values, and beliefs, human reason can elaborate any utterance made . . . [p. 203].

Here is an almost express admission that the Kantian approach tends to convert philosophy from a search for truth into a quest for certainty. Ironically, their overwhelming desire to fling out an anchor in skepticism's sea of doubt has led Kant and his followers to create a philosophy which would deny to humanity all scientific knowledge of truth (i.e., reality). Fortunately, natural scientists have followed the skeptics, not Kant, and as a result have neither despaired of knowing reality nor accepted unreservedly the results of scientific endeavor. Our political or, more broadly, behavioral sciences have been less fortunate, perhaps because Kant held out a greater hope of certainty in this realm and attempted to spell out his political and moral conclusions in considerably greater detail. The result has been that psychology and sociology have, until relatively recent times, produced a great deal of uncorroborated opinion and comparatively little else.

If the store of human knowledge concerning the origins and patterns of human behavior are ever to be meaningfully increased, our behavioral scientists must learn to act more like scientists and less like priests. It is not enough merely to appear to approach the fundamental problems of law in a "scientific" manner as Friedrich describes his own project (p. 4), when this amounts to no more than analysis of the philosophizing and soul-searching of others who have

done little, if any, research into the basic data which the philosophy attempts to organize.

Without pursuing an analogy to absurdity, the current progress of the behavioral sciences may properly be compared to the achievements of biology in classic Greece where matters of fact were decided by logic and dialectic rather than by reference to reality insofar as it is or may be cognizable by human beings. Until such time as our behavioral scientists are able to provide us with more scientifically demonstrable and useful generalizations, the political organism must function without self-consciousness and, to a large extent, without adequate knowledge of how to administer to its ills. This absence of knowledge does not, however, deprive us of some practicable hypotheses as to a proper political organization. Indeed, for the time being, governmental organizations should be founded upon a recognition of how little we know concerning why and how human beings, as individual and groups, behave as they do. As in the case of surgery, until we have sounder bases upon which to operate, it would seem wisest not to operate at all—at least until it becomes obvious that the patient will not survive otherwise. Without knowledge as to how we may prescribe for mankind's ills, it is sounder, from a purely methodological standpoint, to permit individuals to prescribe for themselves to the maximum extent practicable.

Science, after all, is a method of abstracting general relationships from the infinite individual and unique things which comprise reality. It is useful when it permits us to predict with a fair degree of accuracy the results of recurrent or controllable fact situations and relationships. One may argue persuasively that such usefulness is not attainable in the behavioral sciences because the fact situations and relationships considered by that science either do not recur (i.e., the subject matter is too individualized and peculiar to admit of valid generalization) or are not controllable. A more cautious approach suggests simply that, if such generalizations are possible, they do not now exist. Either view may lead to the same conclusion, permanent in one case and tentative in the other, that, in the absence of scientific generalization concerning their relationships, individuals should be treated as individuals except to the extent that practical exigencies require otherwise.

To state the results less abstractly, constitutional democracy is the best form of government precisely because any other form of government presupposes knowledge which does not now exist. Power should be dispersed in the community and individuals be permitted maximum freedom in pursuing their goals, because we do not have sufficient knowledge of human behavior to prescribe any different political organization. Government should be confined to those matters which most directly and obviously concern the commonweal and then only with the approval of a majority of the governed, because in the absence of a scientific basis for a different course of action, individuals should be considered and treated as essentially different. In short, we shall make fewer mistakes with a negative philosophy of law, candidly recognizing the limits of

our knowledge, than by accepting a philosophy of law, such as Professor Friedrich's, derived from highly subjective sources and rejecting the possibility of a more objective knowledge along the lines of the natural sciences.

Professor Friedrich's book is essentially a reasoned elaboration of Western political development within the framework of the predominant modern philosophical view. It is challenging, persuasive and deserving of the most careful consideration by everyone concerned with preserving individual liberty and the democratic process in this time of their greatest trial.

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Market Power: Size and Shape under the Sherman Act. By G. E. Hale and Rosemary D. Hale. Boston: Little, Brown & Co., 1958. Pp. xix, 522. \$17.50.

The Hales have written one of the few worthwhile books in the trade regulation field. It is an excellent and reliable guide to the doctrines, the reasons given in support of the doctrines, and to the cases in the area of market power. This area is hard to define. The Hales are not always consistent as to its boundaries. In general, they are discussing the problem of monopoly and not the problem of conspiracy. But their eyes wander frequently, so that we get their views on such matters as intracorporate conspiracies, allocations of territories, and something of patent license arrangements. In part, the uncertain boundaries no doubt are due to the growth of so much of the book through separate law review essays, but another explanation is the seamless web which the Hales remind us is the character of antitrust law. In the area of its principal emphasis, the book suffers from an inadequate exploration of the history, impact and probable future importance of Section Seven of the Clayton Act. But this is only to say that the book already requires a supplement which, it is hoped, the authors are now preparing in a manner as workmanlike as the present volume.

The Hales have written a work of theology, and what they have described or constructed does not always please them. They usually remain even-tempered about it all, although there are a few indications of indignation, such as when they refer to moral muddlement (which they are against), or when they conclude with a recommendation, which might be thought to involve some desperation, that Section Two of the Sherman Act should be repealed in favor of a limitation upon the over-all size of business enterprise. But these indications of indignation or desperation are exceptions from the patient examination of almost everything that anyone—lawyer or economist—has said in print in the reputable secondary materials on the monopoly problem. And briefs and congressional hearings are drawn upon also. The result is an amazing collection of rationalizations for different positions, and at times the presentation of the