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## Studies in Legal Philosophy

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## STUDIES IN LEGAL PHILOSOPHY



### FOREWORD

The hazards of planning a symposium in the field of jurisprudence derive largely from the fact that the field is itself ill-defined; the legitimate "province of jurisprudence," to use Austin's phrase, has never been fully agreed upon. A historical approach seemed reasonably satisfactory, however, and what follows is a series of studies of some of the great figures in the history of legal philosophy. Happily, no one of our contributors was satisfied with simple exegesis or even with appraising matters of purely historical importance. Each study is an attempt to deal critically with a facet of its subject which is of contemporary significance.

The introductory essay by Roscoe Pound, "The Function of Legal Philosophy," was originally printed forty years ago. During that time it has remained unsurpassed as a concise statement of the functional significance of twenty-four hundred years of legal speculation. The collection of articles which follows Dean Pound's introduction is obviously not intended as a comprehensive survey of that vast philosophical heritage. In reviewing some of the basic issues with which that heritage has been concerned, however, this symposium does touch most of the great ages of legal philosophy. The Greek period is represented by Hans Kelsen's detailed analysis of Plato which takes sharp issue with recent contentions that Plato was a proponent of an empirically grounded natural law. The central figure in the medieval period was Thomas Aquinas, and Thomas E. Davitt, S.J., explores the contemporary implications of the Thomistic theory of law in the fields of Constitutional Law, Torts, Criminal Law and Property.

In terms of traceable influence on the lives of men, the eighteenth and nineteenth centuries produced some of the most important figures in the entire history of legal philosophy. From an examination of four eighteenth-century theories of justice (those of Hume, Rousseau, Montesquieu and Kant), Clarence Morris draws some inferences

about the modern legislative machine and the responsibilities it places upon the judicial process. John Austin's theory of law is considered by Samuel E. Stumpf, and his conclusions question the common belief that Austin's system was premised on a complete separation of law and morals. In a unique study of the arresting Nietzsche, Thomas A. Cowan finds support for a jurisprudence of a truly experimental and critical sort.

Modern European legal philosophy has produced many distinctive contributions and only a few of them could be treated here. Jhering's attempt to revise the fundamental notion of law itself is examined by Iredell Jenkins, who offers an explanation for the widely diverse interpretations put upon Jhering's work by his contemporary followers. The impact of the Nazi regime on legal thought continues to be an important area for analysis, and Wolfgang Friedmann's account of Radbruch's legal philosophy could not avoid involvement with this issue. Although the roots of the Pure Theory of Law are European, it remains the only contemporary legal philosophy enjoying truly world-wide influence. Reginald Parker tersely and clearly summarizes its basic tenets.

Justice Holmes was more than just another legal theorist. In avoiding systematic concern with the problems of technical philosophy while at the same time deeply probing the materials of his profession for what must certainly be called philosophical insight, he typified much of twentieth-century American legal philosophy. In an engaging and poetic study, John C. H. Wu describes the resulting parallel between the philosophy of Holmes and the very spirit of the common law process. If Holmes was one of the more philosophically oriented of American jurists, Morris Cohen was the most juristically oriented of American philosophers. Huntington Cairns surveys the complex and wide-ranging world of Morris Cohen and notes particularly Cohen's insistent queries into the meaning of scientific method. Some genuinely fresh material in the literature of jurisprudence is provided by Andrew Reck in detailing the metaphysical system of the provocative yet virtually unknown Elijah Jordan. Jay W. Murphy has covered the entire breadth of John Dewey's philosophy in an attempt to isolate Dewey's theory of justice. The extensive annotation of this essay adds to the literature a much needed bibliography on Dewey and the law. It has been more than thirty years since, in Hessel E. Yntema's words, the "placid current of juristic speculation in the United States was stirred by the advent of legal realism." From a first-hand acquaintance with the forces and men behind this movement, Professor Yntema examines both the strengths and weaknesses which have been its issue.

The reader who has examined the articles mentioned so far will not need to be reminded of the quantity of legal philosophy's unfinished business. But it seemed appropriate to conclude the volume with a direct thrust into the future. In raising questions about the construction of language systems appropriate to communications about justice, Julius Stone and G. Tarello chart some of the new ground which must be explored by legal philosophy in the second half of our century. The concluding study thus gives force to the point made in Dean Pound's introductory essay—that today, legal philosophy must once again “build rather than merely improve” to the end that the law which we hand down to tomorrow's jurist “will achieve justice in his time and place.”

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