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Book Reviews

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BOOK REVIEWS

READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY. By Morris R. Cohen and Felix S. Cohen. New York: Prentice-Hall, Inc., 1951. Pp. viii, 944, $8.50.

JURISPRUDENCE: MEN AND IDEAS OF THE LAW. By Edwin W. Patterson. Brooklyn: The Foundation Press, Inc., 1953. Pp. viii, 649.

JURISPRUDENCE — ITS AMERICAN PROPHETS. By Harold Gill Reuschlein. Introduction by Roscoe Pound. Indianapolis: The Bobbs-Merrill Company, Inc., 1951. Pp. xii, 527, $7.50.

LAW AND SOCIETY IN EVOLUTION. By Sidney Post Simpson and Julius Stone. Introduction by Roscoe Pound. St. Paul: West Publishing Co., 1948. Pp. xlvi, 692.

LAW IN MODERN DEMOCRATIC SOCIETY. By Sidney Post Simpson and Julius Stone. Introduction by Roscoe Pound. St. Paul: West Publishing Co., 1949. Pp. xlii, 1952.

LAW, TOTALITARIANISM AND DEMOCRACY. By Sidney Post Simpson and Julius Stone. Introduction by Roscoe Pound. St. Paul: West Publishing Co., 1949. Pp. xlii, 2389.

American legal scholarship has offered six general survey works on Jurisprudence and Legal Philosophy since 1948.[1] This period has been the most productive and creative era in American legal history for works of this type. The lawyer, judge, student and teacher of today have unprecedented opportunities through these materials for digging at the roots of law. Needless to say, the subject-matter is immensely practical, intellectually stimulating, and much of it represents the kind of fundamental thinking lawyers must do if they are to contribute to the survival and progress of man.

The reviewer approaches with trepidation a group review of these some 4,509 pages of materials on jurisprudence and legal philosophy, the total significance and meaning of which can only be partially felt, or glimpsed, let alone conveyed. To squeeze out the essence of each with any degree of sureness would be an exercise of faith of which the reviewer is incapable at this moment in history. But squeeze a little we must, to borrow a Cardozoism.

After reading these books the reviewer's bird's eye impression concerning each of them runs somewhat as follows: The Patterson book

1. Professor Stone, co-author with the late Professor Sidney Post Simpson, is an Australian who has lived, studied, and taught in the United States for years, and is in reality one of the foremost scholars on American law.

is a treatise (not a collection of materials) giving an analytical synthesis of the dominant patterns of legal theory in the western world; a work largely "devoted to the realm of legal philosophy, which has chiefly to do with logical and ethical theories about law," (vii), which is filled with illustrative cases, clarifying observations and superb craftsmanship. The Cohen and Cohen book is a collection of writings (plus some cases reported, but numerous case references) which focuses upon basic legal conceptions, a wide realm of ideas, arranged in such a manner as to permit orderly comparison among the contributors and with synthesizing articles at the end of main topics which often draw the previous materials together for analysis, criticism, speculation, and orientation — the emphasis is historical and philosophical, logical and ethical; it deals with law in the realm of ideas and social events; it is designed to furnish a pattern of thought, a way of approach to basic questions of the legal system. The Simpson and Stone Book One, *Law and Society in Evolution,* is a collection of cases and writings arranged in historical and sociological perspective giving a great over-view of the evolution of the law of the western world in terms of stages of evolution and the birth and impact of the ideas and social events which were the main subject matter of the evolution, and arranged in terms of legal institutions, and demands upon the legal system. The time sequence begins with Hammurabi and ends with modern times and situations. The Simpson and Stone Book Two, *Law in Modern Democratic Society,* is a collection of cases and writings about the facts, pressures, events and institutions of law in such modern society, arranged in terms of interests pressing upon the law and secured by the law as it is buffeted (and buffets) the stream of life. The law meets and resolves some issues. Many remain to be met and resolved. The book is a dynamic display of the anatomy of modern democracy in the context of laws and legal institutions. The Simpson and Stone Book Three, *Law, Totalitarianism and Democracy,* builds upon Books One and Two (mostly Two, although Book Three is completely integrated and can be taught or read alone), and follows a pattern similar to Book Two, but its cases and materials are designed for comparative study of the basic legal institutions, ideas, and law patterns of the Nazi, Fascist, Communist and Democratic state types, with comprehensive insights on the fundamental legal issues of present day, and future, democracy as it strains to achieve its as yet unachieved ideal realization. In all three of the Simpson and Stone books there are numerous cases and a large segment of the writings come from appropriate social science sources.

The Reuschlein book is a textual type survey designed to present general summaries of the main contemporary contributors to legal thought in the United States, with extensive quotations from the con-

tributors. "This book is intended to be a 'survey' and it is offered as just that. It is the hope of the author that the reader will be prompted to read the works of the 'Prophets' in their original form." (v.).

To a varying, though often large, degree these works necessarily, in view of their scope, must draw from similar sources. When a world is surveyed the world is the given. The Patterson, Cohen and Cohen, and Simpson and Stone books are superb scholarly accomplishments which reveal eminent scholars contributing to knowledge in a manner designed by themselves, and oriented toward filling a gap in the legal universe which they conceive requires filling. Each work fills a large gap in legal scholarship. The works are meshed, though not meshed. They are tools for the classroom which can be used together or separately. Each will add to the other. Each can stand alone. Patterson systematizes, analyzes and classifies. Cohen and Cohen deal in ideas by presenting the ideas for the reader to read. Simpson and Stone give a dynamic perspective of what we are dealing with. This oversimplifies. To further the oversimplication. The reviewer left Simpson and Stone with the question: What must we do? He left Cohen and Cohen with the question: How must we think? He left Patterson with the question: What can we utilize in doing and thinking? Thus, the process is unending. It is the process of perfecting society, man and law.

A review of this type could take all the books and compare their emphases and materials; or it could present impressionistic glances at each. The latter will be done since it is believed clarity concerning each will be aided. Professor Patterson's *Jurisprudence* is clearly the most comprehensive and scholarly account by an American in a single book of the scope, nature, structure, sources, definition and function of law as envisaged as a system and as seen largely in the context of modern times. However, the time sweep of the Patterson work is inclusive since it deals with ideas as well as with men. It is a book which is the result of nearly a half century of thought about legal philosophy and jurisprudence, and it is the fruition of a generation of teaching such materials to law classes by the author, and of years of thinking about how this subject-matter can be presented to students and lawyers for the nourishment of their intellects. It is a basic text, a lawyer's guide, and a teacher's tool. It is not a parade of summaries where the inexperienced reader is left high and dry. Throughout, it is enriched by extensive examples from the cases and hard facts with which students and lawyers deal. One could, indeed, prepare from the ample footnote and other bibliographic materials many collections of readings of cases and materials to go along with the treatise for emphasis and elaboration. The book is written with superb and studious clarity, and so establishes an ideal for works of this type. The influence upon Professor Patterson exercised by Dean Pound and Professor John

Dewey is referred to by the author and is at once apparent; yet, the book is clearly an original contribution by the author to legal literature. A national authority in Insurance Law and Contracts and Legal Philosophy bespeaks the fact that his treatise speaks with a varied background. A summary review can only hit a few of the high spots in such a comprehensive treatise.

The author had in mind the student when he wrote this book. "The novice on jurisprudence is often baffled when he finds that every book or article on the subject presupposes the reading of a dozen others. Hence the implications of the writer's ideas are here spelled out to an extent that some professional jurisprudence [jurisprudents?] or philosophers will find over-simplified and even distorted. For the same reason, one will find repetitions, frequent cross-references to other parts of this book, and frugality in footnoting." (viii). After emphasizing the practical value to the "hard-boiled practitioner" (p.4) of jurisprudence, the author's love of subject-matter is revealed by the statement, "Through jurisprudence you may look at life in society and, like O. W. Holmes, you may catch an echo of the infinite." (p.4). Part I (pp.1-66) orients the student in the province or scope of jurisprudence, and particularly enlightening materials reveal the role of the various branches of philosophy in the law, and the reviewer would call attention to the materials on logic and scientific method, semantics, and ethics and value-theory. Brief reference illustrates the role of the social sciences in jurisprudence, and a thought provoking classification is made of jurisprudence into the internal and external disciplines (the latter including relations between law and government, society, justice, logic, etc., and the former emphasizing internal structure or discipline). Part II (pp.66-180) deals with the fundamental question "What is Law?" Different answers emerge depending on whether the inquiry relates to law's relations to the state, society, ethical ideas, or social control. The author emphasizes the first of these relationships, or the imperative conception of law. The generality, normative character, authority, and sanction of law are depicted with brilliance. This part should be a most helpful supplement to the case study by making the student aware of the many faceted characteristics of the phenomenon of law. Throughout this part are references to the ideas men have had on this subject written in the context of contrast between men and schools of thought and with understandable illustrations of the points involved. Part III (pp.180-325) is "concerned primarily with the problem of 'finding the law.'" (p.180). "'Finding the law' is the static aspect of legal judgments, that is, of the reasoning process of arriving at 'legal judgments.'" (p.180). How are judicial judgments made? By logical application of rules of law? Here are to be found the main theories and

writings on this subject of the present time. Part IV (pp.325-559), What Should Be The Law, is a comprehensive summary and analysis of the principal theories of modern times concerning what the law should be, with nearly a hundred pages on pragmatism, sociological jurisprudence and legal realism. Part V (pp.559-595) is a critical study of the judicial process. Six pages are required to list the table of cases cited in this work. Over twenty-three pages of books and periodicals cited furnish a good bibliography for further study. The care of editing and clarity of writing is superb. This work should be widely used. The reviewer utilized it in many places in teaching contracts while he was reading it for review preparation. Indeed, Patterson's book, the Cohen and Cohen book, and one of Simpson and Stone's volumes were taken to class to illustrate the point that the question of "meeting of the minds," and Restatement 45 and 90 were nothing more than quite fundamental problems in jurisprudence and that the student is thinking jurisprudentially when he wrestles with the conceptions therein involved. There is no course in law school which this work would not enrich. A ditto for the Cohen and Cohen, and Simpson and Stone books should be added.

The Cohen and Cohen book is an illustration of superb editing resulting in the handling of materials on the fundamental characteristics of law and society in a manner which builds on historical perspective, contrariety of opinion, and final synthesis. Oddly enough, the work does not read like a mere patchwork of collections, but like the integrated, organized and oriented book that it is. The product of the scholarly work of father and son, Dr. Felix S. Cohen completed the work after the untimely death of the late Professor Morris R. Cohen, one of America's great philosophers who contributed so much to scholarship in many fields during his life — he was one of the few philosophers of modern times who nourished the law by his insights. The reviewer has utilized this book for student research assignments, and plans to use it as a basic text this next semester. The work consists of four parts. Part I, Legal Institutions, develops the fundamental concepts of property, contract, torts and liability, and crime and punishment. The nature and types of property is revealed by traversing materials from Grotius to Berle and Means. The origin and justification of private property is seen in a context of such different works as *The Institutes* of Justinian and Tawney's *The Aquisitive Society*. The practical value for student use of these materials has been experienced by the reviewer in the use of the materials on the nature and types of contracts, with illustrations from Kant, Hegel, Pollock, Williston, Holmes, Corbin, Oliphant and Llewellyn. The subject "what promises should be enforced" is introduced with the famous Adkins, Blaisdell and Parrish cases where the Supreme Court, it will be recalled, wrestled

and won over 19th century tendencies to quarantine legislative adjustment affecting contractual freedom. The advanced student, and this is not a work for beginning law students, will find old names, places and cases throughout this first part, and the materials on crime and punishment will give him much to think about concerning the nature and causes of crime, and the purposes and role of punishment in society, which he probably caught only fleeting glimpses of in the standard cases and materials on criminal law. The reviewer would have welcomed more materials from the modern criminologists in this latter chapter, but the basic data are here for discussion and further research. Perhaps, such materials would not have been appropriate since this chapter is not one on the dynamics of crime, the psychoses of criminal behavior or of the modern society, but of a consideration of the more generalized nature of crime and punishment in a philosophic as contrasted to a sociologic context.

While Part I does not pretend to explore other than perhaps the essence of the specific subjects mentioned, it will serve as a framework in which to consider much of the other materials. Part II, The General Theory of Law, begins with a chapter on The Nature of Law. A fascinating comparison of different theories is offered through materials, among others, from St. Thomas ("law is something pertaining to reason"), Coke ("artificial reason" of the law), Blackstone ("'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'"), Savigny (the customary nature of law), Austin (law as command of the state), and samples from Holmes, Pound and Erlich which bring the approaches of modern pragmatic and sociologic thought for evaluation alongside the previous theories. The authors conclude this chapter with their articles which discuss the implications of the various theories upon ways of thinking about law. "A definition of law is useful or useless. It is not true or false." (p.429). This should be a most interesting chapter to teach. They illustrate the confusion in thinking concerning the moral element in law in "other-worldly terms" rather than in "earthly terms." (p.434). "If ethical values are inherent in all realms of human conduct, the ethical appraisal of a legal situation is not to be found in the spontaneous outpourings of a sensitive conscience unfamiliar with the social context, the background of precedent, and the practices and expectations, legal and extra-legal, which have grown up around a given type of transaction." (p.434). "It is the great disservice of the classical conception of law that it hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy." (p.434). In The Nature of the Judicial Process the authors explore the prob-

lems of the "relationship between rules and concrete decisions," "the 'phonograph' theory," the filling of the gap between rules and decisions by ethical values, the filling of the gap "by reliance on expertise" and the relationship between judicial power and despotism (p.439). The concluding article by Dr. Felix Cohen furnishes excellent basis for critical evaluation of theories of the judicial process and of our limitations of knowledge concerning the nature of this process. "Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself." (p.479). In chapter 7 on Legislation the authors consider the fundamental problem "of the intellectual and non-intellectual sources" of the friction between the legislative and judicial processes (p.483).

Part III, Law and General Philosophy, consists of a critical review of the role of logic and scientific method in the law, the logical nature of legal propositions and questions, and the relationship between law and ethics; and the classic The Place of Logic in the Law (p.540) by Morris R. Cohen cannot be otherwise described than as a monumental epitaph for a great mind and human being, and the same author's Law and Scientific Method can perhaps be glancingly seen by the statement "To urge that judges, for instance, should rely on their experience or intuition in disregard of logically formulated principles is to urge sentimental anarchy. Men will generalize in spite of themselves." (p.560). "The law, and especially present American law, is desperately in need of a scientific elaboration. . . . *Stare decisis* means little in a changing society when for every new case the number of possible precedents is practically unwieldly. Without principles as guides, the body of precedents becomes an uncharted sea; and reliance on principles is worse than useless unless these principles receive critical scientific attention." (p.566). The reviewer finds a marked tendency in himself to devote a review length consideration of such individual articles, as for example the brilliant materials by Felix S. Cohen on The Ethical Basis of Legal Criticism: "The ethical responsibilities of the judge have so often been obscured by the supposed duty to be logically consistent in the decision of different cases that it may be pertinent to ask whether any legal decision can ever be logically inconsistent with any other decision." (p.590). Suffice it to say that the chapter on Law and Ethics could only be superb in view of Felix S. Cohen's vast contributions in this field. The materials on Law and Metaphysics might conveniently be read with Patterson's materials on the same subject. The concluding essay by Felix S. Cohen on Field Theory and Judicial Logic contains a forceful appeal toward understanding the "legal ideals" of those with whom we disagree rather than to intolerantly cast them off without critical examination.

"In fact, I find it to be a fair working assumption that when a legal philosopher says something that I recognize to be absurd, the statement probably meant something different to him than it means to me." (p.705).

Part IV, Law and the Social Sciences, utilizes history to consider the ethical, political, economic and other interpretations of history in quest of understanding of the historical process and so of values to live by. Anthropology is demonstrated as furnishing valuable insights for critical evaluation of modern institutions, and to permit evaluation in broader perspective; it offers "new observation posts from which to study the variations in human institutions and to compare the consequences of alternative social patterns." (p.786). Both Patterson and Simpson and Stone drew upon modern anthropological scholarship for insights into the nature of law and society. The same may be said concerning Law and Economics where changes in the nature of industrialized society, theories of economics and economic arrangements are felt in legal doctrine. Law and Politics begins with the introductory note comment "If one finds property, contract, liability and crime to be products or functions of government, the student of law can hardly refuse to face the basic problems of government." (p.860). Space does not permit a summary, except that the materials consider the age-old problem of "how to govern the governors," (p.861), the problem of bureaucracy, the problem of the consent of the governed, and the problem of political ideals which "treats some of the basic value issues with which the chapter on Law and Ethics deals and to which most of the other chapters of this volume ultimately point." (p.861).

The Cohen and Cohen book is a mine of excellent bibliographic materials. Brief introductory notes highlight chapter problems. It is a notable contribution to legal scholarship and should if widely used influence the coming generation of lawyers toward a critical evaluation of the role of law, and the students' own roles, in preserving sanity in a strife torn world. The materials can be used for separate course, or courses, or as collateral reading for separate substantive and procedural courses, or, indeed, they could be assigned as reading for the student body, if the curriculum does not possess a separate course in jurisprudence. The same, of course, would be said of the Patterson and Simpson and Stone works.

The three books by Simpson and Stone have been taught by the reviewer in separate courses over a period of time. The tendency to elaborate on them will be curtailed because the books have been reviewed in other places, since they were published in 1948-1949. As teaching tools they are outstanding. There is no one set of books which, in the reviewer's judgment, reveals law in the total perspective

of society as do these books. Nor, is there a more dynamic presentation of the multi-faceted scope and nature of law. Likewise, the sharpness of analysis of the basic issues of law in democratic society and the pointing to problems unsolved and demanding solution is most enlightening. The opportunity for student study of similar phenomena in the laws of the Nazi, Fascist, and Communist states and Democratic states is presented in dramatic manner. All schools of jurisprudence can be seen here, as well as the main theories and ideas expressed about law.

Book one, *Law and Society in Evolution,* in the reviewer's judgment is an unexcelled work for giving a student perspective of the kinds of legal systems and legal thought which men of the western world have had, and of the types of problems which those men have faced in inventing a system to perform socially the task which law is designed to perform. Of course law's task differs depending on the time, place, viewer and problems, values, power structures, and theories of the nature of man and society, and the universe. From Kin-Organized societies with their narrow kin units where law is mixed with custom and religion, and administered by priest or wise man, where law is intimately related to divine origin, and where the needs of man for law have yet to be complicated by the pure food and drug acts or atomic energy or refined philosophic speculations, and where the machinery of law enforcement is adapted to the mechanical, ritualistic concepts of man of the time, the student emerges to Part II, Law in an Emergent Political Society, to observe the seething vortex of change which arises when man invents the phenomenon of politically organized society and practices new ways of social control — forced to do so by the nature of the institutions and demands which he finds himself confronted with. Here are to be found the seeds of the modern state, the modern lawyer, procedure, the emergence of the common law, the jury system: all to large extent focused on a comparative basis between Roman legal institutions, but largely emphasizing Anglo-Saxon and Early English traditions. Part III's Law and the Rise of Commerce sees the birth of law's adjustment to man's newly discovered ways of making a living, his quest of ultimate standards for law's measurement, and the conflict of modes of trial and the systems of equity and the common law; new demands converge upon the legal system as seen through the rise of contracts, the changing concepts of property and its uses, growing problems with monopolies, the development of new remedies, and the birth of labor problems. Then follows Part IV's Law and Expanding Industrialism which actually furnishes us with a gigantic preview of law in the democratic state or the modern industrialized state. Legislation tends to replace the law making of the common law courts, and the theory of laissez faire

affects contracts and property utilization and state activities; the quest of reform and simplification of procedure and substance begins; there are efforts to cast off the institutions of the past which are preserved in the present due to man's ignorance, tenacity to stick with the known and fear of change; theories of judicial process wrestle over the slot-machine concept and sociological approach, and legislation meets the tradition of the judiciary's urge of ordered continuity with the common law traditions. One ends the study with the awareness that the process has not yet finished, is unending, furnishing constant challenge to modern civilization, and one finds himself impelled to search for standards or values for the guidance of future laws.

Book Two, *Law in Modern Democratic Society,* begins with the social and ideological background of such society, and proceeds to depict the processes of growth, change and adaptation of the law to meet new facts, events, inventions and demands. The classification is in terms of the interests which are pressing upon the law and those which are secured by the law. How to maintain the minimum physical conditions of social life, preserve health, safety, peace and order, how to deal with the automobile, health insurance, zoning and related phenomena. Abundant cases reveal the judicial process in action with novel problems together with statutory, and informative textual material. The sweep of modern business, financial, and labor institutions is depicted and problems converge for solution, as economic and social institutions are pelted with new pressures, or old pressures seen in next context. Social institutions must be maintained and progress, so problems of speech, voting, lobbying, marriage, homestead, divorce, sterilization, contraception, religious oaths, atheism, public support of religion, morals, movies, crime and a host of other facets of the social vortex are factually presented in scholarly context and set on a plane for evaluating the competing interests and searching for value standards for the decision by society's instrumentalities. Natural and human resources are to be utilized and preserved. Water, soil, forest, oil, gas, parks, child welfare, child labor, maternity, health, juvenile delinquents and scientific views of control of crime, treatment of defectives, the vast problem of the unemployed and those who are lost on the economic wayside, protection of business from themselves and prevention of economic exploitation of the unprotected are illustrated with superb clarity in the context of judicial decision, legislation and scholarly observation. The individual life of man, as opposed to social life, is displayed in the context of the protection of man's interest in personality, and changing forms and nature of property and pressures on the law of contract is revealed with similar types of materials as above. Restraints upon individual interests as seen through the area of creditor's rights, bankruptcy legislation, spendthrift trusts,

exemption of charities from tort liability, and restrictions upon, and realization of, the sovereign immunity from suit doctrine. The vast modern legal machinery of social control is revealed through analysis of administrative, legislative and judicial process phenomena. The materials of Book One are excellent background for the student in measuring the procedure, efficacy, and state of disequilibrium of these procedural components of the modern democratic state. Topped off by comprehensive materials on the limitations upon law in the problem of social control, the book gives a truly dynamic and dramatic picture of law in the present United States, or similar society. It is on completing these two books that the noticeable difference between the Simpson and Stone and the Cohen and Cohen materials is apparent. The reviewer would suggest that the latter materials could be taught with greater effectiveness if the teacher and student were aware of the conflict producing social data which are available in the Simpson and Stone volumes, and moreover the problems of the future of law, the unsolved issues, and the vast stress for survival of our ideals can be better seen from a background of the Simpson and Stone materials. These will help dramatize the scholarly materials in the Cohen and Cohen book. Indeed, the latter work and the former work complement each other.

Book Three, *Law, Totalitarianism and Democracy,* one might say (in order not to exceed the limits of a group review) builds on Book Two, because here the fundamental forces playing upon law in the modern democratic society are measured, evaluated, contrasted and studied with those forces and institutions existing in the Nazi, Fascist, and Communist state types; and the last part of the book analyzes with deep insight the problems of democracy in a time of change. The problem of maintenance of freedom (an indispensable aspect of democratic institutions), the issues of planning versus the spontaneous productions of individuals in the market and social arena, and the horrendous implications of atomic energy and international affairs are seen in the context of democratic institutions and ideals. Teaching this book has been a fascinating experience from the standpoint of observing increasing student awareness of the nature of the society in which he lives, the problems of adjustment, the challenges in preserving democratic institutions, the sharpening of the realization of the part which ultimate ideals play in shaping the law of a society, the increasing acuity with which the student thinks and talks about things which are "democratic," the tendency to pierce for the first time folklores of democratic society which heretofore in the student mind have gone uncontested. In all, Book Three is a happy ending for this trilogy. Uppermost in the reader's mind, on completing these three books, may be the problem of how to maximize the possibilities

for democratic survival in the modern world. The reviewer might add that in the course of teaching Book Two and Book Three various student projects analyzed the law of the state of Alabama for its "democratic" and "undemocratic" aspects, raising the problem, of course, of standard and value formulation, and self-analysis. In these three books are large segments of cases, statutory materials, and materials drawn from the social sciences. To be mentioned is the forty-four pages at the end of Book Three consisting of author index, table of cases, and statutes (covering all three volumes): a valuable source of reference, as well as an indicia of the comprehensiveness of these volumes. Editing is superb as in the Cohen and Cohen materials. Introductory observations pave the way into the materials, and are excellent.

The Reuschlein book's contribution appears to be the systematic presentation of materials concerning the contemporary American contributors to jurisprudential thought which may be used as a basis for beginning orientation of the student and as a stimulant for further reading. No complete picture of any one movement in this area of legal scholarship can be obtained, nor is there the systematic direction of the development of ideas and doctrines and insights which is apparent in the other five books under review. The author has written in a clear style, and he lets the main personalities speak largely for themselves, although he does insert his fundamental value positions, and perhaps reveals the fear felt by other neo-scholastic scholars toward compromise, adjustment, and pragmatic adaptation without the foundation of ultimate standards which all could agree upon. This fundamental philosophic position has of course played a large role in the history of thought, and is still vigorous. The "survey" purpose of the author is well achieved, and no student could read this clearly written work without having myriads of questions for further study. Perhaps, he would be stimulated to get into the Patterson, Cohen and Cohen, and Simpson and Stone works, and thence further into the exciting atmosphere of winds of doctrine which overflow the jurisprudential horizon at the present time.

JAY W. MURPHY*

THE STRANGE CASE OF ALGER HISS. By The Earl Jowitt. Garden City: Doubleday, 1953. Pp. 380.

Strange, indeed, does the case of Alger Hiss seem to this eminent English lawyer and jurist, The Earl Jowitt. Alger Hiss, a man who won distinction in preparatory school, in college, in law school, and in public life, a man who began his professional career as secretary to

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Mr. Justice Holmes, who later served his government, in various capacities, so effectively as to win rapid promotion and who had convinced all his colleagues and superiors of his integrity and devotion to duty — this man was convicted of perjury. And at whose instigation? That of Whittaker Chambers, a man whose disreputable conduct concededly began not later than when he was in college, who from 1924 or 1925 to 1938 was a member of the Communist party, living a life of constant deception, endeavoring to harm, if not to destroy, his government; a man who, after his professed renunciation of communism and atheism and his conversion to the Christian faith, committed perjury in testimony before a Grand Jury with reference to the very matters which were the subject of his testimony against Hiss. Small wonder that the Earl should have been puzzled and have been willing to give part of his leisure time to a study of the record of the trial and of the Chambers story as related in *Witness.*

And he has made this study as a lawyer and a judge, not as a news reporter or commentator, not as an interpreter of social or political ideologies, not as a student of abnormal psychology, not as a modern Jeremiah. As an English barrister and judge, he frowns upon our too-free pretrial publication of matter bearing upon the guilt or innocence of an accused. He takes at face value our accepted doctrine that a defendant must be acquitted unless proved guilty in open court beyond a reasonable doubt. In this connection he conceives the function of the prosecuting attorney actually to be what our highest courts have officially proclaimed it to be, namely, to put the facts before the jury fairly without distortion and without appeal to emotion or prejudice, so that no innocent man may be convicted and no man go free who has been proved guilty beyond a reasonable doubt. And he believes that the trial judge should assist the jury by an analysis of the evidence, as the judge always does in England, and, as this reviewer can dogmatically assert, a United States district judge may very properly do, although not obliged to do so. All this a reader must bear in mind, if he is to understand the learned Ex-Chancellor's analysis and commentary.

In this book he puts before the reader his impressions of Alger Hiss and his wife as gathered from the record of the trial, and of the Chambers as revealed in the record and in *Witness;* he analyzes their stories and weighs the evidence where they conflict; he considers the testimony of Chambers and Hiss in the light of their previous statements to government officials, Congressional committees and Grand Jury; he explains trial by jury as conducted in England, contrasting the American procedure as exemplified in this trial with reference particularly to the function of the judge and the obligations of prosecuting counsel; he expresses with deference his astonishment at the

volume of remotely relevant evidence that was received; and makes some trenchant remarks, with characteristically English understatement, concerning some aspects of the trial. Many of the objectionable features he charitably attributes to our theory that the lawyers, rather than the judge, try the case.

His impression of Hiss, derived from the record, is that of "a man somewhat conceited, too conscious that he had met on intimate terms the most distinguished of his countrymen, not over-ready to be forthcoming with his less distinguished compatriots, and in short not suffering fools gladly, and not being a 'good mixer' — so immersed in his official life that he took little or no trouble about the affairs of his private life." (p.67). But he got from the record no impression of dishonesty. With Whittaker Chambers, on the other hand, as he put it, "the desire to embroider and embellish is so transcendent that I do not believe he knows when he is leaving the straight and narrow path of truth." His judgment on public affairs he finds to be "equally unreliable" (p.46). He recognizes the brilliant qualities of mind of Chambers, but he repeatedly states that a jury could place no reliance on his testimony except when corroborated. Consequently when the stories of Chambers and Hiss conflict, he requires corroboration of the former's statements and in most instances fails to find it.

As to Mrs. Hiss and Mrs. Chambers he thinks each was inclined to go to extremes in support of her husband. But he makes no specific charges against the former. He dismisses Mrs. Chambers, so far as her credit is concerned, with the following quotation from the examination by Mr. Murphy: "If he (meaning Chambers) told you that starting tomorrow, we are going to Ypsilanti and your name was Hogan?" Answer: "We would go to Ypsilanti and we would be Hogans." "It is perhaps hardly necessary," he adds, "to say that she corroborated her husband's testimony about visits — but about documents she knew nothing." (p.82).

Nine-tenths of the testimony at the trial had to do with efforts to show close contacts between Hiss and Chambers and their families from 1934 to 1938 and the association of Hiss with other persons alleged to be communists. From this mass of material the author selects that dealing with the alleged subletting of the Hiss apartment to Chambers, the transfer of the old Hiss Ford car, the alleged loan of $400 from Hiss to Chambers, who never offered to repay it, the time and circumstances of a gift of a rug by Chambers to Hiss, various alleged automobile trips, and the alleged meetings between Hiss and communists of higher rank than Chambers. As to most of these, the author finds flaws in the Chambers version. He insists that the attention devoted to these matters tended to obscure the real issue, namely, whether Hiss lied when he told the Grand Jury that he had

not turned over to Chambers in or about February and March 1938, documents or copies of documents taken by Hiss from the State Department. And it was upon this issue that the testimony of Chambers required corroboration. This requirement of corroboration is fixed by law as a condition of conviction for perjury. The testimony of a single witness, no matter how trustworthy, is not sufficient. And The Earl Jowitt would not believe Chambers under oath on any important matter, except in so far as he was corroborated.

Alger Hiss had a trial by jury in which all the requisites of a fair trial were observed under our adversary system. That is assured, for his conviction was affirmed by an able appellate court. This does not mean that the appellate court believed him guilty, but that no reversible error was found in the record. As a lawyer the author must and does recognize that all an accused can ask is a fair trial on the same conditions as those accorded to other members of the community. Our system no more guarantees the acquittal of the innocent than the conviction of the guilty. But when a man who has risen high in a cultured community and has established affirmatively an unblemished reputation for integrity is charged with so despicable an offense, it is particularly important that his guilt be established beyond peradventure to a jury insulated so far as possible from prejudice and assisted by a judge trained in separating the unimportant from the crucial and in making the distinction clear to the jury. What has worried and continues to worry the Ex-Chancellor follows:

1. The Congressional investigations with the wide publicity given them through television, radio and press, the partisan comments in the press, and the criticism of the conduct of the first trial by various persons including some members of Congress, given extensive publicity in newspapers and magazines, created a climate of opinion which could scarcely fail to affect the jurors, no matter how conscientiously they strove to overcome it.

2. In his revelations to officers of government, to the Congressional Committees and to the Grand Jury, prior to the pre-trial hearings in the action for libel brought by Hiss against Chambers, Chambers not only failed to allege any espionage activities by Hiss but repeatedly, under oath and otherwise, asserted that he knew of no such conduct by Hiss. He accused Hiss and his brother Donald of being dues-paying communists, told inconsistent stories as to his collection of dues from them, and, at the trial, the innocence of this charge as to Donald Hiss was conclusively shown.

3. The evidence as to the alleged first act of treachery by Hiss in furnishing Chambers secret State Department documents from the Nye Committee files was persuasive that the documents then procured

by Chambers were not secret but were available to the press generally. Indeed, the author thinks that the complete refutation of the testimony of Chambers on this point shows that he was so willing to manufacture any and all sorts of evidence that doubt properly falls upon the authenticity of even the crucial type-written documents.

4. The conduct of the prosecutor did not measure up to the standard set in English practice. "I do not think," says the author, "that it is proper for Counsel for the Prosecution to use every legitimate means to secure a conviction in a doubtful case." And he feels Mr. Murphy in his final summing up commented unfairly on some testimony, and for the first time suggested that a comparison of the typed documents with the typing of letters written by Mrs. Hiss would show that Mrs. Hiss typed the secret documents. And this latter argument apparently impressed the jury for they later asked for the documents.

5. The judge in his charge made no analysis of the evidence, but left the jury to apply it to the issues without guidance. In England, it would have been his duty to make a survey of the evidence.

6. The only real corroboration of the testimony of Chambers is found in the evidence that the crucial typewritten documents were typed on the Hiss typewriter while in the possession of Hiss. The inference that they were typed with his knowledge and consent is strong, but in view of all the other testimony, it is not strong enough to remove all reasonable doubt. Hiss may be guilty, but the prosecution did not prove his guilt.

Of course it is impossible for any person to know whether or not Alger Hiss was guilty. How much, if any, truth there is in the testimony of Chambers or in his book is likewise unknowable. Opinions are sharply divided, vigorously expressed, most of them founded on inadequate data. Anyone who desires to form an intelligent opinion as to the justice of the conviction by the second jury will find the essential materials in this book. The learned Ex-Chancellor does not hesitate to express his own conclusions, but he does not ask the reader to accept them.

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THE NEW SCIENCE OF POLITICS: AN INTRODUCTION. By Eric Voegelin. Chicago: University of Chicago Press, 1952. Pp. xiii, 193. $3.00.

The author is a very learned product of Kelsen's Vienna School of Pure Law. Although the present work has in itself nothing to do with law, its legal-theoretical value as well as the author's heritage can

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be readily discerned. For it is the axis around which rotates his theory that politics, to be a science, must not be "gnostic," by attempting to establish absolute (hence authoritarian) values. Even as natural law and democracy are truly incompatible — because if law is "natural," divine, supreme, and immutable, it need not and indeed ought not be based on the will of the majority — so are politics as a revelation and politics as a science. Although the author makes no reference to legal theory and the natural law controversy, the parallelism is obvious. It is for this reason that the book ought to be read by lawyers.

The author's fight against the dream world of political dogmatism, or "gnosticism" as he calls it in a rather broad way, leads to the realization that it has been a habit of man — of Western and Islamic man, at least — to justify every variety of political theory and action upon the basis of some allegedly absolute truth, be it the Bible, Aristotle, or the divinity as such or as represented through its temporal agents. The "gnostic insanity" inevitably leads to continuous warfare both spiritual and on the battlefield.

The book, very erudite and at times not at all easy reading, proposes that the strongest resistance against gnosticism can be found in philosophers of John Locke's tradition and in the modern Anglo-American democracies. He thinks that there is a mere glimmer of hope, requiring all our efforts, that we might repress gnostic corruption as manifested in modern totalitarianism and restore the forces of civilization, that is, of classic and early Christian thinking.

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