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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. 944. \$8.50

A lecturer in jurisprudence who wishes to provide his pupils with a collection of (sometimes) provocative readings (as distinguished from a treatise or textbook) could use Jerome Hall's volume, *Readings in Jurisprudence* (published at Indianapolis by the Bobbs-Merrill Co., 1938); the massive three-volume *Cases and Readings in Law and Society* by Simpson & Stone (published by West Publishing Co. at St. Paul, Minn., 1948), or the present work. I cannot say that I would regard the present volume as an obvious or substantial improvement on Jerome Hall's earlier work.

Of course, no one can make a final and definitive selection of readings on a subject so generally undefined as jurisprudence in its modern universe of discourse. If jurisprudence be regarded as the fundamental *philosophy of law*, then, I think Hall's work is more philosophical. If jurisprudence be regarded as the *sociology of law*, then Simpson & Stone's work is more sociological. Yet the authors have made a brave attempt at gathering stimulating materials from philosophers and quasi-philosophers (from Heraclitus to Dewey) who have written on legal basics.

Without the index, this book runs to 928 pages, far too much material to be assigned in an ordinary course on jurisprudence. Jerome Hall's book went to 1169 pages; and Simpson & Stone's cases and readings assumed the form of three heavy tomes comprising 2389 pages.

In reading the preface and the introductory notes, by which each chapter begins, I could not escape the impression that this would have been a finer book had Morris R. Cohen lived longer. The son's work is not, I think, equal to that of the father. Without having actual information on the point, I would suspect that too much of the introductory material was contributed by the son. These introductions do have the merit of welding the disparate parts of this book into a kind of unity. (The compilation of excerpts in Hall's book is not similarly bonded). But they leave much to be desired in particular cases.

Before addressing myself to some aspects of the book which I found challenging, let me outline its topography.

The book is divided into four parts. The first part, entitled "Legal Institutions", contains four chapters on such legal subjects as Property, Contract, Torts and Liability, Crime and Punishment. Each chapter is broken up into two or more parts. Thus, under the heading, Property, chapter 1 treats of: (a) the *nature and types of property*, and (b) the *origin and justification of private property*. Chapter 2 treats of the *nature and types of contracts*, the *social roots of contracts and what promises should be enforced*. Chapter 3 contains some definitions of *tort*, and an analysis of *tort liability*. Then it appraises, very briefly, the notion of *damage*; and more completely, the notion of *causation*. The final chapter of Part I (Chapter 4) investigates the *nature of crime*, the *causes of crime* and *criminal procedure*, as well as the whole idea of *punishment and responsibility*, including the *purposes of punishment*, the *types of punishment* and the *alternative to punishment*.

Part II, entitled, "The General Theory of Law", yields Chapter 5 with studies on the Nature of Law; Chapter 6 which treats of The Nature of the Judicial Process; and Chapter 7, where the *nature and scope of legislation* as well as *statutory interpretation* are explained.

Part III, entitled "Law and General Philosophy" devotes a sometimes mystifying chapter to Law and Logic. Such subjects as *logic, experience* and *the scientific method*;

the *logical nature of legal propositions and questions*; and the *relationship between logic and ethics*. Another chapter (No. 9) expatiates on Law and Ethics. The final chapter in this part deals with Law and Metaphysics—but it is in many cases a “metaphysics” scarcely recognizable as such by the metaphysicians of the Schools.

Part IV, under the heading “Law and Social Sciences” comprises four chapters. The first two are named Law and History and Law and Anthropology. The third presents the question Law and Economics, analyzed and outlined as *economic systems and their legal defenses* and the *legal factors in economic science*. The final chapter of the book is Law and Politics. The first group of excerpts in this chapter concern *law and administration*. The second group studies the *separation and distribution of powers*. The third investigates such oversimplified subjects as *law as coercion* and *law as consent*. The last group deals with *political ideals*.

On the first page of the preface, the authors write: “It is with the thought that all of the ethical issues of the law are very near to us, in court rooms, legislative halls and city streets, that the materials of this book have been put together.”¹ This insight and unifying purpose are, I believe, sounder than laymen, lawyers, judges and experts in jurisprudence generally believe. But I question whether one who reads the book without reading the sentence just quoted would be able to infer such a purpose or would even believe that this express purpose had more than a verbal value for the authors.

According to the authors, jurisprudence may be regarded “as the jurist’s quest for a systematic vision that will order and illumine the dark realities of the law” or as “legal philosophy conceived as the philosopher’s efforts to understand the legal order and its role in human life.”² The first of these definitions is so inadequate that a law librarian or law student (who is certainly questing a systematic vision that will order and illumine the dark realities of the law) comes comfortably within its scope. Much, of course, depends on what the authors mean by “illumine.” This is a word the authors are rather fond of. They repeat it often. Each time they use it, they are being obviously metaphorical. They are, I suppose, referring to *intellectual illumination*; to the unique process of *understanding*, which is sui generis, and which, therefore, invites metaphorical circumlocutions. I question seriously whether the authors would use the word “understand” (as St. Thomas used it) to signify apprehension of the “quiddity of things” or of “those truths that are immediately known by the intellect once it knows the quiddities of things.”³ The contempt in which one of the authors seems to hold the whole notion of *nature* (quiddity) and the Natural Law makes one wonder whether, according to him, *illumination* as an act of *understanding*, really brings us into intelligible relationship with *things*, their *natures* or quiddities. Yet, if there is *illumination*, light is cast on *something*, which we can see as an objective and ontological structure, or all knowledge is vain.

I quite agree that “only as men learn to substitute rigorous reflective thought for hit-or-miss trial-and-error can they escape . . . barbarisms.”⁴ But I see nothing particularly *rigorous* or *reflective* in the definition of jurisprudence expressed and exemplified in this book. Nor do I think that “free competition among ideas” has, historically, worked any better in the area of philosophy of law than it did in economics or political science. Certainly, it didn’t prevent the rise of terrifying totalitarianisms. There can be no “method of free competition among ideas”⁵ which

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1. P. iii.
 2. *Ibid.*
 3. DE VERITATE I, 12.
 4. P. iv.
 5. *Ibid.*

will philosophically justify or defend our sanities if men genuinely believe there are no absolute truths. There never should be any really free competition between truths and falsehoods, in the sense that men are equally free, morally, to choose one or the other. This is not to say that we know *all* truths. We are not God. But it is just as silly to say we know *no* truth as to say we know *all*.

While jurisprudence and legal philosophy (like many other things) do constitute "a great cooperative adventure, pursued across many centuries by men of many races and many faiths," there is no metaphysical premise "that radically different views of the same fact may be equally correct," if the category "*radically different*" includes "contradictory."⁶

The Introductory Note for Chapter I begins with the sentence "If the usefulness of a legal theory depends upon the extent to which it illumines legal problems, the field of property must serve as a pre-eminent testing ground for theories of law."⁷ Before a legal theory can possibly be *useful*, it must be *intelligible*. It couldn't be used unless it were *understood*. The quoted sentence puts the cart before the horse. Some *illumination*, at least, ought to come before there can be any question of *usefulness*. Moreover, it is not enough for a theory to be made intelligible by *some sort* of intellectual illumination. The theory must be conformed with the natures of things. Objective reality is the measure of our truths. Protagoras was wrong. Our minds are not the measures of things.

Readings from the works of Morris R. Cohen (of which there are many throughout this book) are invariably stimulating and interesting. By contrast, pericopes from F. S. Cohen's *Transcendental Nonsense and the Functional Approach*, for example, suffer by juxtaposition with his father's works. Take this sentence by which F. S. Cohen describes the "thingification of property": "Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, *property rights*."⁸ This misses the whole point and function of *language*. Words are *signs* whose whole business is to refer to *things* (referents). No good judge would ever examine *words* and come up with rights or property rights, like a magician taking a rabbit out of the hat. We must go beyond words to the *natures* of things. The nature of a house or an ox (as a knowledgeable order, pattern or structure), in relation to the nature of man, and in the context of Nature (the *ensemble* of natures) provides the basic ontological premise from which we derive all natural rights and laws. To talk of the "supernatural Something"⁹ that is immanent in certain trade names and symbols is to construct, not a straw man, but a thing of mere words. To assert that "*The actual value of a utility's property . . . is a function of a court's decision*"¹⁰ subtracts attention, invalidly, from much reality (hydroelectric dams, transmission lines, power stations, balance sheets, expert appraisals, etc.) by way of oversimplification.

By quoting pieces like Holmes' *The Path of the Law*¹¹ the authors certainly fail, egregiously, to justify one of their alleged and primary purposes, namely, to show "that all of the ethical issues of the law are very near to us, in court rooms, legislative halls, and city streets."¹² Holmes, an atrocious philosopher of the law even when he was a good judge, had written: "If you commit a tort, you are liable to

6. *Ibid.*

7. P. 5.

8. P. 35

9. *Ibid.*

10. P. 38.

11. P. 119.

12. P. iii.

pay compensatory sums. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can." Yet, it does. But unless ethics somehow gets into the law—as well as some rudiments of religion, too—you have the type of legislation of which Hitler and Stalin are capable. To put the matter in another way, ethics as a theory of morals or right conduct *always* gets into the law. It is either sound ethics, and then you have good law; or it is unsound ethics, and then you have bad law. Indeed, your whole capacity to appraise or criticise laws as *good* or *bad* comes not from laws themselves or legal systems, but from moralizing.

I can see nothing to commend inclusion of the doggerel entitled "Llewellyn, Ballade of the Class in Contracts."¹³ Jurisprudence, no matter how defined, does not deserve such pitiful versification.

Quite a few pages of this book are dedicated to the subject of "Causation."¹⁴ To this section, Cohen *files*, contributes part of one of his own essays entitled "Field Theory and Judicial Logic."¹⁵ There he makes the flat statement: "Functions and equations have displaced 'cause and effect' as the basic terms of physical explanation."¹⁶ While it is quite true that *one* type of explanation in modern physics has been by way of "functions and equations," it is utterly sophomoric to suggest that functions and equations have displaced other explanations including "cause and effect." No nuclear physicist could ever write an equation to describe, for example, binding energy unless he started his basic experimentation with fairly accurate notions of "cause," "effect," the *difference between the two* and the *difference between causes and conditions*. To be consistent with his own easy simplification, Mr. Cohen should have used functions and equations in his "scientific" jurisprudence and should himself have eschewed "causes" and "effects." On page 245 he scoffs at the notion of causation; on page 281 he writes: "This emphasis raises to a critical point the problem: 'What causes crime'?"¹⁷ Indeed, on the latter page, he even talks about "the nature of crime" (emphasis added) apparently without worrying about his own bogey, the "thingification" of words.

Nor does he gag at a vocabulary which uses the word "causes" in a "fundamental" sense: "Those who look for fundamental causes of crime within the body or soul of the criminal . . . do less than justice to the complexity of the criminal situation."¹⁸ It seems rather odd that an author, who in his preface speaks highly of "rigorous reflective thought," should thus poke fun at the very idea of causation on one page and then on a subsequent page talk about the "fundamental causes of crime." It is even more astounding to seek the "fundamental causes of crime" outside of the body and soul of the criminal; *unless you believe that man does not enjoy free will*; or that man is not responsible for his deliberate acts. If man is free then, whatever his environment and conditions, *he* must have initiative in evil. For that evil *he*, as the master of his considered conduct is responsible. This is a corollary derivable from the fact that man is a *person*. As such he is not just pushed by or pulled to what is bad by *causes outside him!* This is not to say that all acts of men are free and deliberate. All of us know the influences of bad associates, the attraction of

13. P. 122.

14. Pp. 233-68.

15. P. 245.

16. *Ibid.*

17. (Emphasis added).

18. P. 281.

external circumstances. Christians, especially the saints, know a great deal about the incitements of passion and of Satan himself. But unless the fundamental cause (in the scholastic sense of *deficient*, not *efficient* "cause") of crime is *in* the criminal, I see no reason why the criminal should ever be held responsible or punished. Of course, if men have no free will, then the fundamental "cause" of crime might be sought outside the body and soul of the criminal. But, if men have free will, how can you look for a "cause" more fundamental than man's own interior choice. "If we are to treat intelligently of its causes,"¹⁹ crime must be viewed against the background of the integral *nature of man* with its attribute of freedom.

One is, I think, permitted to question the value of the quotation from Lombroso who underestimated so obviously when he said that "genius like moral insanity has its basis in epilepsy!" Carry that far enough and you ought to hospitalize and never imprison a criminal.²⁰ Nor can Bonger (or anyone else for that matter) explain why people in desperate economic situations can become saints, if economic conditions always occupy a major place in the etiology of crime.²¹ Proletarians are generally least passionate about the dictatorship of the proletariat—a fact which is inconvenient to the theories of those who think that the cure for communism is higher pay or better economic conditions.

Maybe it is necessary, as the authors suggest on page 370, to recognize at times the relativity of definition to purpose. But if there is any virtue in intellectual "illumination,"²² one of the primary purposes of definition is to tell us in words what something *is* in its *essential nature*. Unless in some way I have been mentally illumined enough to know that the nature of a cat is different from the nature of a mouse, I stand in perpetual danger of confusing the one with the other. If the State is in reality nothing except what Marxists say it is, namely, an instrument in the hands of the *bourgeoisie* for the exploitation and oppression of the masses, then a revolutionary attitude, in response to the challenge of pitiless States, is understandable. Marxists insist that the definition they give of the State "illuminates", not only the question of the State versus individual, but also the question of the proper revolutionary attitude. However, I cannot see why I should ever become benighted enough to pay such a lasting and weighty tribute to the "relativity of definition"²³ as to regard the Marxist definition of the State as an accurate definition of the real nature of the State. Definitions stand to the thing they define as drawings stand to the things they depict. If a modern abstractionist or dadaist puts under my nose a canvas that looks like nothing so much as fury in color, I will not hear him tell me that he has painted a picture of St. Joan of Arc on a white steed. If a man insists on defining jurisprudence as a "cooperative effort," I do not see why he would hesitate to call a *trade union* "jurisprudence." It is not enough to recognize the relativity of definition to purpose; both must be related to reality.

That is why it is rather silly to say as does the younger Cohen: "A definition of law is *useful* or *useless*. It is not *true* or *false*, any more than a New Year's resolution, or an insurance policy. A definition is in fact a type of insurance against certain risks of confusion. It cannot, any more than can a commercial insurance policy, eliminate all risks. Absolute certainty is as foreign to language as to life."²⁴

19. *Ibid.*

20. P. 294.

21. P. 296 ff.

22. P. 370.

23. *Ibid.*

24. Pp. 429-30.

It has to be a *true* resolution or policy before you can rationally call it useful or useless.

Quite obviously, if in order to *define something*, we have to know *everything* about that *something*, or we have to be able to *express everything* about it, we would be radically incapable of definition. But no one can reasonably suggest that finite man, when he defines, must exhaust the intelligibility of the being he defines. He must, certainly, make the thing he defines intelligible at the risk of giving no definition (or illumination) at all. If the definition is *false*, it may still be useful, *e.g.*, to a playwright who wants to make a Darwinian monkey out of one of his characters. Also, it is rather foolish to talk about a definition being "useful" or "useless" unless one first *defines* the very *purpose* in relation to which use or uselessness is assigned. You cannot get away from the question of truth or falsehood simply by a convenient retreat to words like useful or useless. Why? Because the very next question must be: "Is it *true* that this is useful? How do you *define* 'useful or useless'?" If Cohen can know the *truth* about his asserverations of uselessness or usefulness, why should he gag at the possibility of knowing the truth or falsehood of other definitions? Certainly neither of the Cohens would admit that a bluebook scribbled by one of my babies could be useful as a text-book in jurisprudence. A blue book of such scribbblings would not fulfill anyone's definition of a true text-book of jurisprudence.

Even the able Morris R. Cohen failed to make proper distinctions in this area of discourse: "The first manifestation of absolutism that suggests itself is the complacent assumption that there can be only one true or correct definition of any object."²⁵ If he is saying that no single *formulary* monopolizes truth, he is correct. But if man is a rational animal (and he is), then quite obviously you cannot define him, essentially, as an irrational animal. Admittedly, when you pursue the nature of things which God has made and try to comprehend them in a net of words by way of definition, you can rarely be complacent. The task is usually staggeringly laborious. The point is that precisely because the *nature* of the thing is one, so the essential definition too must be on though varied in verbal expressions. A thing cannot at the same time and in the same respect both be and not be itself. Its true definition will, therefore, take on an absolute character.

We have the same problem whenever we try to define something made by man, like a chair or a tort or a poem. We constantly run into *difficulties* of definition. Is a "collective bargaining agent" really an "agent"? Is a "labor contract" really a "contract"? The whole philosophical problem of *analogy* as distinguished from *metaphor* has a bearing here. Words are not always used either *univocally* or *equivocally*. There is a third category of uses properly called *analogical*.

The rather naive but persistent notion that law is nothing but the *prophecy* of what the courts will do was one of Oliver Wendell Holmes' obsessions. Judge Jerome N. Frank still clings to it stubbornly.²⁶ In this view, law is rather a by-product of decision by judges than a premise according to which judges decide. Or as Jerome Frank put it: "Rights are lawsuits won and duties are lawsuits lost!" The decision (judgment) of the court "was not knowable when Jones and Smith (plaintiff and defendant) acted. It was not knowable when Jones consulted his lawyer or Smith his lawyer."²⁷ In particular cases, it is true, that no one can know certainly what the *decision* will be. Lawyers frequently must advise their client that they are unable to *foresee* how the court will decide close cases. The vast majority of cases are not appealed precisely because they are not close cases. Besides, a greater majority of

25. Pp. 435-6.

26. P. 474.

27. *Ibid.*

"cases" never come to the courts, because the potential parties and their lawyers know the law well enough to avoid litigations or violations; or because they settle violations out of court.

A lawsuit or a litigation is a particular kind of a fight, not any kind of a fight, like a brawl in a tavern or a scrimmage on a football field, or a sortie up some Korean hill. It is a fight according to rules of law. It is a fight in which the judge *uses as his premises* pre-existing rules of law in order to romp or struggle to a conclusion or decision. Sometimes, because the judge is human and therefore fallible, he makes mistakes in rendering that decision. Sometimes, with the best of good-will and the highest competence, the law is so poorly defined that a judge finds it difficult to discover it. Sometimes he cannot discover applicable law because it does not exist. There is a gap in the legal structure. Then the judge, as it were, must start from the edges of the fabric of the law and work inward to patch the gap. But the existence of many dubious questions and the existence of many *lacunae* in the law does not argue that there are no legal certitudes or principles. It is from these certitudes and principles we progress by argument, inference and implication if as judges we are to render decision in novel cases; if, in other words, we are to patch the holes in the garment of the law. The only other alternative would be to have the judge say to litigants: "There is an hiatus in the law on this point. I can do nothing about it until the legislature fills the gap."

In one sense it is as strange to be told that there is a distinction between "lawyers' logic" on the one hand and "logicians' logic" on the other²⁸ as to differentiate between *lawyers' arithmetic* and *arithmeticians' arithmetic*. Bertrand Russell, on the same page, tells us to be on guard against "French logic." I suppose that F. S. Cohen would want us to suspect "supernatural logic", on the basis of what he wrote: "Our legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow. Against these unverifiable concepts modern jurisprudence presents an ultimatum. Any word that cannot pay up in the currency of fact upon demand is to be declared bankrupt. . . ." ²⁹ (If the Mr. Cohen had thought better of human capacity for correct definition he might not have so flagrantly misused the word, "supernatural"). Incidentally, how can the two or three sentences just quoted from Mr. Cohen be "defined in terms of experience"? Can they pay up "in the currency of fact"? What is the meaning of the word "fact"? Is that meaning (definition) verifiable or unverifiable?

There are five very different types of truths which can validly be included in the category represented by the word "fact" in the natural order. Consider these "facts":

- 1) As I write this, I have no headache.
- 2) A whole is greater than any of its parts.
- 3) The interior angles of a triangle equal two right angles.
- 4) Alexander the Great died before he was thirty.
- 5) I see the paper on which I write.

All of these are "facts." Are they all scientifically verifiable as statements or as concepts? Can all of them be established by the "scientific method" of *verification by experiment*?

Morris R. Cohen when he wrote a book on logic with Mr. Nagel certainly realized something of this. It seems to me the son failed to read his father's work.

The approval of one of Bertrand Russell's dogmas, to wit: "Wherever possible,

28. P. 529.

29. P. 572.

logical constructions are to be substituted for inferred entities"³⁰ can hardly be reconciled with the author's disapproval of concepts which cannot be defined in terms of experience. How could anybody go about verifying scientifically a concept like that of Mr. Russell, just quoted? Can a "logical construction" or an "inferred entity" be verified by the empirical methods of the laboratory?

As if that were not enough, F. S. Cohen then proceeds as follows: "In other words, instead of assuming hidden causes or transcendental principles behind everything we see or do, we are to redefine the concepts of abstract thought as constructs, or functions, or complexes, or patterns, or arrangements, of the things that we do actually see or do. All concepts that cannot be defined in terms of the elements of actual experience are meaningless."³¹ May not a "concept of abstract thought" be an "actual experience"? Define "actual experience," Mr. Cohen.

Having thus conveniently eliminated "transcendental nonsense," it would only be natural for F. S. Cohen to imply that "Ethics, conceived as an other-worldly pursuit," has "little enough to do with the practical processes of the law."³² How such a statement can be reconciled with an attempt to justify the view that our jurisprudence and legal philosophy are near to our ethical issues (including man's ultimate purpose and destiny) is difficult to perceive. In such a context, one is not surprised to find a quotation from Russell's *The Harm That Good Men Do*. Not that anyone can deny that even good men do unintended harm from time to time. If they intend genuine harm, they are not *good*. But a man has to define "good" and "harm" intelligently in order to use Russell's title intelligently. The harm that evil men do is more obvious and staggering, and more worthy of a philosopher's strictures.

It is always so easy for some modern to say glibly and superciliously: "Our current ethic is a curious mixture of superstition and rationalism."³³ But the ethics which such moderns would substitute is also a curious mixture of the same kind. It is often a composite of rationalist pride and reckless inhumanity, too. Is it not rationalist pride to say "More is to be hoped I think from the progress of reason and science"?³⁴ Has humanity ever progressed more in science and in works of reason than it has today? Yet it seems to be as helpless as it was in the days of the Greeks to live the ethically good life. Nor does it serve any useful, reasonable or scientific purpose to say with Russell: "I do maintain that self-interest, like altruism, is better when it is *enlightened* than when it is unenlightened."³⁵ What does this illuminative and scientific metaphor mean?

We receive enlightenment from knowledge considered as intimate communion with reality inside of us and outside of us—reality leading from an insignificant me to the First Cause, which is sheer Reality. Is that what Russell means? When it comes to such fundamental, he stops defining. He takes for granted a definition of enlightenment. F. S. Cohen is right when he says: "An ethics, like a metaphysics, is no more certain and no less dangerous because it is unconsciously held."³⁶

Cohen shows how brittle is the ethical system of a Bertrand Russell. He quotes Russell himself on the point: "It may be laid down that every ethical system is based upon a certain *non sequitur*. The philosopher first invents a false theory as to the nature of things, and then deduces that wicked actions are those which show

30. P. 575.

31. *Ibid.*

32. P. 594.

33. P. 612.

34. P. 613.

35. P. 615 (emphasis added).

36. P. 636.

that his theory is false."³⁷ Surely this is an authoritative explication of Russell's own method. It would have been wiser for Russell not to invent a *false* theory as to the nature of things. He could discover the right theory by simply discovering *nature*. Had he done that, he would come so close to the Natural Law as to trip over it.

Another bizarre sophistry culled from F. S. Cohen's many writings in this collection: "Modern ethics seeks to attain moral knowledge through the methods of science. Moral thought which has not made its contact with science seems always to proceed as a search for a master key, a final dogma from which the answers to all moral problems may be inferred. But science rejects all dogmas. And modern ethics, which seeks to attain the status of a science, likewise rejects all dogmas."³⁸

What Cohen inconsistently forgets is that his own statement has not rejected dogma. His statement simply sets up *the dogma that there are no dogmas*. Taken with his previous dogmatic prejudice against *true* definitions, this dogma is rather pointless (without a proper definition of "dogma")! It also sets up the plausibly stupid dogma that modern ethics inherits *much* from the methods of science. With so much science piled up all about us, why has not modern ethics been more evident? With all our science and technology, we succeed in making more destructive bombs, and more precarious peaces. We certainly have not avoided recourse to bigger and bigger wars, slave labor camps and brain washing. Insofar as science means systematic and disinterested search after the natures of things, ethics is scientific when it follows the Natural Law. But if science means only the methods of today's science, including experimental research and verification, logically one would have to take the position that *experiments with murder* must precede the conclusion that murder is wrong.

Holmes' threadbare essay on the Natural Law was included under the title "Law and Metaphysics." Scarcely anything in that essay is worthy of the same metaphysics, unless it be metaphysical to say that "A dog will fight for his bone." In general, this shallow essay demonstrates Holmes' ignorance of the Natural Law. He conjured up a bogey out of his imagination, a convenient caricature. He playfully demolished it.

One could go on. But one grows weary.

GODFREY P. SCHMIDT†

TAXATION AND BUSINESS CONCENTRATION. By Tax Institute, Inc. New York: Tax Institute, Inc. 1952. Pp. 264. \$5.00.

This volume collects the papers delivered at a symposium conducted by the Tax Institute, Inc. in 1950. About half the contributors are practising lawyers and tax specialists, who repeat the frequently voiced complaints that our tax structure favors big business. One after the other they point to Section 102 (which imposes a penalty surtax on unreasonable accumulations of earnings); to Section 115(g) (since amended but which then penalized stock redemptions to obtain funds needed to pay estate taxes); to high rates generally and the capital gain tax in particular; to the non-deductibility of dividend payments; and to various other provisions, all of which are alleged to hinder the growth of small enterprises without seriously affecting larger ones.

Clearly a large, well-established corporation with a layer of protective fat in the form of earnings built up over a long period can better withstand the impact of income

37. P. 641.

38. P. 653.

† Lecturer in Law, Fordham University School of Law.

taxes than can a small, inadequately capitalized, struggling enterprise. But it is a far cry from this to contend, as do some of the contributors, that the present income tax laws inevitably lead to business concentration and eventually even to monopoly.

The conclusions of the economist-contributors are more guarded. Perhaps the most objective paper is that of Professor J. Keith Butters of the Harvard Graduate School of Business Administration. He points out that there is no clear evidence of increase "in over-all industrial concentration in manufacturing during the war and early post-war years," or that recent mergers have significantly increased industrial concentration in manufacturing and mining. From this it would seem that the business concentration allegedly attributable to discriminatory tax laws exists largely in the minds of the critics. So much for the facts as to business concentration.

Professor Butters does find—as expected—that the high corporate tax penalizes smaller enterprises more severely than the larger ones "and in this way contributes to the maintenance or increase in the existing levels of concentration." But, he adds, "almost any tax structure not deliberately aimed to penalize bigness as such would have this effect . . ." Thus such hardship as has been caused by the tax laws is largely unavoidable.

The point is that most of the corporate enterprises which are of a size regarded by some as dangerous to the general welfare attained most of their growth long before the current high tax era. That the present tax structure may prevent others from attaining giant size is not necessarily evil.

JOHN P. ALLISON†

† Member of New York Bar.