REVIEWS AND NOTICES

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Legal Theory. By W. FRIEDMANN. London: Stevens & Sons. 1944. Pp. xvi, 448. (£1, 10 s.)

The English, and perhaps to an even greater degree, the Canadian, lawyer and law student has, until recently, approached law and the study of law from a purely analytical point of view. The study of legal philosophy has been, to a large extent, consciously and almost religiously avoided and left to continental writers. In the last fifty years, however, the Americans, under the leadership of Gray, Holmes, Pound, Cardozo, Llewellyn and others, have more and more turned to an examination of the aims, ideals, objects and techniques of the administration of justice, in the realization that consciously or unconsciously the solution of problems of social control depends not merely on professional skill or craftsmanship but on some ideal of justice outside the law. We know today, as it was known to Plato and Aristotle, that individuals, courts, groups and nations generally are actuated by views of ultimate aims and objects. In attempting rigorously to exclude a study of such ultimate aims from the lawyers we have, perhaps, failed to realize, as Friedmann states (p. 251) that "lawyers who are unconscious of their legal ideology are apt to do more harm than their more conscious colleagues. For their self-delusion makes it psychologically easier for them to mould the law in accordance with their beliefs and prejudices without feeling the weight of responsibility that burdens lawyers with greater consciousness of the issues at stake."

The present volume by Dr. Friedmann does not seek to support a new theory of law. Actuated by the belief that decisions are impelled and directed by some "legal ideology" — a belief which he demonstrates by the discussion of actual English and American authority in Part VI of the present Book (Legal Theory, Social Ideals and Legal Practice) —the author has set himself the ambitious task of describing the content of thinking on legal theory from Aristotle to the present time. He realizes that legal theory is in a sense part of philosophy and at the same time part of political theory. Thinking on man's position in the universe cannot, for the legal theorist, be divorced from thinking on man as a political being. Thus, one must consider the philosopher's views as related to a certain political ideology as, for example, Hegelianism and Neo-Hegelian theories in relation to political ideology leading to the authoritarian "fascist" states. As the author points out, some legal philosophers have been first and foremost philosophers. Others have been politicians using philosophy to support their political views. Of late — and it is to this group Dr. Friedmann and most of the modern American writers belong — lawyers have been impelled by both national and international upheaval of individual and social values and the resulting doubts and skepticism to turn to a consideration of ultimate values and social justice.

To permit a conscious choice between values and objects which will vary from time to time, rather than to prove any given value, Dr. Friedmann attempts within the first half of this comparatively small book to

discuss, *inter alia*, (1) the various views held on "The Search for Natural Justice — Natural Law Theories"; (2) the substance of continental metaphysical thought characterized by Kant, Fichte, Hegel and the later Neo-Kantians such as Stammler, Del Vecchio, Binder and Kelsen, all done in about fifty pages; (3) how modern social developments of the nineteenth century led to the search for certainty and security which marks the thinking of the analytical school of Austin and his followers; (4) how the impact of changing industrial conditions and the intervention of the state into an existing philosophy of economic liberalism lead to the divergent views of Spencer, Gierke and Duguit, for example, on the subordination of the individual in the interest of a collectivist view of society; (5) such varied approaches to Sociological Jurisprudence as that of Ehrlich, Timasheff, Holmes, Pound and Llewellyn in nineteen pages, and in which the so-called "realist" school of the United States is neatly — and more understandingly than is common in England — disposed of; (6) the utilitarianism of Bentham, and the later attempts of Mill and Ihering to reconcile individual and social interests; (7) the modern "lawyer's" approach of Gény and Pound's "Social Engineering"; (8) the effect of modern Socialist, Fascist and Catholic thought.

One may well gasp at the scope which the author purports to cover in this first part of the book, and it would be easy to criticize statements and classifications and to wonder why a certain writer found himself in the company in which Dr. Friedmann chose to place him. The manner in which writer after writer is flashed momentarily on the scene is also a bit bewildering. While the reader cannot fail to be impressed with the ease and familiarity with which the author deals with the most divergent philosophies, he must feel that he has been given either too much or too little. We wonder whether Dr. Friedmann might not find in a subsequent edition that he could make the going a little less heavy for the average English reader by dealing not so much with individuals as with general trends of thought. He has done this to a considerable extent in the opening of his chapters — which furnish a pre-view of the more detailed exposition which follows. In a book of the present size, to give an accurate or complete "thumb-nail" sketch of the number of writers he mentions is not only dangerous, but may, we believe, discourage many readers who should be, as we were, fascinated by noting the relation and inter-relation of large bodies of thought. We must admit that on a first reading this was far from easy since we had to separate considerable detail in order to get what we believed to be the picture the author was presenting.

Part VI of the present book will undoubtedly appeal to the common law lawyer more than the first half of the book, since it is here that Dr. Friedmann actually shows from judicial experience and precedent the effect of legal ideals on the moulding of the law. Two of the chapters in this Part, namely Chapter 24, dealing with and contrasting English, American and Continental jurisprudence — the techniques of case law and precedent — the similarity between underlying and fundamental principles, etc., and Chapter 25, "Social Security and Some Recent Developments in the Common Law," have both previously appeared in this REVIEW ((1942), 20 Can. Bar Rev. 175 and (1943), 21 Can. Bar Rev. 369). Other chapters have appeared in the *Modern Law Review*. All of them furnish admirable material for study by that large part of the profession which still believes, or at least *states* that it believes, that law is fashioned solely from legal material.

Every teacher of law worthy of the name knows that he must teach more than a list of so-called immutable principles. These chapters will furnish some indication of what that "something else" may be. It does not dictate that "something" since in the nature of man it cannot be dictated. It does show, however, the problem of making clear possible choices and of permitting intelligent choice. This must always be an individual matter — which is why we need intelligent judges rather than well-trained legal technicians.

The last part of Dr. Friedmann's book, dealing with "Legal Theory and Some Problems of our Time" discusses such questions as state *versus* international sovereignty, the much-abused "rule of law", and an extremely provocative chapter on the essential legal values of democracy. In this chapter Dr. Friedmann comes closer to expressing his own personal convictions than elsewhere in the book. His conclusion is as follows:

> We may conclude with a brief summary of what appear to be the essential legal values of modern democracy. They are, firstly, the recognition of individual personality, whose development is protected by individual rights. Of these rights those are the most essential which protect the essential personal faculties and spiritual values. Those which protect material conditions of existence, rank lower and are subject to changing conditions of society. Freedom of worship and thought ranks higher than freedom of property.
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> Individual right is balanced by responsibility towards one's fellow citizens and legal responsibility for one's acts.
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> Democracy demands legal protection for equal opportunity of development, regardless of personal, racial, or national distinctions; but the latter postulate is as yet severely limited by the organization of mankind in national states.
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> Democracy further enjoins the law to ensure to the individual the possibility of participation in government, through adequate representation and direct responsibilities.
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> It finally demands a system of law which puts no individuals or classes above the law, guarantees its administration without distinction of persons and expresses the principle that everyone counts for one, in legal rules.

The extent to which we shall be able to attain or maintain these values will mark the extent to which we and the rest of the world have profited from the present war.

The present book should be warmly received. It marks the rebirth of jurisprudential thought in England after many barren years. For some twenty-five years there have been frequent signs of unrest in England with the purely analytical jurisprudence of Holland and Salmond. Nothing, to date, has indicated so clearly as the present volume, the break with the self-satisfaction and isolationism for which such analytical positivism stood.

C. A. W.