THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE

The Philosophy of Law in Historical Perspective

SECOND EDITION

By Carl Joachim Friedrich

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TO A. N. HOLCOMBE

IN FRIENDSHIP

ERROR MULTIPLEX, VERITAS UNA

Preface to the Second Edition

The present edition contains a few corrections as well as additions, notably on pages 7, 49, 64, 119, 129, 166, 173, 175, 176, 182, and 219, that were suggested by the many helpful reviews that have appeared in learned journals. I would like to add that, in view of my general outlook on law and history, the second part does not pretend to be a rounded philosophy of law, nor is it an outline; it merely seeks to highlight certain problems which seem to me to be in the foreground today, while many others which are also being discussed have received more or less satisfactory treatment in the past. One criticism has often been made, and that is that the contributions of contemporary American jurisprudence, particularly the work of so-called realism, have not been given adequate space. I would plead that a treatment which provides a total of fourteen pages for Plato and Aristotle did rather well by contemporary relativists, formalists, and skeptics in assigning the same amount of space. However, I have added a couple of paragraphs and have included a review article which appeared in the thirties and which contains some of my major doubts about this approach to the philosophy of law. I have also included a paper on "Law and History" which was prepared for a conference on law and the humanities under the auspices of the American Council of Learned Societies in 1960 and which has since appeared in the *Vanderbilt Law Review*, October, 1961.

Some critics stress the fact that I did not go into the political and social realities behind law *in extenso*. Quite apart from the fact that the editorially imposed limitations of space forbade such exploration, it seemed to me that my other writings provided considerable evidence of my views. Since I am publishing a comprehensive political theory this year, I hope I may be forgiven for referring to that work as a companion volume to the present study.

In conclusion, I would like to mention that I do not consider myself a Kantian or a neo-Kantian since I am in basic disagreement with Kant's distinction between noumena and phenomena, of norm and fact, which is such a crucial aspect of most contemporary legal philosophy, including the so-called pure law and realist schools. Rather do I incline toward the view that ultimately norm and fact are aspects of the same reality revealed and known to us only through human experience. This is a point of view which makes me feel akin to Aristotle and Thomas Aquinas, on the one hand, and to the most advanced thinking on the nature of reality in contemporary science, on the other hand.

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Preface to the First Edition

This brief volume is an effort to discuss the problems of the philosophy of law, as they present themselves today, within the framework of its history. Such an enterprise presupposes that one is willing to select very carefully among the mass of available materials and viewpoints. Inevitably, one will be influenced in making such a selection by what he considers important to the discussion for our time. Much that is interesting must necessarily remain undiscussed. I have tried to use as a measuring rod and standard of selection the relatively objective one provided by the originality of the different contributions. There is one exception, namely, the natural-law writers of the seventeenth and eighteenth century discussed in chapter xiii; their originality is disputable indeed.

This book is an English version of *Die Philosophie des Rechts in historischer Perspektive,* which appeared as one of the volumes of the "Enzyklopädie der Rechts- und Staatswissenschaft," under the editorship of Professor Wolfgang Kunkel (Munich). I am very grateful for his encouragement and helpful advice. While this English edition in large part follows the German original, there are also significant variations and additions, especially in chapters xi, xx–xxiv, and the notes. The notes make no pretense at completeness, obviously; they merely seek to give some hints as to the sources of some of the more important statements made in the text. The English text was read and criticized in its entirety by Professor A. P. d'Entrèves (Oxford and Turin) and by Professor Samuel Shuman (Wayne University). The comments of both were of very great assistance, as were the observations of a number of European critics and reviewers. Dr. Henry Kissinger (Harvard) had at an earlier date offered valuable comments on the German manuscript.

C. J. F.

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PART ONE

The Historical Development

I. *Introduction*

Every philosophy of law is part of a particular general philosophy, for it offers philosophical reflections upon the general foundation of law. Such reflection can either be derived from an existing philosophical position or may lead to such a position. It is characteristic of the history of the philosophy of law, and very natural too, that philosophers have been inclined toward the first approach, lawyers and jurists toward the second. But not every philosophy leads into a philosophy of law, or has done so. Thus Descartes philosophized little about law. On the other hand, many jurists are satisfied with studying the mass of legal norms in front of them, leaving to others any general philosophical exploration of this world and contenting themselves with the general views that are common to the profession. The common law, which is largely traditional, rests on such a general view of the law. It is unquestionably possible to be a good lawyer or jurist without being clear about one's legal philosophy, as it is certain that one can be a good philosopher without having a philosophy of law. What must be questioned is the thought often expressed by lawyers of the more practical sort that law does not involve any philosophy of law. For the law consists in statements or propositions which are put in words, and such statements, commonly called judgments—and typically being normative judgments in the law—occasion the kind of general, philosophical questions significant for such judgments. If positivists, pragmatists, and formalists at times speak of the law as if it existed in a vacuum, unrelated to values, opinions, or beliefs, this sort of viewpoint implies actually a philosophical position of sorts. Likewise, philosophy cannot declare itself unconcerned with the philosophy of law, and if a particular philosopher does not develop a philosophy of law, this does not prevent others from applying such a

philosophy to the law. Thus we have a Cartesian philosophy of law, although Descartes himself did not work it out.

Two viewpoints must therefore be taken into account in considering the philosophy of law, if such a consideration is to be scholarly or "scientific" in the broad sense. The word "science" in such a statement is of course not used in the narrow sense in which science deals only with general regularities, rules, or even "laws," meaning the laws of nature of the natural sciences.[1] We shall, in what follows, always use the term "science" in its more general meaning. According to this meaning, it is the nature of scientific work—in contrast to the opinions of laymen, to religious dogma, to poetry and the like—that such work is related to a *corpus of learning* which, steadily increasing, deals with a particular *body of experience* and which is thus enlarged by men concerned with this particular body of learning, the scholars or scientists, with the aid of *methods* regarding which there exists *agreement*, potential or actual, among the workers in this field of learning.[2] What follows from this general notion of science quite clearly is that there are, as just stated, essentially two viewpoints from which the philosophy of law may be treated, and they will both be presented here. First, a "scientific" philosophy of law must review the development of philosophical doctrines in order to determine which problems have already been clarified significantly so that we can build upon the foundation provided by previous thought. And, second, it is necessary at least to sketch upon which philosophical ground each particular contribution rests, that is to say, from which general philosophy it has emerged. We hope to deal with the first of these viewpoints in the first part of the book, in which a brief history of the philosophy of law is

[1] Such a concept does not even fit the natural sciences in their entirety, for there are very important natural sciences, like anatomy, which do not concentrate upon laws or generalizations but upon structures and configurations. The morphological aspect is important in political science.

[2] This definition is elaborated in "Political Science and Political Philosophy," the author's contribution to a volume entitled *Approaches to Politics* and soon to be published by Northwestern University.

presented. But it may be well to say a few more words concerning the second viewpoint.

All scientific understanding and knowledge rest upon experience. But the sensationalists, at times called empiricists, were in error when they tried to reduce all human experience to the experience of the senses. The intellectual and spiritual life of man is part of his experience. Thinking itself is a kind of experience, as are feeling, willing, and, more especially, creative production. For law, all these kinds of experience are of importance.[3]

It would be much easier to arrive at philosophical clarity if these several kinds of experience could be seen as a logical and coherent unity. This is not in fact possible, and all efforts to date to accomplish this (and they constitute a considerable part of the history of philosophy) have led to the denial of one or another of the realms of experience. This needs further elaboration. The experience of observing a succession of sense impressions leads to the hypothesis of causation. Hume analyzed the hypothetical nature of the law of causation; Kant in turn showed how essential this law is for all orderly thought. Without positing causes, it is impossible to think about the experience of the senses (or about a number of other things—notably about history, which presents itself to the observer in the form of reports about things which allegedly have happened). From this hypothesis of cause and effect one arrives at the philosophical position known as determinism. But the experience of willing, of making a decision in a situation permitting alternatives, leads to the hypothesis of freedom. It is impossible to engage in the act of willing if one does not presuppose that one may act either one way or another. The hypothetical nature of this freedom was formulated most sharply by Hobbes, but here too Kant was able to show that the hypothesis of freedom is necessary for an acting person. It is the meaning of the famous categorical imperative to demonstrate the essential nature of all normative judgments. But the logical consequence of the hypothesis of freedom is a philosophy of indeter-

[3] Cf. Michael Oakeshott, *Experience and Its Modes* (1933); Eduard Husserl, *Erfahrung und Urteil* (1938).

minism. Existing monistic philosophical systems may therefore be divided into two classes, those which rejected the hypothesis of freedom, or at least reduced it in scope, and which therefore are deterministic; and those which, if they did not reject the hypothesis of causation, have greatly restricted its scope, and which are therefore voluntaristic. The latter is true, in a general sense, even when the rejection of the hypothesis of causation is linked to some kind of deity (theological systems). But there is still another possibility, which consists in an attempt to hypostasize two sharply separated worlds, to separate, that is, the world of norms from the world of events in nature, as did Kant (dualistic systems). Yet there always remains a residue of philosophical incoherence; for since the logical component of human behavior is a part of human experience, it follows that we cannot make the whole of experience logically consistent. We have developed this thought with reference to the questions of causation and of freedom, which are related to those of observing and deciding. But similar difficulties appear if one considers the problems of creative experience, and, again, if one turns to feeling, which is still another experience that can be equated with the other kinds of experience only by highly artificial constructions (although this has often been attempted).

A radical philosophy of experience thus appears to be a general view of the world which stresses problems. In this respect, it possesses a certain kinship with pragmatism, but problems are not, as in pragmatism,[4] derived from operational and related notions, but are built into the very fabric of the basic given. They are the first order of being. A philosophy of experience is a philosophy of the problem—the term "problem" taken in the very concrete sense in which the word *problema* originally meant in Greek something which, like a roadblock, is thrown across our path. The ever-recurring problem is how all of human experience may be made fruitful for the progressive understanding of a particular

[4] John Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (1929), esp. pp. 99 ff., 122 f., and 223 ff.; see also his important earlier study, *Experience and Nature* (2d ed.; 1924). Cf. Anatol Rapoport, *Operational Philosophy: Integrating Knowledge and Action* (1954).

object of knowledge. Law is such an object, and we are advancing at the outset, in the light of our philosophy of experience, the basic hypothesis that, without a comprehensive grasp of the problems of all experience, law can be presented only in an artificial and contradictory way. Only by taking account of all the different kinds of experience can we give an image of the law adequate to reality and at the same time general. Only thus can a comprehensive philosophy of law be developed.

Consequently, the historical chapters of this book are actually an integral part of the philosophical and systematic approach; for unlike the historicists and positivists, I believe that history, and especially intellectual history, exhibits design and that the successive philosophies of law embody progressive insights, parts of the truth we seek. Therefore, such systematic history will provide the ground for anything we might add. And in turn, the systematic part does not pretend to present a rounded philosophy of law but rather what I conceive to be emerging consensus concerning a number of issues which have remained "open." One's search for the novel is tempered by a realization of "the old truth" which Goethe counseled his romantic contemporaries to grasp.[5] Most of the so-called novelties are old errors in new linguistic garb. But there *are* new perspectives emerging. Mr. Justice Holmes's well-worn phrase that "the life of the law has not been logic, but experience" poignantly overstates a crucial insight—crucial, that is, if experience is seen as broadly and comprehensively human. Therefore, the positions as they emerge from the historical panorama, when implemented by the supplementary systematic observations delineate my philosophy of law. It is not a Kantian or Neo-Kantian position, not a natural law or positivist position, but rather a view of law and justice in which fact and value are seen as intimately related in all human experience in politics.

[5] "Das alte Wahre, fass es an," Goethe wrote. My position is radically at variance with that of H. L. A. Hart (*The Concept of Law*, 1961), who on p. viii explains that "in the text the reader will find very few references to other writers," though at the end of the book "there are extensive notes." Hart adds that he hopes "that this arrangement may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain. So long as this belief is held by those who write, little progress will be made in the subject. . . ."

II. *Law as the Will of God*

THE HERITAGE OF THE OLD TESTAMENT

Ancient Judaism has played a decisive role in shaping the origins of Western concepts of law.[1] For the one God reveals himself very differently from the Greek gods. Jahweh, the god without name of Israel, was clearly distinguished from surrounding gods of other peoples by his preoccupation with law. The Old Testament is filled with acts of legislation, with the struggle of God to secure the observation and enforcement of these laws, with the reward or punishment of the chosen people consequent upon their behavior toward these laws. Everyone knows that all Christians derive a dual obligation from this heritage. On the one hand, the Ten Commandments; on the other hand, the warning against mere obedience to law, that is to say, against pharisaism and sanctimoniousness. Max Weber has shown in his *Sociology of Religion* how closely the position of the priest in ancient Israel was connected with this god, the legislator. Indeed, the faith itself has drawn nourishment from the position of the priest as interpreter of the law.[2]

It has less frequently been observed how extraordinarily powerful has been the influence of these religious notions upon West-

[1] See Robert Pfeiffer, *Introduction to the Old Testament* (1941), esp. pp. 51 ff. and Part II, chap. vii, pp. 210–70. J. M. P. Smith, *The Origin and History of Hebrew Law* (1931) may be compared with the generalizing approach of H. Spiegelberg for an insight into the categories employed. The most authoritative work on the general historical background is Eduard Meyer, *Geschichte des Altertums* (1881). A brilliant special study related to the problems of legalism is that of Louis Finkelstein, *The Pharisees* (1938), while H. M. Orlinsky, *Ancient Israel* (1954), gives a succinct portrait of the setting of these ideas (esp. pp. 153 ff.).

[2] Max Weber, *Gesammelte Aufsätze zur Religionssoziologie*, Vol. III: *Das Antike Judentum* (1893; 4th printing, 1947); an English edition was published under the title *Ancient Judaism*. Cf. with this the classical account of Julius Wellhausen on Israel in the *Encyclopaedia Britannica* (9th ed.).