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Introduction to Volume VIII;Introduction

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INTRODUCTION TO VOLUME VIII

A principal part of this issue is devoted to a consideration of Marxist-Soviet ethics and jurisprudence. These essays add to a literature which has already developed in the law journals and in such specialized periodicals as *Soviet Studies* and *Russian Review*.¹ The editors believe that there is urgent need for continued and intensive examination of the problems which Marxist philosophy and its Soviet incarnation present. This volume is a small contribution to this process. The problems examined are peculiarly problems of the natural law, if the natural law is to be found in reflection on common experience and in observation of human needs and the means of meeting them.

At the same time that these essays confront problems stamped with a political and ideological urgency, it may be possible to consider what their authors say in a wider context. The problems, perhaps, may be looked at under this heading: the relation of general theories of reality to specific

1. Some articles examining the foundations of Soviet law are the following: Harold J. Berman, *Soviet Justice and Soviet Tyranny*, 55 COLUMBIA LAW REVIEW 795 (1955); Harold J. Berman, *The Challenge of Soviet Law*, 62 HARVARD LAW REVIEW 449 (1949); Wilhelm R. Beyer, *Aktuelle juristische Hegeliana*, 47 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 227 (1961); Edgar Bodenheimer, *The Impasse of Soviet Legal Philosophy*, 38 CORNELL LAW QUARTERLY 51 (1952); Umberto Cerroni, *Kelsen e Marx*, 37 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 660 (1960); S. Dobrin, *Soviet Jurisprudence and Socialism*, 52 LAW QUARTERLY REVIEW 402 (1936); Lon L. Fuller, *Pashukanis and Vyshinsky: a Study in the Development of Marxist Legal Theory*, 47 MICHIGAN LAW REVIEW 1157 (1949); George Ginsburg, "Socialist Legality" in the U.S.S.R. since the XXth Party Congress, 6 AMERICAN JOURNAL OF COMPARATIVE LAW 546 (1957); V. Gsovski, *The Soviet Concept of Law*, 7 FORDHAM LAW REVIEW 1 (1938); George C. Guins, *Soviet Law—Terra Incognita*, 9 RUSSIAN REVIEW 16 (1950); George C. Guins, *Soviet Law in the Mirror of Legal Science*, 16 AMERICAN SLAVIC AND EAST EUROPEAN REVIEW 66 (1957); John N. Hazard, *Soviet Law: An Introduction*, 36 COLUMBIA LAW REVIEW 1236 (1936); John N. Hazard, *The Trend of Law in the U.S.S.R.*, 1947 WISCONSIN LAW REVIEW 223; John N. Hazard, *Soviet Socialism and Due Process of Law*, 48 MICHIGAN LAW REVIEW 1061 (1950); Max Laserson, *Russische Rechtsphilosophie*, 26 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 289 (1932); Rudolf Schlesinger, *Recent Developments in Soviet Legal Theory*, 6 MODERN LAW REVIEW 21 (1942); Rudolf Schlesinger, *Justice in Russia: Dissent*, 60 YALE LAW JOURNAL 976 (1951); Rudolf Schlesinger, *Social Law*, 12 SOVIET STUDIES 56 and 145 (1961); Samuel I. Shuman, *Soviet Legality as Revealed by Soviet Jurisprudence*, 5 WAYNE LAW REVIEW 209 (1959); N. S. Timascheff, *Soviet Jurisprudence Since World War II*, 11 RUSSIAN REVIEW 233 (1952). A. Yurchenko, *The Present Soviet Interpretation of Law*, 9 BULLETIN (Institute for the Study of the U.S.S.R.) 9 (1962).

In addition, the following books bear on Soviet jurisprudence: HAROLD BERMAN, *JUSTICE IN RUSSIA* (Harvard University Press, 1950); V. GSOVSKI, *SOVIET CIVIL LAW*, 2 vols. (University of Michigan Press, 1948-49); GEORGE GUINS, *SOVIET LAW AND SOVIET SOCIETY* (The Hague, Netherlands, 1954); K. GRZYBOWSKI, *SOVIET LEGAL INSTITUTIONS: DOCTRINES AND SOCIAL FUNCTIONS* (University of Michigan Press, 1962); JOHN N. HAZARD, *LAW AND SOCIAL CHANGE IN THE U.S.S.R.* (London, 1953); HANS Kelsen, *THE COMMUNIST THEORY OF LAW* (New York, 1955).

A convenient translation of some basic expositions of Soviet legal philosophy is *SOVIET LEGAL PHILOSOPHY*, translated by Hugh W. Babb, with an introduction by John N. Hazard (Harvard University Press, 1951).

areas of human effort. It is characteristic of those trends of Anglo-American thought usually labeled empiricism and pragmatism to concentrate on the specific areas with their particular problems; and in America, pretty generally, I suppose, we perceive the benefits of this approach and share a conviction of its advantageousness. In law, as in science, we prefer the concrete situation, the discrete set of facts.² Each field is found to have its own problematic, and the answers are assumed to be most successfully obtained by a "working out" of the problems in the context in which they are encountered in practice. Our distrust of speculative thought, always strong, has received its most recent technical support in the works of those philosophers of language, particularly at Oxford, who suggest that most of the traditional questions of philosophy have been verbal puzzles, which may be elucidated by a proper understanding of linguistic usage. Professionally, technically, perhaps even emotionally, we are committed to our own corners.

Our faith in our methods extends naturally to our materially most menacing problem, and suggests the final solution of the cold war. We believe that as the Soviet Union becomes a settled technocratic society, managed by a bureaucratic and scientific elite, its concern with the solution of the problems of its domestic development will lead it to amend or drop the ideological posture which we find at once absurd and terrifying.³

Possibly we are right in our belief and in our expectation. It would be to contradict all experience to doubt that operational involvement has measurable effect on theory, formulation, and general perspective. Some of the essays herein sustain our hope. Helmut Slapnicka's note, in particular,

2. Over twenty-five years ago, Gustav Radbruch noted as to Anglo-American jurisprudence: The anxiety of the positivist lest morals or right law should encroach upon the realm of positive law resulted in a horror of any valuating science of law. . . . The natural law in its German form is before the eyes of the English jurists as a deterrent example. "A literature formidable both in bulk and character," Salmond says about it. "The foliage is luxuriant but the fruit is scanty," Bryce says about "lucubrations of this type" and adds that life is too short to deal with these books.

Radbruch observed, "The first American who dared to put 'philosophy of law' on the title-page of a book was Roscoe Pound. But his observations about the purpose of law stop where a real legal philosophy ought to begin." Radbruch concluded, perhaps with undue sanguineness:

But it is only possible to wait upon the doctrine of individual case and to evolve legal ideas from case to case as long as there are not deep cleavages between case and case, as long as development proceeds in a steady flow, as long as it does not go over weirs and cataracts. But when shattered social conditions press for quick regulation through the Legislature, general theories about the aims and instruments of law, a legal philosophy and a legal policy must be ready to hand. For this very reason the rapidly changing social conditions of America have brought a rebirth of legal philosophy nearer the less volcanic English conditions.

Gustav Radbruch, *Anglo-American Jurisprudence Through Continental Eyes*, 52 *LAW QUARTERLY REVIEW* 530, 540, 542, 543-544 (1936).

3. See the criticism of the related view that totalitarianism in the Soviet Union may also decline under similar influences, ZBIGNIEW BRZEZINSKI, *IDEOLOGY AND POWER IN SOVIET POLITICS* 13-36 (1962).

documents the extent to which a blind copying of Soviet law, ideologically enjoined, has been halted by local exigencies in Eastern Europe. D. Joravsky's article somewhat similarly suggests that, although the malleability of science seems greater than its practitioners usually assert, there are some limits to the serviceability of biological theory for a higher ideology.⁴

Yet, as the pages which follow suggest, we may also underestimate the role of grand theory and general formula. Both Helmut Dahm and Georges Cottier are passionately concerned with the origins of Marxist thought; they are inclined to analyze its continuing tensions in terms of its "immanence," its denial of "transcendence."⁵ Their approach mirrors that of significant Soviet philosophers of the present, like V. P. Tugarinov, who is copiously cited by Dahm. If these strikingly abstract categories of thought seem so charged with consequences, does not this kind of general formula demand our further attention?⁶

It would seem at least historically evident that theory breeds theory; and that abstract thought has a history of abstract predecessors. Historians of ideas take this history seriously, and, indeed, according to Collingwood, this history seems to be the only history possible.⁷ As Dahm suggests, this history has its parallels, and as George Kline suggests, it has its paradoxes and even, perhaps, its lessons.⁸ There are, of course, a multitude of influences on the history of thought other than intellectual ones. They are analyzable in biological, psychological, economic, social, political, or personal terms. These authors do not deny these influences, but I believe they would agree that the history of thought cannot be reduced to them. They are all serious historians of ideas.

But need we take this history seriously, and whom do I mean by "we"? By the latter I mean myself and the reader (professor, lawyer, or judge) who has more interest in the flow of human ideas than the cataloguer's detached and inhuman curiosity. Must we admit that the general ideas, the

4. *Infra*, pp. 117-120, 47-50.

5. *Infra*, pp. 69-78, 104-105.

6. There is abundant indication that the Russians have in the last two centuries taken this kind of category more intensely to heart than their Western counterparts. In *THE BROTHERS KARAMAZOV* Ivan observes:

"And what have Russian boys been doing up till now, some of them, I mean? In this stinking tavern, for instance, here, they meet and sit down in a corner. They've never met in their lives before and, when they go out of the tavern, they won't meet again for forty years. And what do they talk about in that momentary halt in the tavern? Of the eternal questions, of the existence of God and immortality. And those who do not believe in God talk of socialism or anarchism, of the transformation of all humanity on a new pattern, so that it all comes to the same, they're the same questions turned inside out. And masses, masses of the most original Russian boys do nothing but talk of the eternal questions! Isn't it so?" F. DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 242 (bk. V, ch. 3) (Constance Garnett trans., 1937).

7. R. H. COLLINGWOOD, *THE IDEA OF HISTORY* 304 (1946).

8. *Infra*, pp. 58-66 & pp. 31-34.

preposterous abstractions, of Hegel, Feuerbach, Marx, have changed the shape of both biology and law for a substantial portion of mankind, and that this change is not without its impact upon us?

The Soviet Union has taken its theory seriously. A problem has bothered Western thought since Plato phrased it through Thrasymachus: Is law anything but the interest of the rulers?⁹ In accepting the position of Thrasymachus, the theorists of the Soviet Union have, however, offered with it a promise of redemption: a future identification of rulers and people in a single class, mankind. Meanwhile, the people rule through the Party and, using law to destroy the remnants of individualism, work for the building of Communism. It would seem inaccurate to suppose that the general theory has not had as much effect on the quality of law in the U.S.S.R. as any specific problem of the Soviet economy or Russian environment. The creation of a vast vigilante force, the *druzhiny*, for a recent example, is a reflection of Communist theory as much as a response to local conditions.¹⁰ In a way curiously contrary to some Marxist assumptions, "consciousness," "spirit," "rational thought" have been employed to modify the environment, the economic base, the conditions of life. The Marxist description of reality has functioned programmatically to give solutions to particular situations.

Our authors urge us to consider this phenomenon, beginning with an examination of its roots in philosophical activity. J. M. Bochenski, in particular, invites our attention to the development of a powerful system of education producing an enormous quantity of professional philosophers and enormous quantities of printed philosophical matter.¹¹ If general theories have consequences at all, he is right to be excited by this major effort to spread systematic speculative thought. We might even take this educational enterprise more seriously than the Soviet efforts to raise their output of physicists and engineers.

Professional philosophical activity, however, does not exhaust what I mean here by "general theory" or "general ideas." The activity of the schoolmen of Soviet philosophy is not to be compared in importance with the activity of the writers. *Bleak House* was worth more than a book of Bentham; *One Day in the Life of Ivan Denisovich* is of more jurisprudential significance than a volume of Vyshinsky.¹² Dr. Johnson was

9. THE REPUBLIC, bk. 1, 336^b-354^c.

10. *Infra*, pp. 28-29.

11. *Infra*, pp. 7, 10-12, 20, 29.

12. *One Day in the Life of Ivan Denisovich* (see *infra*, p. 65, fn. 39) is apparently the first work of fiction to be permitted to appear in the Soviet Union portraying life in a labor camp for "criminals." It is like many of the other novels of muted protest described by

right in *Rasselas* in seeing the poet as the legislator of mankind. It is thus that Helmut Dahm in his essay looks first to contemporary Soviet literature for the most revealing expressions of Soviet expectations, values, and purposes.¹³

General ideas, of course, do not exist except in some living person's mind. They take effect only through the mediation of a person. They are taught principally, not in textbooks, but by personal example. The Soviet Union would not exist today without the force provided it by the great examples of purpose offered by the masters, Marx and Lenin. Here is another merit of Dahm's essay: he focuses on the appeal which certain ideas of the Enlightenment, presented in fiction, made to Lenin, who found in Chernyshevskij's novel a rationale and a hero.¹⁴

The following material suggests, then, the effect of general theories on law. Formulated explicitly in professional language or contained implicitly in the images of a work of art, general notions of the nature of reality are consciously held and activate at least some of the shapers of Soviet society. Looking at this other legal system, we can observe the play of notions of purpose, of responsibility, of freedom, and of humanity different from our own. The essays in this volume do not attempt to deal with the wider problems of whether all such notions are necessary or superfluous, helpful or harmful, enlightening or confusing. But in reading these essays we may ask if we should, or can, reject the intrusion of such broad notions into our own professional field, a field so richly provided with its own problems, and so generously endowed with its own techniques for handling them.

The question does not seem an irrelevant one when so many persons concerned with the law and its learning seem to have consciously chosen to deny the relevance of the fundamental notions or at least to treat them as "frozen," as givens beyond rational inspection. H. L. A. Hart is embarrassed at the quaintness of speaking of "purpose" in connection with law.¹⁵ Only one American law journal has reviewed Ellul's *The Theological*

Dahm in that the protest is never explicitly formulated. These novels recall the comments of a nineteenth century French critic of Russian literature:

It is not wholly correct to say that Turgenev *attacked* slavery. The Russian writers never attack openly; they neither argue nor declaim. They describe, drawing no conclusions; but they appeal to our pity more than to our anger. Fifteen years later Dostoyevski published his "Recollections of a Dead-House." He took the same method — without expressing a word of indignation, without one drop of gall; he seems to think what he describes quite natural, only somewhat pathetic. This is a national trait. E. M. DE VOGÜÉ, *THE RUSSIAN NOVELISTS* 105 (J. L. Edmands trans., 1887).

13. *Infra*, pp. 51-58.

14. *Infra*, pp. 63-64.

15. H. L. A. HART, *THE CONCEPT OF LAW* 184-188 (1961).

Foundation of Law.¹⁶ Few Americans are likely to be easily persuaded by Arthur Kaufmann that metaphysics can shed light on the paradoxes of the law.¹⁷ The state the world is in, some might seem to feel, comes from the deplorable Communist habit of letting general principles dictate specific results.

Is our objection only to the particular principles invoked? Is our repugnance to being taught in our own field only to being taught by dialectical materialism? Is not there an equal repugnance to Thomistic metaphysics, as in Kaufmann, or neoorthodox Protestantism, as in Ellul, having any say in the statement, elucidation, or development of the law? Is it not believed that any general theory like the natural law is at worst a misleading slogan and at best an empty one? Is it not wondered what such theory can teach us on the problems we confront professionally, legally, judicially, educationally?

The champions of realism have established that law is not a self-contained chain of syllogisms: we are responsive to sociological, economic, and psychological fact. We have learned, further, to conceive law functionally as an instrument of human purpose. We never tire of asking the reason for the rule, and the reason for that reason. But we stop at the widest questions of value and meaning.

Must we cut the chain of questions short, or does a legal "Why?" become at last a metaphysical or theological one?¹⁸ Surely our law does not exist in a professional vacuum, insulated from conviction as to human purpose, from all description of the reality in which we move and live. If the right place to start from is the field, do we not, in working it out, encounter assumptions, implications, values we brought with us to it, and do not these cry out for a more general treatment? Can we not strain to catch, under the rhetoric of Marxism-Leninism and the fantastic phraseology of Hegelianism, the traces of similar encounters with experience? Is natural law not found in these traces?

Necessarily cautious, aware of the ambiguities of language, sensitive to the fragility of most grand explanations, conscious that the trick may be to find the right plane, the right level, of generality — can we, any more than those Soviet citizens described by our authors, help raising the questions? Do we not all suspect that to ask a question is to half possess the answer, and that to share a question is to share a nature and a purpose?

JOHN T. NOONAN, JR.

16. 36 NOTRE DAME LAWYER 238 (1961). The review, *infra*, p. 188, thus makes two.

17. See *infra*, pp. 79-96.

18. Cf. Tugarinov, cited *infra*, p. 69.