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Books Reviewed

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BOOKS REVIEWED

GRIECHISCHES RECHTSDENKEN. By Erik Wolf. Vols. I, II, III₁ and III₂.^{*}
Verlag Vittorio Klostermann, Frankfurt am Main, 1950-56. Pp. 435,
494, 336 and 432. DM. 148.00.

This is one of the rare works which it is almost an impossibility to review, and almost an impertinence to praise or criticize. The author, whose amazing learning at times is simply overwhelming, proposes nothing less than to write a comprehensive and, in a way, conclusive presentation, analysis, and interpolation of the whole of legal (or, perhaps better, lego-philosophical) thought which from the "mythological age" down to the Macedonian conquest preoccupied the mind and the emotions of the Hellenic peoples. All this Professor Wolf accomplishes against the background of an astonishing array of factual information mastered with great dexterity, superb scholarship and, one suspects, loving care. Hence any reviewer, unless he intends to write a companion volume, must confine himself to a few basic observations. But the more the interested reader penetrates into the subject which Wolf discusses so splendidly and competently, the more he is tempted to say something about it; and this not so much in the spirit of disagreement as by way of a quiet scholarly conversation over a tremendously important and at the same time exceedingly fascinating problem.

In his introductory remarks Wolf cautions the reader not to interpret or "understand" the texts and traditions of early Greek myths or pre-Socratic authors in the spirit of our own time. The traditional "classical" (whatever that means), Scholastic, Romantic, or humanistic interpretative approaches to early Greek thought, the author rightly maintains, only too readily succumb to the danger of falsifying the original meaning of these texts or traditions by reading into them concepts, conceptions, ideas, ideals, and even prejudices (including our own greatly tainted *Weltanschauung*) which were totally alien to the early Greeks. Hence we must try to comprehend, through intuitive insights and direct apprehension, the actual messages which these old sayings convey, rather than evaluate (and distort) them in the light of what they mean to us and to our standards of value. The whole problem, then, comes down to this: direct apprehension (*Wesenschau*) will have to take the place of valuation, and *Nachführung* (perhaps *Nachdichtung*) that of interpretation. Thus, ultimately, the author opens up the bewildering and, possibly, never fully to be answered problems of semantics, limitations of intercommunication, analogy and translation. In keeping with his plea for immediate comprehension and direct apprehension in the sense of "*Wesenschau*," Wolf subjects the early Greek texts, many of them fragmentary and extremely obscure, at least to the ordinary reader, to a thorough "revision" and "retrans-

^{*} Vol. IV is still in preparation.

lation," with the result that in not a few instances his findings differ considerably from the traditional and commonly accepted renditions.

Whether, on the whole, the "revisions" suggested by the author—which are often as challenging as they are original—can and will be accepted without reservations, is not for the reviewer to say. Steeped in the traditional approach, the reviewer at times finds it somewhat difficult and even impossible fully to concur with some of these "revisions," especially since the author frequently seems to ignore the very canons which he himself establishes in his introduction and to which he commits himself univocally. To be more specific, Wolf is to a large extent influenced by, and perhaps even dependent on, the existentialist philosophy of Martin Heidegger and Karl Jaspers, and the particular nomenclature coined and used by them. This becomes apparent, to cite but one instance, in his statement¹ that the Dike "*das einem jeden Seienden wesenhaft Zukommende erfüllt . . . es zu sich selbst . . . zu seiner Entfaltung . . . und zu seinem Vergehen . . . zu bringen weiss . . . Dike ist . . . diejenige Ordnungsmacht, welche das Wesen der Menschen und Dinge zu [ihrer] Reife bringt und dafür sorgt, dass ein Jegliches nicht nur 'zu seiner Zeit' (wenn es 'zeitig' ist) geschieht, sondern auch ('zuletzt') von 'seiner Stunde' ereilt wird.*" In another connection² he refers to the Dike as "*das lichtende und richtende, Ordnung ordnende und Geordnetes erhaltende Wesen*"; and "*indem sie 'anwest,' geschieht was 'δίκη' ist.*" But this kind of ontological interpretation, aside from its poetical beauty, definitely contains a rank anachronism, in that it constitutes "*das Sein des Seienden*" or "*das Wesen*" as the essence of everything. Viewed in this manner, the original Dike, this really incomprehensible factor, becomes "*durchschaubar*" (rationally comprehensible) and even rational in the sense of later philosophies. It might be appropriate here to point out that language in general, both in its simplicity as well as complexity, is a reflection of mental operations. This reflection can be, and incidentally is, manifested in diversity of ways. Every new linguistic concept fundamentally represents a new intellectual creation. Consequently, no concept of one language or one epoch is simply transferable to another. This fact is brought home most convincingly whenever we deal with the texts of the mythological age.

In the opinion of the reviewer the Dike, like the Themis, is an essentially vague "religious" term—"religious" in the sense of emotional commitment—and like the ultimate rationale of all things, basically "*undurchschaubar*" and incomprehensible except to the "inspired." It is, at least for us, an "irrational" or, better, "metarational" force which cannot simply be reduced to a rational principle or concept. In short, it is not a noetic problem as the author tries to make it out, for noetics is a relatively late phenomenon; but a "metanoetic" or "paranoetic vision." Dike as a universal principle or concept is definitely a Stoic notion. The same criticism could be applied to Wolf's interpretation and discussion of Heraclitus of Ephesus, to mention one other instance. Despite the author's assertion³ that he proposes to let Heraclitus speak for himself without

1. WOLF, 2 GRIECHISCHES RECHTSDENKEN 209.

2. *Id.* 339.

3. 1 WOLF, *op. cit.* at 237.

committing him to any preconceived philosophical valuation, the reviewer strongly suspects that Wolf is here under the spell of Josef Brecht's thesis that Heraclitus was the "first existentialist." Be this as it may, Wolf's novel and certainly challenging renditions of the Heraclitean fragments fairly smack of existentialist notions cloaked in the characteristic existentialist nomenclature of Heidegger, such as "*Schein der Erscheinung*," "*wes*," "*entwes*," "*Zuteilung des Zukommenden*," "*das Unzukömmliche*," "*das Unbegriffene*," "*Entwesung*," "*das Imrechtsein des Seienden*," "*Verfasstheit des Wesens*," and "*in Unordnung befindliches Unwesen*."⁴

Perhaps Wolf is oblivious of the possibly "shamanic" background of early Greek mythology (and early Greek "philosophy"). In the further elaboration of this "shamanic theme" the reviewer wishes to recall, for instance, that Lucretius once compared the pronouncements of the earliest Greek philosophers to the obscure and often incomprehensible oracles of Apollo, the patron of the inspired but not necessarily rational, consistent, or intelligible seer of old. The same Lucretius also hails what he calls the poetry of Empedocles as the voice of a divinely inspired genius who proclaimed his insights and decrees of fate in such a way that he could hardly be called a mortal man, and with more certainty and sanctity than any delivered by the Pythian prophetess. This picture of Empedocles, as drawn by Lucretius, is one of a man capable of intuitive divination, second insights (which become manifest in visions and dreams); of a mystic's commerce with the divine, and capable of displaying the "artistic temperament" usually ascribed by ancient tradition to the inspired or "mad" poet. Thus, according to Lucretius, Empedocles was really a prophet-seer, poet, and savant (philosopher) all in one: he was, in other words, a prototype of the original "prophet-poet-savant" combination.

Needless to say, this complex prototype is essentially the Eurasian shaman (the old bard, the Roman *vates*, the Gallic druid, the old Irish *fili*, the Welsh *Awenithion*, the Nordic *Thulr*, the Indian *Kavi*), that inspired prophet-seer, wonderworker, poet, and savant who, while in a fit of divinely inspired madness, interprets the past, prophesies the future, and reveals the mysterious and incomprehensible workings of the gods in solemn and usually obscure poetic (hieratic) words. The prophet-poet-savant of old had no *voûs*, but he was possessed of divine inspiration which, incidentally, constitutes the oldest, though certainly metalogical "theory of knowledge." This knowledge is an exclusive "gift of heaven." In our own time, according to the reports of Professor H. M. Chadwick, the Siberian shaman, this heir of the original shaman, still says about himself: "The gods, with whom I confer and whose commands I understand and heed, have appointed me that I must wander beneath, upon and above the earth . . . I am the shaman, who knows the past and the future and everything that happens in the present, beneath, upon and above the earth. And I speak about these things with authority and in an exalted language. For the gods speak through me." But does this not sound like some of the orphic-mythological pronouncements? And when the Siberian shaman (or *baksha*), with one or

4. Some interesting observations concerning the nature of the Heraclitean Dike can be found in G. S. KIRK, *HERACLITUS: THE COSMIC FRAGMENTS* 127 ff. (Cambridge, 1954).

several companions, journeys to the heavens (or the underworld) on the back of a goose, raven, or horse to visit Erlik Khan in order to receive instructions from the deity, he does nothing more than King Minos, who every so often visited his divine father in the Idaean cave in order to receive instructions in matters of law and government. This shamanic journey is duplicated by Parmenides, who in his *Way of Truth* tells us that he travelled on a chariot, attended by the daughters of the Sun, on the way of the deity which conducts the man who knows "as far as the heart desires" and "far from the beaten track of men." And beyond the gates of Day and Night, he met the goddess who promised to instruct him in all things. In his *Purification*, to mention just another instance, Empedocles, who in this displays a great affinity with Pythagoras, Pherekides, and Epimenides, contends that during his many reincarnations he had been "born in all manner of life: I have been a boy and a girl, a bush and a bird, and a dumb fish in the sea." But the same is also claimed by the Asiatic shaman, the Celtic bard, and the Norse Othin. To continue the parallel between the shaman and the early Greek poets: Musaeus, the inspired poet-seer, is said to have flown through the air by the favor of Boreas, and the Hyperborean Abaris flew around the world on his magic arrow, feats which are also claimed by the Eurasian shaman. Hence it is probably "shamanic inspiration" received while in a magic trance which furnishes the background and the original meaning of the earliest Greek "literature," be it the first theogonic or cosmogonic poems, the minstrelsy of the Homeric cycle, the didactic poetry of Hesiod, the sayings ascribed to the so-called Seven Wise Men, or the "aphorisms" of the "obscure" Heraclitus of Ephesus. Perhaps even the Platonic *anamnesis* is but a sophisticated rendition of the shamanic visits with the deity.

Be this as it may, what really matters are two basic facts: first, it is not so much a question of whether an individual person of the Greek mythological age, such as Orpheus, Epimenides, Musaeus, Abaris, or Salmoxis ever existed. What concerns us here is the fact that certain attributes (prophet, seer, poet, savant) always seem to belong together and cohere in a recurrent type which is most aptly described as the shamanic type. Secondly, although the vocabulary of these prophet-poet-savants appears to be our own and their diction seems to be familiar, the mold as well as the literary formulae in which this vocabulary or diction is cast is alien to the traditional mold in which ordinary, especially modern secular thought is transmitted. For does not Plato himself admit that "in their rapt condition" the poets "say many true things, but do not know what they mean"? In other words, while we apparently possess their vocabulary and their diction, we do not any longer fully understand what these inspired or "mad" shamanic men (or women) were talking about. Such limitations on our part, the reviewer believes, must also be accepted by Wolf, and this despite his valiant efforts to penetrate beyond the limits of the justifiably incomprehensible and perhaps ineffable.

One must also bear in mind that the cosmogonies and theogonies, from which the author derives some of the earliest forms of Greek legal thought, contain elements which are the outcome not of immediate experience or observation, but rather the products of shamanic visions or "revelations." They enshrine elements

of great antiquity whose origin was already unknown to the poet or poets who transmitted them. But they retained the sacred and, hence, mysterious character of early religion and religious revelation. From the sixth century B.C. onwards they were assailed with increasing frequency by philosophers and moralists. Like the unedifying parts of other traditions or "revelations," they were not fully abandoned, but rather "defended" by the expedient of allegorical interpretation. (And this is exactly what Wolf seems to do in his work.) A deeply religious poet like Aeschylus could discover a profoundly moral significance even in what he had to consider the "amorality"—"amoral" from an "enlightened" non-mythological or, perhaps, "sophisticated" standpoint—of the gods. It is not unreasonable to conjecture that, however enlightened or progressive the Greek poets and philosophers of the fifth century B.C. might have been, they could never entirely throw off the weight of authority invested in the magnificent though often obscure (and therefore probably attractive) language of the old shamanic prophet-poet-savants. But then, again, later Greek philosophy and poetry is not a motherless Athena, an entirely new discipline breaking in from nowhere upon a culture hitherto dominated by shamanic prophet-poet-savants. Although the process of rationalization had been at work for some time before Thales of Miletus, the presumed "first philosopher," made his appearance, the figures and themes no less than the vocabulary and diction of the shamanic period survived and even re-emerged in the later systems. We have but to remember the Love and Strife of Empedocles or the ghost of a creator in the *νοῦς* of Anaxagoras. Down to Aristotle Greek philosophy presents a number of features which cannot be attributed to rational inference based on open-minded observation of facts, but must be ascribed to lingering shamanic traditions.

To return to the Themis-Dike problem for a moment: Wolf does not, it seems, pay sufficient attention to the fact that Themis and Dike, to mention only two of his "*Satzungen*" (the reviewer doubts that this term is an appropriate translation of Themis or Dike), are essentially two religions, incomprehensible and ineffable, but nevertheless apparently real and efficient "forces" which in an unintelligible manner operate throughout a chaotically polytheistic universe. Themis and Dike cannot possibly be reduced to a single principle or standard of comprehension or perhaps to "*Satzungen*." Neither does the author sufficiently recognize the dichotomy or "dualism" of (the older) Titanic gods and (the newer) Olympian gods—a dichotomy which, together with other polytheistic notions, to a large degree is responsible for tragic conflicts and paradoxical situations. One may even maintain that the *Grundmotiv* of Greek polytheism, at least in its earlier form, is of necessity the paradox and its practical concomitant, the tragedy. Aside from the dualism of Titanic gods and Olympian gods, the Themis-Dike problem also seems to reflect the many tensions caused by the transition from matriarchate to patriarchate in early Greek society with all its sociologically upsetting and confusing effects. This, among other matters, is also brought out by Sophocles' *Antigone*, where a Titanic *δίκη* and an Olympian *δίκη* collide with the tragic result that Antigone, a mere pawn of mightier forces, is crushed—a fate which she accepts without flinching or lament. And finally, in

the opinion of the reviewer, the kindred group or clan meaning of the Titanic (matriarchal) Themis, as contrasted by the polis meaning of the Olympian Dike, on which Wolf barely touches in his discussion of Tyrtaeus,⁵ is not sufficiently stressed by the author.

In the opinion of the reviewer, Themis, Dike, etc., to which the Homeric epics no less than the great tragedies of the fifth century B.C. refer, are, at least for the uninitiated (and are not we all really "uninitiated"?), variations of a kind of blindly working and, hence, irrational compulsion operating according to some incomprehensible designs of mystical powers, which are external and, therefore, equally incomprehensible to the average man. The pre-Olympian Themis, who is both a personal goddess and an impersonal "compulsion," is somewhat related to the pre-polis (matriarchal) society. But Themis and Themis-law also embody the belief in a pre-ordained fate in which man's total existence is inextricably enmeshed. The later Zeus or Olympian tradition, which is also related to the polis (patriarchal) society, adopted and adapted the Themis and thus paved the way for an incomprehensible conflict between Themis-law and Zeus-law. The Olympian Dike, likewise a personal goddess and an impersonal "compulsion," sees to it that "every one receives his due," that "everything reaches its pre-ordained ('just') fulfilment," and that "every assignment is met," including the "assignments" of the Themis. Like the Titanic Themis, the Olympian Dike cannot be reduced to a simple rational principle in the philosophical sense of the term. Themis and, perhaps to a lesser degree Dike, also signify "surrender" to what ordinary man cannot fully grasp but somehow dimly accepts as inescapable. But whatever Themis or Dike may mean to us, we must always bear in mind that the various and often conflicting characteristics traditionally attributed to Themis and Dike date from many of the most ancient legends of immemorial antiquity down to the sophisticated and already somewhat skeptic interpretations of Euripides.

The reviewer's eye caught an interesting footnote⁶ in which the author states: "It is not likely that Hesiod had any immediate knowledge of the sayings of the Old Testament. But according to F. Dornseiff . . . there existed 'an ancient near-eastern literary tradition' with which Hesiod was acquainted." Hesiod's *Theogony*, in the main, is a *Hymn to Zeus*, prefaced by a short cosmogony. A comparison of Hesiod's *Hymn to Zeus* and the (much older) Babylonian *Hymn to Marduk* (*Enuma elis*) will divulge at once the striking dependence of the former on the latter. There naturally exist some discrepancies, but these discrepancies are less compelling than the similarities, and even less than might be expected when we consider the fact that the Babylonian story reached Hesiod in fragmentary form through several intermediaries and detached from the ritual which explained it and gave it coherence. It must also be remembered that the preserved form of the *Hymn to Marduk* is only one version of the Babylonian religious myth, and that it is known to be a revision of a still earlier Sumerian version. The recent discovery of the Hittite-Hurrian *Epic of Kumarbi*, which is really nothing other than a Hittite-Hurrian version of the Babylonian

5. *Id.* 313.

6. *Id.* 121, note 3.

Hymn to Marduk, seems to provide the much needed connecting link between the Babylonian myth and the Hesiodic adaptation. Minoan or perhaps Mycaean travellers or traders who, as we know now, were in constant contact with the Hittites at Ugarit, the great trading center and meeting place of the Minoan-Aegean peoples and the Hittites, or, at a later date, at al-Mina, probably carried the Hittite-Hurrian version of the Babylonian-Sumerian *Hymn to Marduk* to Crete (where it might have gone through a Minoan phase, as indeed the Cretan legends of the birth and death of Zeus and the Paliokastro *Hymn to the Greatest Lord* suggest), and from Crete to the Greek mainland where it became the model for Hesiod's *Hymn to Zeus* or *Theogony*. Hence the Hesiodic *Hymn to Zeus* is essentially an adaptation of the Babylonian-Sumerian *Hymn to Marduk* through the intermediary of the Hittite-Hurrian *Epic of Kumarbi*. Features common to all three forms are the forcible separation of Heaven and Earth, the conflict of the different divine generations, the old god's attempt to destroy the younger generation (in *Kumarbi* and Hesiod he devours them), and the castration episode. From the *Epic of Kumarbi*, but not from the *Hymn of Marduk*, Hesiod borrowed the story of the fertilization of the Earth by the severed genitals of the old god; the image of the stone-baby; and the figure of Upelluri, a Hurrian Atlas who supports sky and earth.

In order to do complete justice to the so-called Sophists and their contributions to Greek legal thought it may be well to realize that the "Sophistic movement" or "Sophistic enlightenment" is also a far-reaching sociological and political phenomenon. The Greek peoples, especially the Athenians, stirred by the stern experiences of the Persian wars, gradually began to learn the practical value of knowledge and the significance of practical "know-how." This realization, in a way, brought knowledge to the market place. People, in ever larger numbers and with ever greater intensity began to seek more information on the many questions which disturbed them. They demanded counsel, assistance as well as guidance in the many issues presented by an ever more complicated and complex life. At the same time, closer contacts with different and often older cultures began to undermine beliefs and ideas which for a long time had been considered unassailable. Concurrently with this development the realization waxed stronger that in all walks of life the man of knowledge was more capable, more useful, and certainly more successful than his ignorant counterpart. Especially in the domain of public (democratic) activity, so important during the fifth century B.C., independent thinking, individual initiative, personal judgment, and persuasive eloquence began to replace time-honored customs and traditions. This novel and perplexing situation, which as often as not was deplored and even maligned by the opponents of change, in the main had a wholesome effect in that it threw into the open the most guarded and often most distorted "secrets" and problems of total human existence. Publicity and public agitation rather than secrecy and mysterious authority became something of a general and widespread obsession, and it was the immortal achievement of the Sophists to have "demystified" much of what hitherto, perhaps purposely, had been kept from an overawed and essentially docile multitude. This essential fact must always be kept in mind whenever we try to evaluate the Sophistic concern with law

and justice. Frequently this concern was not so much an attempt at "constructive reform" as a destructive critique of existing social conditions.

The Sophists did all this partly in response to a general demand of the time, partly from the noble impulse of freeing men from the bonds of ignorance and superstition, and partly as a lucrative business which simply capitalized on the general (and perhaps democratic) insistence on a greater share in knowledge. Thus it happened that in a relatively short span of time not only the social significance of knowledge, but also many of its basic aspects, tendencies, functions, and problems, as well as their solutions, were fundamentally not to say radically changed. Knowledge turned into a social power as well as a determining factor in political life; and in so doing it became engrossed with the paramount demands of both theoretical and practical thought and, especially, with the questions of legal, political, and social existence. It is here, above all, that we must seek for the beginnings of the Sophistic interest and search into the province, nature, and function of the law. Naturally, in their predominantly anthropocentric orientation the Sophists would relate law essentially to secular man living in a secular society and thus for the first time thrust "human nature" into the center of the legal orbit. This attempted integration of human nature and law of necessity led to a series of complications and conflicts, especially since no agreement on the essential nature of man apparently could be reached; and the crucial antithesis of "justice according to nature (or human nature)" and "justice according to (positive) law," which was created by these Sophists, has never ceased to preoccupy philosophers and jurists.

The reviewer cannot agree with Nestle's interpretation, which Wolf seems to accept, namely, that Protagoras' famous statement, "Man is the measure of all things," refers primarily to "social" or "political" man. If we can rely at all on Plato, *Theaetetus* 152A: "Does he [scil. Protagoras] not say that things are to you as they appear to you; and to me as they appear to me; and that you and I are men?"—then Protagoras must have referred to individual man both in his theoretical as well as practical aspects, and not merely to "social" or "political" man or, perhaps, to the genus man. To restrict the Protagorean dictum to "social" or "political" man would also eliminate the epistemological or theoretical relativism of Protagoras for which, according to tradition, he has become famous. The reviewer suspects that Nestle's view is probably tainted by what Aristotle⁷ had to say about νόμος and νόμιμα.

It is also surprising to see that the author failed to realize that Gorgias' *Defense of Palamedes* probably furnished the model for Plato's *Apology of Socrates* (even in antiquity Plato was accused of plagiarism); and perhaps only a person trained in the Anglo-American common law tradition might appreciate Gorgias' statement that the trained orator—the forensic orator, advocate, or "lawyer"—should replace the traditional lay "judge" or "legislator." He who knows the traditions of the common law knows also that its history should be written not so much in a setting of wonderworkers, kings, legislators, and courts, but against the background of great lawyers and great legal practitioners. For is it not true that the grandeur that once was Rome is actually the grandeur

7. POLITICS 1280 b 10 ff. NICOMACHEAN ETHICS 1133 a 29; 1134 b 35.

that was the Roman law? and that the grandeur of the Roman law was the immortal achievement of the great Roman jurists and jurisconsults? And what holds true for the Roman law is certainly true for the Anglo-American common law, which is essentially a lawyer's law. Of all the legal systems which Western civilization has developed in its long history only two have escaped the oblivion of time, namely, the Roman law (in the modern civil law) and the common law. They have continued to flourish exactly because they were "lawyer's law." Hence Gorgias' remark that "lawyers"—in ancient Athens the forensic orator in a way took the place of the present-day lawyer—should replace lay judges (heliasts untrained in the law) and lay legislators is, after all, not without merit. It merely enunciates a position, not uncommon among Sophists (and, incidentally, popular with Plato, Xenophon, and others), that the experienced and skilled person should be given preference over the inexperienced and unskilled person.

The reference to Critias as "the greatest hater of the people (or, of democracy, μισοδημότατος)"⁸ was not made by Xenophon originally, as Wolf infers, but rather by Polycrates in his *Κατηγορία Σωκράτους*, and merely reported by Xenophon.⁹ In the opinion of the reviewer, the whole of Xenophon's *Memorabilia* 1.2.9-61 is but a restatement and rebuttal of some of Polycrates' charges and allegations which he had launched against Socrates in his *Κατηγορία Σωκράτους*. The *κατήγορος* of *Memorabilia* 1.2.9-61 is not Anytus, Meletus, or Lycon, but Polycrates, as may also be gathered from Libanius' *Apologia Socratis*.¹⁰

Perhaps the definition of law which, according to Aristotle, *Politics* 1280 b 11, was proposed by Lycophron, could liberally be translated as follows: "Law is a body of agreed upon but nevertheless authoritative grounds of and guides to actual decisions in controversies, which grounds or guides serve as a kind of social guarantee (and social control) through which men mutually delimit and secure to one another certain rights (or interests) which by tradition or convention have been recognized as pertaining to the nature of man."

The *Anonymus Jamblichi*, which in all likelihood constitutes the transition from Sophistic individualism to Plato's legal and political theory (an investigation of the extent to which Plato was familiar with the *Anonymus Jamblichi* would make an interesting study), may be called the most important and certainly the profoundest pre-Platonic work on legal theory. Wolf's exposition and discussion of this unknown author is, indeed, a brilliant piece of work, especially his observation that *Anonymus Jamblichi* seems to overcome the possibly disastrous antinomy of νόμος and φύσις by stressing the sovereignty of the law-abiding citizenry. On the other hand, the reviewer is a little startled to find Antiphon of Rhamnus listed among the "democratic Sophists." To say that Antiphon wished to re-establish a democratic *politeia* shaped after the ideals of Solon and Pericles seems to ignore the fact that the oligarchic reaction of 411 B.C., in which Antiphon apparently played a major role, intended to return to the "Constitution of Draco" or, as we would say, to the political ideals of the

8. 2 WOLF, *op. cit.* at 129.

9. MEMORABILIA 1.2.12.

10. Cf. Chroust, *Xenophon, Polycrates and 'The Indictment of Socrates,'* 16 CLASSICA ET MEDIAEVALIA 1-77 (1955).

"Founding Fathers" (this becomes evident in Antiphon's advocacy of a "return to the original natural community"), rather than to that of Solon whom the oligarchs of 411 apparently considered "the first of the democratic demagogues." And certainly Antiphon had no use for a Pericles and his democratic reforms. On page 151¹¹ the author is guilty of an obvious anachronism when he states that Antiphon did not wish to bring about "civic unity" by means of force, because he knew from experience that after their dismal experiences with the reign of the Thirty Tyrants the Athenians were strongly opposed to any kind of *τύραννις* (incidentally, *τύραννις* is misspelled). Antiphon, together with Archeptolemus, was executed in 411 B.C., presumably for his participation in the oligarchic revolution, while the reign of the Thirty Tyrants lasted from c. September, 404, to May, 403.

The reviewer concurs, on the whole, with those scholars who see in the "philosopher Socrates" primarily the product of fanciful Socratics—who in the diversity of their literary and artistic talents as well as in the variety of their philosophical inclinations have tried to erect a literary Socrates legend of manifold forms, all of which are as intangible as they are elusive. Every Socratic, barring those instances where they borrowed from one another or from a common source, seems to have created his own brand of Socrates or Socratic philosophy. In the course of time this practice necessarily led to a great diversity of alleged "Socratic philosophies" or "Socratic schools," each claiming to render the only accurate account of Socrates and his teachings. But whatever each of these Socratics offers as the alleged true philosophy of Socrates probably is nothing other than the peculiar kind of philosophy advanced by this Socratic himself. This would explain why Socrates was for Plato a sublime ideal, for Antisthenes a model which called for imitation, and for Xenophon a pedagogical pattern. In sum, Socrates has become "all things to all men" or, better, "all philosophies to all philosophers." The seriously conflicting sources about Socrates should bear this out fully.¹²

Wolf seems to overlook the fact that in all likelihood the Xenophontean Socrates is strongly influenced by the teachings of Antisthenes, and that Plato's *Apology*, as has already been stated, is probably an imitation of Gorgias' *Defence of Palamedes*. In any event, the similarities between the Platonic and the Gorgian apologies are too many and too great to be accidental. Also, the author pays no attention to the effects which Polycrates' *Κατηγορία Σωκράτους* had upon the whole Socrates tradition. It is the contention of the reviewer that this Polycratean pamphlet, which was published between 392 and 390 B.C., is the true cause of the apologetic furor which gripped some of the Socratics, but apparently not Antisthenes. Xenophon, in *Memorabilia* 1.2.9-61, displays his thorough acquaintance with some of the charges contained in the Polycratean pamphlet. It is in *Memorabilia* 1.2.9-61 that he attempts to rebut and disprove them. Plato's *Crito*, the reviewer believes, is likewise an indirect rebuttal of Polycrates (and hence apologetic in nature), who had charged Socrates with

11. Vol. 2.

12. On page 10, vol. 3 (Bibliography on Socrates), the reference should read: F. M. Cornford, rather than Conford.

having despised the legal and political institutions of democratic Athens and, incidentally, with having worked towards the overthrow of Athenian democracy. In the *Crito* Plato answers Polycrates (whom he never mentions, however) by creating the fiction that Socrates was the most law-abiding citizen, even "unto death." This characterization, however, ill befits a man who apparently was closely associated with such men as Alcibiades, Critias, Charmides, and Adeimantus.

Unfortunately, due to the desperate source situation, little is known about Antisthenes. But whatever we may glean from the surviving tradition often seems to be rather attractive, especially his bland glorification of honest work, be it manual or intellectual. From such a prophet of the dignity of conscientious work we might expect interesting and perhaps appealing views on law and justice. It should also be borne in mind that Antisthenes and his ideas probably influenced some of the legal notions of the Stoics. Tradition, it appears, also ascribed to Socrates many traits and views which in all likelihood were Antisthenian. That Xenophon's *Cyropaedia* is strongly under the influence of Antisthenes and Antisthenian pedagogical notions, needs no special comment. Suffice it here to point out that Cynic "hero worship," aside from Hercules, also included King Cyrus about whom, according to Diogenes Laertius, Antisthenes wrote several works with which Xenophon apparently was acquainted.

Xenophon's notorious unreliability as a Socratic reporter or, for that matter, as a reporter in general, be it about Greek history or his exploits during the famous Retreat, is too well known to deserve comment. But did Xenophon really intend to write a historico-biographical report on Socrates? Or did he compose his *Socratica* merely in order to propagate, in the name of Socrates, his own ideas? Is it not true that the Socratic conversations recorded by Xenophon are for the most part, if not all, nothing more than vehicles of Xenophon's well-known fondness for displaying his literary gifts or for advancing his personal convictions, philosophy of life, and his notions about a great many things in general? To cite but a few examples: the lengthy and seemingly quite competent discourses on the duties and qualifications of a good military commander or cavalry general, as well as the statements on military strategy or tactics in general with which Xenophon credits Socrates, are as fanciful, not to say fictitious, as are the discussions on national economy or politics likewise ascribed to Socrates. Xenophon the economist, planter, strategist, dog-breeder, huntsman, soldier, historiographer—in short, Xenophon the "Jack-of-all-trades" and the man of many interests—during his long and adventurous life became acquainted with a great variety of tasks connected with practical life. But this does not entitle him to impute the same interests to Socrates. And what could a Xenophon possibly tell us about the law of the Greek city, about civic virtues and about Greek legal thought, about civic-mindedness and legal justice—he who was perhaps the perfect type of that ancient Greek who in his complete detachment from his native city Athens was apparently quite devoid of all sentiments of loyalty and a deeper commitment to the laws of Athens? He abandoned Athens in the hour of her greatest need and most dire prostration in order to gain some superficial notoriety (and considerable plunder) with a band of countryless and

lawless adventurers who became lost somewhere in the heart of Persia when the treasonable designs of Cyrus the Younger came to a sudden end at Cunaxa. He definitely exaggerated, to say the least, about the role he played in the famous Retreat. After his return to Europe he felt no scruples, Athenian though he was, to fight against Athens and her allies on the side of his Spartan friend and idol, King Agesilaus. Disappointed and exiled (probably for his treasonable conduct), he retired to a beautiful country estate in Elis, to enjoy the fruits of his plunder as a mediocre literatus and hunting squire, steeped in piety. Fascinating, however, is Professor Wolf's statement that the Xenophontean *Cyropaedia* is a sort of "Fürstenspiegel" (Mirror of Princes), full of Machiavellian ideas; or his observation that unlike Plato, Xenophon realized the necessity and perhaps even the coming of large political organizations and empires. And as in the case of Caesar's "Reichsgedanken," such empires stand in need of different laws than the old Greek city. Like Thucydides, but for different reasons, Xenophon holds that the traditional city-state had outlived its usefulness.

Xenophon's *Defence of Socrates before his Judges*, it appears, was primarily composed to "correct" what others already had written about the trial and death of Socrates. It is quite possible that Xenophon had in mind here the *Apology* of Plato and perhaps other Socratic apologies no longer extant. Internal evidence suggests that the *Defence* was composed some time after 385 or 384 B.C. Since this work was designed primarily to portray and extol the proud and inflexible conduct of Socrates before his judges, it is not really an account of what transpired during the trial, but rather a testimonial of Socrates' loftiness and, hence, as Jaeger maintains, a sort of "appendix" to the *Memorabilia*. Jaeger's opinion, however, at least in the form in which it is stated, is open to challenge. The *Defence* may well be called an appendix to *Memorabilia* 1.1.1-1.2.64, which, as has already been shown, was originally an independent essay or Socratic *Apology*; but it cannot be called an appendix to the whole of the Xenophontean *Memorabilia*, and this for the simple reason that *Memorabilia* 1.3.1 ff. in all likelihood were written after the *Defence of Socrates before his Judges*.¹³ For this reviewer holds that the chronological sequence of these three works is the following: *Memorabilia* 1.1.1-1.2.64, *Defence*, and *Memorabilia* 1.3.1-4.8.11. He maintains that *Defence*, chap. 20, is dependent on *Memorabilia* 1.2.49 (*Defence* 20 is a summary of *Memorabilia* 1.2.49); and that *Memorabilia* 1.2.49, like the whole of *Memorabilia* 1.2.9-61, was stimulated by the publication of Polycrates' *Κατηγορία Σωκράτους* between 392 and 390 B.C.

The *Wasps*, *Knights*, *Acharnians*, and *Clouds* of Aristophanes are, among other things, also classical parodies of the activities of the legal profession or the professional advocate in Athens. Apparently these parodies reflect the public sentiment against the "professional lawyer"; and they contain bitter

13. The reviewer bases his assumption that *Memorabilia* 1.3.1 ff. is later than the *Defence* on the fact that in *Memorabilia* 3.5.1-28 Socrates discusses with Pericles the Younger means and ways as to how Athens may be restored to her former greatness. The general background of this discussion is definitely the political situation which existed in Greece between the battle of Leuctra (371 B.C.) and the battle of Mantinea (362 B.C.). Xenophon, it is surmised, died not too long after 360 B.C.

complaints of the older men against the brash young advocates who are said to be extremely skilled in the use of hair-splitting dialectics in order to make "the straight crooked and the crooked straight." The new "lawyer's law," which is not always above reproach, is unfavorably compared with the allegedly honest ways of old. Generalizing from certain instances of reprehensible behavior among lawyers, Aristophanes turned his wrath upon the whole profession, proving thereby only that at all times and in all places the alleged depravity of advocates and lawyers is, and always has been, an undying subject for sweeping criticism and a perpetual topic for fanciful satires.

In turning to another part of literature, it may be said that poetry, especially epic poetry, places the main emphasis upon the individual rather than the event; it deals with man (and his heroic deeds) rather than with institutions. In Greek cultural history we encounter a singular phenomenon which is indicative of the power which the Homeric epics had over the minds and hearts of the Greeks: long after the Greeks had developed rather advanced and complex social as well as political structures, that is, long after they became keenly alert to the political and social problems of their time (although on the whole they failed to solve them adequately), they were still completely satisfied with what Homer and other poets had to tell them about their own past. Homer was, to put it epigrammatically, their past. Tradition has it that Herodotus was the "first historian," but Herodotus came rather late. When the "Father of History" wrote his tales (certainly naive at times), Pericles had already spoken about the ideals of Greek political and democratic life, Aeschylus and Sophocles had composed their stirring tragedies, and such men as Solon, Cleisthenes, and Ephialtes had carried out their far-reaching social reforms.

The Greek term for "history" originally meant something like "inquiry"; and the word "historian," at least according to Homer, *Iliad* 22.486, meant someone who, because he is an "inquirer" into old customs and traditions, acts as an "arbitrator" in controversies in that he can get at what is "right" in a particular case. Judging from a fragment ascribed to Heraclitus of Ephesus, the term "historian" apparently refers to a person who looks realistically at the facts of experience rather than philosophizes about them. It should also be borne in mind that Aristotle's *Natural History* still retains this particular meaning; Aristotle does not philosophize or speculate here about the genesis of the physical world, but rather proposes to establish certain facts of experience. This transition from myth (or philosophy) to fact also affected Herodotus' attitude towards "law," although occasionally he still philosophizes about "cosmic justice" when he discusses, for instance, the intermeshed consequences of the rape of Io, Europa, Medea, and Helen. Here, too, mysterious powers are at work. If we compare Hecataeus and Herodotus, we must also realize that between these two "historians" stood an event of the first magnitude and prime historical importance: the Pan-Hellenic war with Persia. This event alone did much to shake the Greek out of that spirit of complacency which once upon a time had sworn by Homer's myths or had insisted on fanciful genealogies.

The originality of Thucydides' *Peloponnesian War*, as compared with the *History* of Herodotus, lies in the fact that Thucydides tries scrupulously to avoid

the products of poetic imagination. Hence he might be called the "Father" of intelligently pragmatic historiography, centering attention on facts, likely motives and possible purposes which apparently became manifest in actions or facts. Possibly under the influence of Sophistic teachings, he turned into a "sociologist" rather than an "ethicist." Nevertheless, as may be gathered, for instance, from 5.105.2, there exists something like a mysterious and inexorable "necessity" which intertwines human action and reaction, cause and effect, intentions and results, conduct and reward. But this "necessity," in a way, always remains incomprehensible. At the same time Thucydides the "sociologist" is also a "moralist": justice, which to him means probably that which is every one's due, is more than mere expediency. Expediency devoid of justice can turn into a highroad to disaster. Wolf correctly maintains that the terms "*νόμοι*," "*δίκη*," "*δικαίον*," and "*τὰ δίκαια*," have with Thucydides a traditional as well as a novel meaning which might go back to Sophistic influences; and, that according to Thucydides, war, this "schoolmaster of violence," has a deteriorating effect upon all values and the sense of value, including the sense for justice and moral restraint, by ushering in the crudest forms of pragmatism. And finally, Wolf's discussion and analysis of the Melian episode in its profounder moral and legal implications is simply superb. It is, to use a well-worn phrase, a liberal education in itself.

But the reviewer suspects that Wolf is far too idealistic and, certainly, far too philosophical about the Greek rhetoricians, particularly the forensic orators, and about their contributions (or lack of contributions) to Greek legal thought. In order to prove his point, the reviewer, who is a lawyer interested in the history and achievements of the legal profession, wishes to launch into a rather lengthy and somewhat detailed discussion of these orators, their origin, their function, their activities and, especially, their attitude towards the law and the administration of justice. Needless to say, these observations are to a large extent in the nature of supplementary remarks.

Greek (Athenian) rhetoric, especially forensic oratory (which made up an essential part of Greek rhetoric), in the opinion of the reviewer was determined to a large extent by the peculiar administration of justice which prevailed in Athens during the fifth and fourth centuries B.C. The heliastic courts, which were an expression of the absolute judicial sovereignty of the Athenian people, were bound by no particular technical rule of law or procedure. Each Athenian court was supreme: it could interpret, apply, or ignore any law it saw fit. In addition, some laws were not only ambiguous, but even contradictory. Also, since the courts were not bound by any precedent, each court was at liberty to ignore completely its own previous decisions. It must also be borne in mind that the average Athenian citizen, when performing his heliastic duties, was constantly showered with compliments by fawning litigants or defendants and their "lawyers" (the forensic orators). Abject though calculated adulation rained upon him so incessantly that his susceptible imagination soon began to believe what his flatterers told him, namely, that he was an infallible god. The spoiled and fickle will of the sovereign Athenian heliast, although it was often as irresponsible as its decrees were irreversible, really knew no bounds, restraints, or discipline.

Even in his best of moods the Athenian sat in court with a disposition too much like that with which he took his seat in the theater when he settled down to compare, discuss, applaud or "boo" the literary merits of the various compositions submitted to his judgment by rival poets. On occasions he did not hesitate to inflict a heavy fine or decree total confiscation of a man's property on the sole ground that the treasury was empty and had to be replenished so as to be able to pay his "salary." Nearly always he failed to distinguish between law and fact, fact and fiction; and the reasons for many of his purely emotional decisions were often known not even to himself.

As the new heliastic courts developed, the old and rather burdensome rule requiring every litigant or defendant to plead his own case was relaxed to the extent of permitting him to secure assistance in the presentation of his cause. Such assistance took one of three forms: first, a litigant or defendant refrained from speaking at all and had someone else—the *synegoros* or, perhaps more correctly, the *hyperapologoumenos*—speak in his behalf; or, secondly, he spoke for himself and at the conclusion of his speech had some one else—the *syndic*—speak for him; or, thirdly, he delivered a memorized speech written for him by a "speech-writer"—the *logographos*, or logographer.

Undoubtedly, a good logographer was of great if not decisive help to a litigant or defendant. The heliastic courts acted under the principle that every citizen should have a personal hearing before his assembled peers and, hence, liked, nay demanded, to see him stand up for himself. Nothing could serve the interest of the litigant or defendant so well as a brilliant speech delivered in person. Not many persons, however, were equal to this exacting task, especially since the heliasts—who often considered a trial a kind of "oratorical contest," a "spectacle" rather than a serious discussion of evidence, facts, and the law applicable to these facts—were extremely critical of such oratorical performances.

To meet this particular situation there appeared during the latter part of the fifth century B.C. that interesting figure in Athenian public life who was called the logographer. This "speech-writer," as has been shown, prepared the address which the litigant or defendant memorized and then, during the trial, delivered before the court. By retaining a logographer the litigant also preserved the appearance of speaking for himself extemporaneously, something which always impressed the heliasts. Forensic speech-writing soon became an essential part of general rhetoric, which subsequently was subdivided into epideictic, deliberative, and forensic oratory. This latter fact alone should be ample indication of the importance which forensic oratory and forensic speech-writing attained within a relatively short period of time: it was soon considered the equal of epideictic and of deliberative rhetoric, and a goodly number of the most famous ancient orations which have come down to us and are still considered masterpieces of classical rhetoric, are simply forensic speeches either delivered by the author himself or prepared for delivery by some "client" involved in litigation. Forensic speech-writing, in other words, became the occupation of nearly every outstanding Athenian rhetorician.

Obviously, the logographer—and we are mostly concerned here with the forensic logographer—had to do more than merely compose a speech to be

recited by his clients in court. He had to be familiar, at least in a superficial way, with law and procedure, the more so, since, then as now, an adversary was always ready to take advantage of a false legal step, including even a grammatical error or a faulty pronunciation. Thus also in matters of citation, interpretation, or application of the law, the assistance of an "expert" was well-nigh indispensable. Ignorance of the law, a wrong citation, or an oratorical deficiency could and often did have disastrous consequences for a litigant or defendant.

Since the logographer was compelled to furnish his client with a finished product that did not admit of any changes once it was in the hands of the client, the speech-writer had also to anticipate, as far as possible, the arguments and counter-arguments of the adversary. For a person who, on account of his ineptitude or timidity had to have his speech "ghost-written" by a logographer, could hardly be expected, and would scarcely dare, to alter the speech by making changes in order to meet unexpected arguments of the opposing side. Hence correct prediction and skillful anticipation of the opposing arguments could determine the outcome of the controversy.

One of the astonishing features of Athenian public opinion was its pronounced dislike of "professional lawyers." This aversion, it may be assumed, was probably related to the general mistrust of all expert or skilled persons. The Athenian people, it seems, held to the fallacious belief that by his expertness a man became part of an "undemocratic elite" and thus set himself apart from and, hence, against the "average man" who made up the "ideal" democratic community. The fate of Antiphon of Rhamnus, according to tradition the most outstanding and successful "lawyer" of his time, furnishes a telling example of this Athenian aversion to the expert. As a result of this widespread popular attitude, "lawyers"—and the reviewer considers the forensic orator and logographer the Athenian version of the modern lawyer—were always on the defense, justifying their appearance in court by claiming to be either a "friend" or a "remote relative" of the client. Such fictions, often brazenly untrue, were a constant feature in Athenian trials. As an additional justification for his appearance the "lawyer" could always make the unusual plea that he did so because he was a personal enemy of the adversary. Thus when Demosthenes defended Ctesiphon, it becomes quite obvious that he was actually defending himself against his personal enemy and antagonist Aeschines.

The general dislike of the professional "lawyer" also prevented the forensic orator from being recognized as an expert on the law. He was rarely permitted to speak as an expert to the court on any point of law. In consequence, and Wolf seems to overlook this important fact, the forensic orator often was most reluctant to display publicly any knowledge of the law (provided he had any), lest he be suspected of being a "professional man" and thus incur the animadversion of the court. Hence he always wished to appear as a plain, ordinary citizen. Whenever he cited a law, decree, statute, or ordinance in court, he usually quoted it in his own words, often distorting, omitting, or de-emphasizing whatever was not in his favor. The same holds true as regards his declamations about law and justice in general. These rather nonchalant references to law and

justice as well as tainted citations are a rather poor basis for establishing the "legal thought" of the time, especially since these "lawyers" allowed themselves much, and perhaps too much, latitude in the way of omission, interpretation, or plain adulteration. To quote here but one famous example: Aristotle himself suggests to the forensic orator that whenever the "written law" should be unfavorable to a "lawyer's" cause, he ought to appeal to the "unwritten law," and vice versa. Hence, judging solely from some of the forensic orators and their attitude towards the law, the law just happened to be whatever served their particular cause; and the peculiar "*Rechtsdenken*" of these men consisted primarily in their burning desire to win a particular case at all costs.

The activities of an Athenian "lawyer" in court ranged all the way from a careful though often seriously distorted and highly colored discussion of the facts and a more or less competent analysis of the law in relation to the facts, to mere bombastic oratory and platitudinous, and even theatrical, appeals to emotion and sentiment. In order to gain the sympathy of the heliasts, the litigant or defendant, who in this had previously been prompted by his "lawyer," would often begin by contending that the allegations or charges against him were "gross injustice," "outright lies," or "contrary to law." Then he would contrast his own lack of forensic ability, rhetorical fluency, and experience with the cunning, eloquence, and experience of his adversary, who was often referred to as a despicable "professional" or a detestable "sycophant." Whenever possible, he would also refer to his alleged poverty, advanced age, physical infirmities or perhaps to some service he once had rendered the city.¹⁴ Having thus established himself as the sorry "underdog" who properly trembled before his mighty but certainly vicious antagonist, the litigant or defendant would then "courageously" resolve that, despite this "crushing inequality of odds," he would join the issue, knowing that the "righteousness of his cause" would ultimately triumph, particularly since the "enlightened" and "fair" gentlemen of the "jury" could not possibly fail to see the "obvious justice" of his case. Such were the stereotyped commonplaces which abounded in the forensic speeches of the time.

A final problem connected with the "*Rechtsdenken*" of the Greek orators, especially the forensic orators, is the following: the sovereign people of Athens were not only the supreme judges in all matters brought before their tribunal, but, in keeping with their absolute sovereignty, they also had the sole power to pardon in all criminal matters. The Athenians apparently did not see the basic difference that exists between a court of justice and a board of pardon. In consequence, the functions of judging and those of pardoning were as a rule practiced in unison. This fact should also explain why the "lawyers" (or the defendant who had previously been prompted by the "lawyer") so often tried to arouse and enlist the sympathies (or wrath) of the heliasts through all sorts of passionate and dramatic appeals and theatrics. This is also the reason why so many piteous appeals to compassion were made by lawyers for their clients, and why such touching pictures were drawn of the miseries attending a conviction: in criminal proceedings the lawyer would parade before the court the defendant

14. It might be interesting to note here that, at least according to Plato, Socrates, when on trial for his life, flatly refused to resort to such practices.

dressed in rags, uncombed, unshaven, and haggard—the abject picture of a man who had suffered the punishment of exile; he would produce the defendant's weeping wife, dressed like a widow in mourning, and his wailing children who would desperately cling to their distraught father (if the man had no children, he could always hire them for the occasion)—an effective way of warding off a possible capital sentence. All these heart-rending theatrics, of course, had been carefully rehearsed in advance. Also, a “lawyer” who had once rendered some negligible service to the city would not hesitate to ask for a favorable verdict or an acquittal for his client as a public recognition for these services.

Since the Athenian heliasts, as has already been stated, often came to court in order to be entertained by dramatic displays, it was the prime task of any “lawyer” who strove for success to entertain and amuse his “jury-audience” properly, often by using the same means a public entertainer would employ. This should also explain the widespread use of slanderous invectives and personal abuse of the adversary—an important and certainly effective feature of Athenian “legal practice.” In open court Demosthenes, to recite just one instance, called Meidias such galling names as cur, rogue, wretch, villain, blackguard, bully, miscreant, and coward. Demosthenes himself furnishes an explanation for this deplorable practice when he observes that the Athenian courts enjoy listening to abusive language and vile expressions. Since the pleasure of the all-powerful heliasts was of a decisive nature, it is not surprising that many of the forensic orations should abound with a virulence of abuse. Disgraceful epithets were passed back and forth with monotonous lavishness, while the heliastic audience, we must assume, rocked in their seats with laughter, applauding a particularly nasty but clever insult, and constantly calling for more of the same. Such reactions, akin to the effects which a particularly brutal boxing match has upon an inflamed mob-audience, practically compelled a “lawyer” who wished for a favorable verdict, to stoop to vile and repulsive practices.

But enough of this rather unpleasant picture, which has been drawn from life merely to indicate that the reviewer is unable to share Wolf's somewhat idealistic views about the “*Rechtsdenken*” of the Greek orators. There is, however, one general and final observation which the reviewer wishes to make here: the particular judicial system at Athens, where there was no such thing as regular courts manned by trained law men or a regular procedure or perhaps a consistent body of laws, was not exactly conducive to either an efficient administration of justice, or to the development of a distinct class of high-minded and well-trained lawyers who displayed a profound sense of real justice, or, perhaps, a sense of high professional standards. To make matters worse, for a long period of time Athens, for reasons already stated, seems to have displayed a marked distrust and dislike of the professional (trained and skilled) lawyer, and a definite aversion to all forms of legal expertness. By taking this deplorable attitude Athens probably denied itself a chance of developing a class of lawyer-jurists comparable in fame and attainment to the great Roman jurisconsults and jurists. The general and unwarranted rejection of the lawyer as a professional man, it may be added here, had far-reaching and, perhaps catastrophic consequences: it deprived Greece of a chance of becoming the lasting

lawgiver of Western mankind. This failure is the more regrettable since the Greek people, as their philosophical and artistic achievements have so clearly shown, were by nature and disposition eminently qualified and perhaps even destined to approach the complex problems of the law with unrivalled intelligence and profound understanding of the essential. At this point one may give reign to the imagination and ponder over the problem of what might have happened if during the fifth and fourth centuries B.C. the Greeks had competently and sympathetically tackled law from the point of view of the lawyer-jurist. Unlike the rather unimaginative Romans, who saw in the law primarily a technical adjustment of certain aspects of human relations, the Greeks, true to their proclivity for ultimate synthesis, intellectual balance, and profounder insights, fully understood and intelligently knew how to avoid, at least in some of their philosophical discussions, the dangers inherent in that vexing and subsequently never completely resolved "dualism" of law and morals which ever since has plagued us. To them law and morals (and perhaps the Greeks did not know law in the sense we use it today), private morality, and social ethics were essentially one and the same thing: the law-abiding citizen was the morally virtuous man who in all his actions deported himself as the thoughtful member of a greater community, fully conscious of the essential identity of law, morals, and the common good.

It is, indeed, sad to reflect upon the possibility of a more satisfying and more satisfactory jurisprudence that might have resulted for the whole of the Western world if the Greeks, and not the Romans, had attained to that special legal excellence which forever will be connected with the Roman law. It is even sadder to reflect upon the fact that, in the final analysis, it was silly prejudice and untimely pettiness (the popular aversion to the professional lawyer and jurist) which prevented the Greeks, a people so fortuitously endowed by nature and so uniquely placed in such choice circumstances, from becoming the immortal lawyer-jurists and lawgivers they were perhaps destined to be. But such are the real tragedies of history.

To review and, at the same time, to do full justice to a work of such magnitude and such magnificence is no easy task. Of necessity the reviewer has had to confine himself to the role of an eclectic or, perhaps, casual *causeur*. The mere fact that this review, if one may call it so, is both lengthy and occasionally searching, should indicate beyond all doubt that Professor Wolf's work is a monumental achievement. The various observations (and digressions) offered in this review are appropriate only to an accomplishment of more than ordinary significance. The inclusiveness of Wolf's enterprise—four volumes containing 1697 pages—is bound to contain elements which will elicit some disagreement, especially in matters of interpretation, interpolation, and emphasis. The title of the work alone suggests a most ambitious undertaking, and the vastness of its content approaches the dimension of an encyclopaedia. At the same time, the learning and scholarship of its author are simply astounding. In short, Wolf's *Griechisches Rechtsdenken* is in itself more than a liberal education; it is a universal human experience. The author's art as well as his flowing presentation has in itself a Hellenic quality which from time to time brings a deep sense of

pleasure: all the main qualities of truly Hellenic thought are there, the living symmetry of form, the grace and delicacy of detail, and the occasional fantasy enlivening a fundamentally grave problem. No matter what one may think of Wolf's basic commitment to the thought and nomenclature of Heidegger, his work is, and always will be, an outstanding and, probably, the most outstanding contribution to the diversified and difficult field of Greek legal thought, which no earnest student of jurisprudence, philosophy, history, sociology, or the classics can afford to ignore. Not only has the author established a standard of scholarship for others to admire and imitate, but his work is, as the present reviewer has stated in his introductory remarks, one of those excellent and rare accomplishments which it is almost an impossibility to review, and almost an impertinence to praise or criticize.

ANTON-HERMANN CHROUST

DAS NATURRECHT UND DIE EUROPÄISCHE PRIVATRECHTSGESCHICHTE. By Hans Thieme. Juristische Fakultät der Universität Basel, Institut für Internationales Recht und Internationale Beziehungen. Schriftenreihe Heft 6. Helbing & Lichtenhahn, Basel, 1954. Pp. 54. Fr. 6.25.

Taking his cue from Leibniz' *Basis juris socialis inter gentes ipsum naturae jus est* (the basis of the social law among nations is the natural law itself), Professor Thieme discusses the origin and development of natural law in order to promote the science of law and to contribute effectively to the renascence of natural law thinking in our time.

Though nations are now largely isolated from one another in the matter of law, this has not always been so. Efforts have been made to overcome this pernicious isolation as, for example, with the Roman law in ancient times, the canon law during the Middle Ages, and the various systems of natural law in modern times. Of all these systems, the most universal in scope and content was, and still is, the natural law. Pufendorf made this clear in the statement: *Haec disciplina non solos Christianos sed universum mortalium gens spectet* (This subject [the natural law] affects not only Christians but the whole of mankind). Roman law largely vanished with the ancient world, and the unity of canon law was impaired by the Reformation. Though the Renaissance revived the Roman law, it was no longer universally accepted. Thus the science of law, left without guidance, became stagnant; and the vacuum created by the absence of universally valid and accepted legal principles was filled by natural law. Hence, according to Thieme, if we wish nowadays to overcome the isolationist features of contemporary national laws, we will have to return to the principles of natural law.

Hugo Grotius has been credited with being the originator of modern secular natural law. We are not interested here so much in his *De jure belli et pacis* as in his *Inleiding tot de Hollandsche Rechts-Geleerdheid* (Introduction to the Jurisprudence of the Netherlands). This book, which still constitutes a source

of law in the South African Union, is as important as his main work on *The Laws of War and Peace*. Until Grotius, there had been remarkable divergences in the science of law as it was taught at continental universities, or as it was interpreted and applied by the several courts in various countries. It is the lasting achievement of Grotius to have welded elements of natural law, Roman law, and Dutch law into a single, original independent system of private law which reflected the living legal realities of his native country. Why, then, is this work so important, and why was Grotius able to create this kind of work? First of all, in writing this work, Grotius used his wide knowledge as a historian, philologist, and scholarly lawyer as well as his experiences as a practicing attorney. He was thoroughly familiar with the Dutch law and its sources, as well as with the decisions handed down by the superior courts in Germany and France. Secondly, he injected ideas of natural law into the private law. Until Grotius, these ideas for the most part had been nebulous and purely speculative. But he made them important in practical jurisprudence by projecting them against concrete legal problems, and by using them as a means of clarifying and streamlining the positive law. Thus Grotius also became the founder of modern classification and systematizing of private law on the Continent. His *Introduction to the Jurisprudence of the Netherlands*, for instance, introduced such subdivisions as "On Law and Justice," "Species and the Effects of Legal Norms," "Marriage Law," "Property," and "Community Property." Finally, by introducing the ideas of natural law into the law of the land, Grotius not only established working criteria for the validity of the coerciveness found in every law, but he also was able to point out the basis for the creation of new laws. He taught, in short, how to reason about the law, *de lege ferenda*. Hitherto the only legal arguments in use were those of traditional interpretation or the usages and practices of the courts. Grotius, however, taught a more liberal and progressive approach to law. Time and again he sought the social purpose which the law serves.

Thieme notes three characteristic features which make for the unity of modern natural law. First, and paramount, the unity in the method of reasoning—in this instance, the so-called mathematical or geometrical method—whereby truth is arrived at by consistent and logical reasoning and argumentation. Secondly, the unity of language—Latin is replaced by French, the language of diplomacy and of the law of nations. (The basic works compiled by the teachers of natural law were translated into French and soon became the most popular manuals known over the whole of Europe, especially in France, England, Sweden, and Switzerland. They crossed the Atlantic and became popular manuals in the Colonies and the young republic.) And, finally, the common social ideals of the time.

Three types of writers, according to Thieme, were influential in expounding the natural law: the systematists, the analysts (or critics), and the synthetists. The German systematists—Samuel Pufendorf and Christian Wolff—following in the footsteps of Grotius, in a way are the creators of the modern systems of private law. Pufendorf, treating all domains of private law, rearranges the traditional materials—he starts with the individual by way of the law of contracts,

property, succession, and domestic relations; and then proceeds to the law governing states and nations. In this manner he paves the way to modern codification. In the earlier systems of natural law the argument in favor of *de lege ferenda* is rather cautious and even timid: what is traditional or authoritative is at times still preferred to the thoroughly reasonable. Thus, many norms and institutions are upheld and justified, not by reason, but simply because they were traditionally accepted or customarily observed.

Jean Domat, the author of *Les lois civiles dans leur ordre naturel* (1689-1694), was a French legal writer of deeply religious convictions who displays in his work the influences of St. Augustine, St. Thomas Aquinas, Suarez, Calvin, and Grotius. The famous French critic, Boileau, called Domat "the man who restored reason to jurisprudence." As a man of faith, Domat developed a whole system of law from the Christian norm of brotherly love. By reducing the positive law to certain fundamental natural law principles, he indicated the manner of overcoming positive law whenever the latter conflicts with these basic principles. His role in the history of law is similar to that of Pufendorf. He paved the way for the so-called "General Part" of the *Pandects* and the subsequent codifications of the French law. Even more than the famous Pothier, he influenced the future French Civil Code.

Robert Joseph Pothier (1699-1772) similarly based his works on "universal concepts." He considered from every point of view "*la loi naturelle, les données de la conscience, les objections du for intérieur*." Recent studies have demonstrated that the effects of this kind of natural law thinking have been more important in France than was previously conceded. The result of this insight was that jurists became, on the whole, accustomed to place reason above tradition, and to oppose authority with free inquiry.

The significance of the French school of natural law, however, lies rather with the analytical approach. The leading French systematists, such as Helvetius, Mably, Morelly, Voltaire, and Rousseau, who derived little inspiration from the analysts, were mostly under the influence of the English social philosophers and of Grotius and the German natural law philosophers. Their significance went beyond the territorial boundaries of France.

The second or critical phase of natural law doctrine was principally French. The political developments of the period during which the French natural law philosophers published their writings caused their ideas to spread throughout Europe. In France proper they prepared the way for the French Revolution as well as inaugurated important legislative reforms touching on the law of persons, domestic relations, hereditary succession, and real property. The influences of these reforms could be felt in the remotest corners of Europe.

In England an old natural law tradition extends from canon law and Scholastic thinking (through Fortescue and Christopher St. Germain) to such authors as Thomas Hobbes and John Locke, Richard Cumberland and William Blackstone. In John Fortescue's *De natura legis naturalis* (1461-63) natural law is treated as an intermediary between the superior but undetermined divine law and the inferior but determined human law—a point of view which is quite similar to that held by St. Thomas Aquinas. Natural law is the criterion of

human law, and the errors in the King's law are to be corrected in the light of natural law.

Christopher St. Germain's *Doctor and Student* (1523-32) was the most popular manual of equity until the time of Blackstone. This work stressed the great importance of natural law and identified it with the law of reason. Positive law must conform to natural law or else be regarded as an abuse of law.

Blackstone's *Commentaries on the Laws of England* (1765-69) in a way are closely related to contemporary Continental jurisprudence and to the ideas of natural law writers from Grotius to the popular Swiss author Burlamaqui. Time and again Blackstone considers the law not only as a matter of practice, but also as a rational science; he constantly refers to natural rights, natural obligations, and natural justice. Nowhere is there more evidence than in his *Commentaries* of the formative and systematic power of natural law: *Nirgends zeigt sich deutlicher als bei Blackstone die systembildende Kraft des Naturrechts*.¹ Thus, though Blackstone bases his writings not on the Roman law tradition but on the common law of England, he definitely belongs, together with Pufendorf and Wolff, Domat and Pothier, to the group of systematists. And although he is conservative and traditionalist in his views, time and again he resorts to natural law reasoning in order to bring the English common law of the time in line with the two idols of the eighteenth century, Reason and Nature. Before the American Revolution 2500 copies of the *Commentaries* are said to have crossed the Atlantic and helped to spread the message of the natural law doctrine in America.

In England the systematic *Commentaries* were followed by the analytical school. An outstanding representative of this school of natural law is Jeremy Bentham, the great critic of Blackstone and author of the *Comment on the Commentaries* (1774-75). Bentham takes issue with Blackstone's conservatism and endeavors to mitigate some of the harsh provisions of contemporary English law.

The great traditions of natural law had persistently become manifest in the decisions and traditions of English common law courts and the court of Chancery. One aspect of that tradition was the constant appeal to the test of reason to which the validity and binding force of law and custom were subjected. This concept of reason included both the ideas of fairness and the notion of practicability. Essentially the same result was achieved on the Continent by the efforts of such systematic thinkers as Grotius and Pufendorf. The test of reason finally asserted itself in the great European codifications which, in certain situations, call upon natural law and natural justice. Also, the judicial tradition on the Continent, which handed down from generation to generation the "Idea of Law" in its changing content and form as newly arising circumstances and conditions demanded, was based on an implied reference to natural law. Having this constant corrective—natural law understood as the law of reason—there was no particular need in England for revolutions, the reception of foreign laws, or for large scale codifications.

Another aspect of natural law becomes evident in Equity, which originally

1. THIEME, *op. cit.* at 34.

was an appeal to natural justice, or to be more exact, an appeal to the individual sense of justice of the individual Chancellor. But here, too, we can see the strong formative or systematizing effects and influences of natural law ideas which in the end reduced Equity to a system. Thieme rightly quotes² from Maine's *Ancient Law* (pp. 48 ff.), where Maine ascribes the hardening of Equity into a system to the influence of those "mixed systems of jurisprudence and morals, constructed by the publicists of the Low Countries."

In the United States the tests of natural law and Equity, the appeals to reason as well as to natural justice never have lost their basic importance as the foundation of a living law.

What, then, were the most significant changes which natural law ideas carried into the modern Continental codifications as well as into the Anglo-Saxon law? Most important, perhaps, were the civil law guarantees of the Rights of Man. Hence, it appears that the systematists had not labored in vain when they pointed to the limits to the coerciveness of the positive law. And the analysts were correct when they referred to a law "above" or "beyond" the positive law. The *jura connata* (Wolff), the inherent rights of the natural law, such as liberty, equality, and security, were gradually received into the positive law. Thus, feudal privileges were abolished; the legal status of illegitimate children was greatly improved; legal protection was granted to the foreign born; Jews were legally emancipated; serfdom was abolished; and the beginnings of the right to privacy can be noted. In the law of domestic relations we can see the gradual emancipation of the wife from traditional thralldom; a reform of the parental powers; and a liberalizing trend in the marriage laws. In the law of hereditary succession the power to freely dispose of property as well as the right to natural succession was favored. In the law of real property we see the abolition of all feudal restrictions upon the alienation of land. In the law of contracts all impediments which obstructed the free flow of commerce were done away with. Freedom of trade and commerce, freedom of contract, freedom in matters touching upon the rate of interests, etc., became universally recognized.

All these rights (and privileges) became part of the positive law. It is exactly these novel aspects of the law which gave a distinct unity to the codifications of the late eighteenth and early nineteenth century. On the whole, two basic types of legal codifications came into being as the result of natural law ideas: those codes which, due to the influence of Montesquieu, take account of the historical background and the economic and social environment—though faithful to the general principles of natural law, they endeavor to do justice to the specific conditions of time and place; and these codifications which ignore all historical or sociological factors. The legislation of the French Republic, for instance, was completely "a-historical," while the *Code Napoléon* made a conscious effort to maintain a close connection with the institutions of the ancient regime.

How, then, did the great codifications such as the Austrian *Allgemeines Bürgerliches Gesetzbuch*, the Prussian *Allgemeines Landrecht*, or the French

2. THIEME, *op. cit.* note 22 at 37.

Code Napoléon influence the development of legal science? It could be maintained that, on the whole, they encouraged a trend in the direction of legal positivism, a trend which became manifest in legal exegesis and legal interpolation of the codified law. The whole of legal wisdom seemed to have been relegated to law books. Under the influence of Hegel and Darwin, who glorified that which exists as reasonable or successful precisely because it exists, a trend of shallow legal positivism became prevalent during the nineteenth century.

The present reviewer wishes to call to the attention of Professor Thieme that although it is true that it was Stammler who popularized greatly the idea of a return to natural law, it was Leon Petrazhyski, the Polish legal philosopher, who laid down the scientific and lego-political foundations of the present-day revival of natural law.³

We should welcome this short work by Thieme as a harbinger of new ideas. Perhaps the present isolation of mankind, divided as it is into separate states, constitutes only a transitory episode. Maybe a time will come again when the supremacy of the universal natural law, the voice of conscience and reason, once more will prevail over the present Babylonian confusion.

ZYGMUNT EPSTEIN

3. 2 *Lehre vom Einkommen, Anhang: Zivilpolitik und Politische Ökonomie* 437 ff.

THE RIGHT TO LIFE. By A. Delafield Smith. Chapel Hill: The University of North Carolina Press, 1955. Pp. xi, 204. \$3.50.

This unusual and provocative book deserves to be noticed by those who are interested in natural law. It has important implications especially for those who are concerned with the application of natural law in legislation and politics.

Mr. Smith, the Assistant General Counsel of the Department of Health, Education and Welfare, explores the ethico-legal foundation of the individual's claims upon the resources of society. He is concerned, on the one hand, with man's need for security, and argues persuasively that "a calm, undisturbed faith in the sustaining responsiveness of life's environment" is indispensable to human and societal progress.¹ On the other hand, he asserts the need of the individual for freedom.

It is not a mere question, therefore, of meeting the fundamental needs of life. The terms and conditions under which such needs are met will determine whether we are to promote the development of a healthy and dominant personality in our society or continue to undermine and destroy self-esteem and degrade human character.²

The author proposes a system for reconciling these two competing forces: security and freedom. The reconciliation, he says, can be achieved only through law. We must first be able to affirm that the individual has a right to whatever he needs

1. SMITH, *THE RIGHT TO LIFE* 22 (1955).

2. *Id.* 19.

for a decent human existence. This affirmation will have two consequences: society will not be justified in withholding these necessities from him arbitrarily; and the individual will have no cause to feel or become dependent and inferior when he accepts them.

I shall have more to say later about the manner in which the author establishes this right to call upon society for the necessities of human existence. Suffice it to say now that once this fundamental premise is granted, a remarkable vista opens. The doctrine of equal protection of the laws would be more frequently invoked against undesirable statutory patterns of public assistance and discriminatory action on the part of welfare administrators. Need would become the principal basis for assistance. An opportunity would arise to re-examine ingrained welfare concepts about the "worthiness" of welfare recipients, enforcement of support by estranged relatives, residence requirements and payment-in-kind. Social workers could be relieved of policing functions which hinder their work and their recognition as professionals.

At the same time, the needy might be spared some of the intrusion of government in their private lives, for they would not have to dance to government's tune in order to qualify for assistance. Private guardianship of minors and incompetents would replace institutionalism and administrative supervision. The individual would remain free and responsible, his will unbroken by the superior will of government.

In stating his original thesis that men require both security and freedom and in developing the ramifications of his system, Smith often expresses himself in natural law terms. Though his work is purportedly the distillation of his personal philosophy, it is very close to natural law. The author appeals, expressly or otherwise, throughout most of his book to a "basic substratum of law" by which the legitimacy of positive law can be determined.³ His conclusions, which seem to be principally derived from the nature of man and society, are exalted in concept and stirringly presented.

At the second stage of his argument, however, the author abandons the natural law approach. When he attempts to establish the individual's right to call upon society for assistance, he appeals not to the nature of man and society but rather to the development of society since the Industrial Revolution. Prior to that time, Smith argues, the individual was able to satisfy all of his needs directly, but now he is dependent on others for the satisfaction of the major part of these needs. Society's obligation to respond to his cry for help arises from the fact that it has deprived the individual of the "firm commitment" that he had from nature during the centuries before society became mechanized and occupations specialized.⁴

The argument is novel and subtle, but it does not hold water. The complexity of society may affect the kind and amount of assistance that the individual may claim and the range of persons from whom he may claim it, but it would not appear to create the right. Certainly the obligation to assist the needy predated the Industrial Revolution. If the family breadwinner in the

3. *Id.* 94.

4. *Id.* 9-22.

Middle Ages, or even in the Stone Age, became incapacitated or died, those able to help were morally obliged to assist the needy or bereaved family. And if some cataclysm should tomorrow wipe out our industrialized society and leave but a handful of struggling humans on the face of the earth, they would have an obligation to render mutual assistance.

To put it another way, societal changes have only accentuated the underlying obligation of members of a society to assist one another. It may be conceded that many persons who might have been more successful in the simpler state of nature stand confused and helpless in our complex civilization. For them, the primeval jungle has been replaced by a more inimical environment: the technological jungle. Nevertheless, the obligation of society to help these unfortunates and their corresponding right to demand help arise from a relationship more basic than that described by Smith—the brotherhood of man.

If the author had not abandoned the natural law approach in favor of the historical at this stage of his argument, I think that he would have remained on safer ground. The nature of man would appear to afford an unshakeable foundation for the right of the needy to call upon society for aid.

Nevertheless it is easy to surmise why the author may have considered it necessary to abandon a natural law approach at this point. The most vociferous and popularly-acclaimed American exponents of natural law in the last two decades seem to have reached conclusions contrary, in the main, to Smith's noble and sympathetic conceptions. They have often espoused a political ultra-conservatism inconsistent with the maintenance of public welfare programs, at the same time implying that these political convictions flowed necessarily from natural law principles.

I have before me a copy of the proceedings of the Natural Law Institute held in 1950 at this university.⁵ That institute met to consider the question of human rights from the viewpoint of natural law. Papers were presented by a number of jurists, educators, and writers who are noted in this country for their natural law leanings. When these papers departed from generalities and came to the concrete application of natural law, they contained not a single favorable reference to public welfare programs. The speakers criticized the inadequate philosophical principles of the so-called "Liberalists" of the New Deal⁶ and the "sophisticated positivists, the skeptical pragmatists, the creeping socialists (and) the social planners of all shades,"⁷ but offered no assurance that in discarding wrongly-motivated humanitarianism they had not also discarded all humanitarianism. In fact, the indications are that the speakers may have done just that. I cannot tell whether cheers or boos greeted the statement of one participant that "a Congress that does little, thus encouraging the people to do more for themselves, is thereby fulfilling the highest American ideal, of individual liberty and collective freedom."⁸ But I can say that the tenor of

5. 4 UNIVERSITY OF NOTRE DAME NATURAL LAW INSTITUTE PROCEEDINGS (Notre Dame, 1951).

6. *Id.* 39.

7. *Id.* 47.

8. *Id.* 93.

the other talks leads me to believe that the other speakers may well have nodded their heads in agreement at this bon mot.

These and many similar examples of the use of the "meat-cleaver approach to natural law"⁹ to justify ultraconservative political prepossessions have received wide publicity in the United States. They have probably alienated a large number of intelligent Americans who might otherwise have pursued further an investigation of the relevance of natural law to present-day problems. As I have already indicated, a fear that natural law adherents are almost universally insensitive to societal obligations may have caused Smith to veer away unconsciously from natural law considerations at the crucial stage of his argument.

If my surmise has some element of truth, it would seem to indicate that those who seek to convince Americans of the worth of natural law must first take affirmative steps to correct this misconception. The social-minded probably need assurance at the present time that we do not reserve our highest accolades for those who would advocate a return to *laissez faire* and "rugged individualism." Philosophy is an affair of the heart as well as of the head. If they are forced to a choice, many sincere persons will prefer even a soft-minded philosophy to a hardhearted philosopher.

American natural law adherents of liberal sympathies—especially those of the Catholic faith, since Catholics seem to be oftenest to blame in this matter—owe their compatriots an obligation to reaffirm their conviction that natural law is not committed to any political theory, least of all to one that would deny succor to the needy and suffering in the name of individualism. Only then will the presently-disinterested be ready to listen with respect to whatever else we have to say.

CONRAD L. KELLENBERG

9. Cf. 1 NATURAL LAW FORUM 1 (1956).

REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.
New York: Dodd, Mead & Company, 1956. Pp. xxvi, 301. \$5.00.

In this very informative and remarkably clear report, nine distinguished lawyers¹ examine the five federal civilian personnel security programs² now in operation and find them wanting in a number of important respects. The result of their study is a list of recommendations for improving and strengthening the general security program. The recommendations look toward the elimination of two of the present programs and a radical reduction in the scope of the

1. Dudley B. Bonsal, Chairman, Henry J. Friendly, Harold M. Kennedy, George Roberts, and Whitney N. Seymour, of New York; Richard Bently, of Chicago; Frederick M. Bradley, of Washington; Monte M. Lemann, of New Orleans; John O'Melveny, of Los Angeles. The Committee's staff was headed by Professor Elliott B. Cheatham, Columbia Law School, and Professor Jerre S. Williams, University of Texas Law School. Expenses for the study were provided by a grant from the Fund for the Republic.

2. The Personnel Security Program for Federal Employees, the security program administered by the Atomic Energy Commission, The Department of Defense Industrial Security Program, the Port Security Program, and the International Employees Loyalty Board.

remaining three. What survives is to be placed under the general supervision of a proposed Director of Personnel and Information Security. A minor revision is suggested in the standard to be used for determining trustworthiness, and the new standard is to be made uniform for all programs. Finally, each program is to be subject to a number of important procedural safeguards, the detailing of which consumes fully two thirds of the Committee's recommendations.

The *Report* experiences little difficulty in arriving at the preliminary finding of a need for some kind of personnel security program. A brief sketch of the Communist threat, with emphasis upon the successful use by its agents of the technique of penetrating from within, is deemed sufficient for the purpose. The need established, a bit perfunctorily, some may feel, the *Report* addresses itself to the heart of the problem of erecting an effective personnel security program:

We must never forget that the very purpose of national security is to preserve our independence and liberty and not merely to combat the greatest present danger to it, Communism. The reconciliation and combination of such seemingly opposed elements as security and liberty is the mark of every successful social organization, from the family . . . to a great nation. (p. 43)

The Committee concludes that existing personnel security programs adequately guard national security. Its recommendations for change are on the side of greater protection for the individual. With a few important reservations, the result appears to be a clear net gain for both security and liberty.

Scope of the programs.—Approximately six million positions in government and industry now require security clearance for those who hold or apply for them.³ Included in that number are all employees in the Executive branch of the Government; employees of contractors with the military services and the Atomic Energy Commission whose duties require access to classified information; seamen on American vessels; longshoremen employed in areas designated as restricted; and American citizens employed by public international organizations. The Committee recommends that the scope of the programs be drastically reduced by extending their coverage to sensitive positions only and by defining as sensitive those positions which involve access to secret or top-secret material or which permit occupants to make policy decisions bearing a substantial relation to national security. Restriction of the programs to sensitive positions as thus defined would result in the virtual elimination of two which are now in operation, the Port Security Program, covering seamen and longshoremen, and the International Organizations Employees Loyalty Board, covering employees of public international organizations. The Committee estimates that if its test of sensitivity is applied to all positions now covered by security programs, the number requiring clearance will be reduced from six million to one and one-half million.

Clearly, effective reform of existing programs must begin with a drastic

3. The decision in *Cole v. Young*, 351 U. S. 536 (1956), which in effect restricts the Federal Employees Program to sensitive positions, has not materially changed this figure, which is taken from the *Report*. Most of the employees who were thereby released from the operation of that program are still subject to the loyalty test contained in the general civil service regulations.

reduction in the number of positions subject to security clearance. Security is best served by directing the energies of the necessarily limited number of investigators to positions which can be exploited with profit by an enemy. Liberty of the individual is best served by placing as many persons as possible beyond the reach of programs which at best will result in injustice and hardship to some. It may well be doubted whether as many as a million and a half employees need be covered by the programs. This figure is based on estimates furnished by government officials. The Director of Security of the Department of Defense estimated that, in the words of the *Report*, "only about 800,000 positions in its industrial security program involve access to 'top-secret' and 'secret' information." One wonders what Alice would have said upon being informed that the secrets of the Department for the Defense of Wonderland were accessible to only 800,000 persons. The principle urged by the Committee is a sound one, but it must be implemented by a realistic study of exactly what our secrets are and who are in positions to affect their use.

Standards and Criteria.—The standard employed in the first general employee security program, which was brought into being by President Truman's Executive Order 9835, was that "on all the evidence . . . reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." A 1951 amendment changed the standard to read that "on all the evidence there is reasonable doubt as to the loyalty of the person involved to the Government of the United States." President Eisenhower's Executive Order 10450 abolished the Truman program. That order directed the head of each agency or department "to insure that the employment and retention in employment is clearly consistent with the interests of national security." Some variation of the national security test is now used in all programs except that for international employees, which uses the loyalty test.

The Committee suggests that the standard be "whether or not in the interest of the United States the employment or retention in employment of the individual is advisable." It deliberately avoids inserting "clearly" before "advisable" in the belief that the present standard is subject to abuse at the expense of the employee if applied by "unduly literal minded" administrators. The proposed standard continues the trend toward a broader test which in theory places less stigma on those who cannot pass it. The qualification is necessary because unfortunately the public cannot be brought to distinguish security proceedings from the older loyalty hearings. Whether, as the Committee believes, the confusion results from use of the term loyalty in the original program, or whether, as seems quite likely, it stems from the fact that the present program followed hard on the heels of campaign promises to rid the Government of Communists, confusion it certainly is. And in view of that confusion, it may be wondered whether the employee's right to the respect of his community is not better protected by the harsher sounding loyalty test. At least that test compelled those who sat in judgment to look squarely at the seriousness of their determination.

A significant recommendation respecting criteria is that the Attorney General's list of subversive organizations be abolished, unless it is modified along lines

which the Committee suggests. In view of the positive finding that "abolition of the list would not weaken in the slightest the aid which the Department of Justice could and should give to the executive departments in the enforcement of the personnel security programs" (p. 157), it is difficult to justify the list however modified. The Committee notes that the mere fact of membership in a listed organization seems at times to have been taken as a ground for disqualification, and it will certainly be ever difficult to persuade those "unduly literal minded" persons over whom concern is expressed elsewhere in the *Report* that membership can be quite consistent with trustworthiness.

Procedure.—The most significant proposal for procedural reform is the establishment of a central screening board in the Civil Service Commission. The board alone is to determine whether security charges are to be filed, a function now exercised as to its own employees by each of the seventy-odd executive agencies. Before the board determines that charges should be filed, the employee is to be given an opportunity for an informal conference, with benefit of counsel. The lack of procedure for careful attention to the question of whether security charges ought to be filed at all has been a source of frequent and well justified criticism in the past. Once charges are filed, a great deal of damage is done, even though on examination they turn out to be groundless.

In the commentary accompanying the recommendations for screening procedure the Committee urges that the screening board refrain from issuing charges in a case until it determines that the case is truly a security matter and not one which can be effectively disposed of under the general suitability provisions of the civil service regulations. This is an important point, and perhaps it ought to have been incorporated in the text of the recommendation. It is designed to end the practice of placing the "security risk" tag on a variety of unsuitable employees whose shortcomings are only tangentially related to the question of their trustworthiness. There are sound reasons why alcoholics, homosexuals, and ex-criminals ought to be excluded from sensitive positions, but there is no need to bring the security machinery to bear on them. To eliminate completely the use of the machinery in such cases, the substance of the suitability requirements of the civil service regulations should be incorporated in regulations covering noncompetitive positions in government and positions in private industry affected by the security programs.

The wisdom and fairness of the screening procedure are so manifest that it may well be wondered why any other system has been tolerated. So it is with the other proposals for procedural reform. Employees suspended pending determination as to clearance are to continue to receive their salaries, and, where possible, are to be transferred to nonsensitive positions without loss of pay. Subpoena power is given to the screening board and to the several hearing boards, which are to receive for determination the cases of employees charged by the screening boards. Hearing boards are to furnish written findings of fact and conclusions to the charged employee. If the employee is cleared he is to be reimbursed in the amount of a reasonable fee for his attorney.

Viewed as a whole, the proposals for procedural reform go far to justify the Committee's enthusiastic conclusion that, upon their adoption, "no

reasonable citizen could feel that this [national security] was being achieved at the sacrifice of our basic principles of liberty and our sense of fairness." And certainly any criticism of the *Report* must take into account the desire of the Committee to do a good deal more than to draft an ideal personnel security program. It wanted a program which would be acceptable to very nearly all shades of opinion on a much disputed subject. It doubtless hoped to influence the forthcoming report of the Commission on Government Security, appointed to study the field by a Joint Resolution of Congress in 1955, a hope shared by those who are interested in a less restrictive program. Yet with all due regard for the delicacy of the endeavor, the *Report* seems to go too far in one vital direction and not far enough in two rather important ones.

Its recommendations on the question of whether the charged employee is to be permitted to confront his accusers goes too far. Not only undercover agents but even casual informers are to be shielded whenever a shield is deemed necessary to the maintenance of an effective security program. It is easy to agree with the Committee that in the great bulk of security cases confrontation is unimportant because the facts are admitted by the charged employee. But as the Committee itself concludes:

Yet it is small solace to the individual, when confrontation is important in his case to know that in many cases it is not. Each individual is entitled to fair play. (p. 176)

Use of the "faceless informer" is not confined to security cases. It has entered into other administrative proceedings, most notably into conscientious objector and deportation proceedings. For the moment at least, the practice has been permitted in those areas by the Supreme Court, over the sharp protests of a sizeable minority. But whether or not it receives ultimate constitutional sanction, it is a vicious practice, one at war with the most fundamental notions of fair play, and one which ought to be confined to cases in which its use is absolutely compelled.

The Committee agrees, but it feels that in some security cases use of the undisclosed informer is justified. Its argument has considerable force so long as it is restricted to defending the anonymity of undercover agents. And even there one wonders. Would it not be possible, as others have suggested, to afford the charged employee at least a part of the benefit of cross-examination by permitting a representative having the requisite security clearance to confront and cross-examine the witness? Or why not provide that in any case where it is necessary to deny the right of confrontation, the hearing board and the agency head shall be powerless to make an adverse determination, but must order the employee transferred to a nonsensitive position? But regardless of the merits of shielding undercover agents, protection of casual informers cannot in final analysis be defended in terms of national security. National safety is jeopardized, not secured, when we put those who serve the Government at the mercy of persons who are not willing to be identified with the charges they bring. It is positively distressing to be told, by way of justification, that "even casual informants would not

give information if confrontation were required." If that is so, we are really in peril; but the insidious agents who have placed us there are our own irresponsible citizens.

On two counts the recommendations of the *Report* appear to fall short. Why assign to the head of the employer-agency the task of making the final determination as to whether the charged employee is to be retained? The Committee feels that the agency head should have the last word because he knows the demands of the position held by the employee and because he is charged with responsibility for the successful operation of his agency. Neither reason seems to warrant making the judgment of the hearing board amount to a mere recommendation. The agency head can pass on to the board his views on the sensitivity of the position. Indeed he must do so in every case if the board is properly to apply the proposed standard. Responsibility for the operation of the agency rests with him, but he can most effectively discharge his responsibility in the personnel security area by a careful choice of appointments to the hearing board of his agency. On the other hand, why all the admirable procedural machinery designed to make the hearing resemble a judicial trial, if the head of the agency is to be permitted to make an arbitrary determination without reference to what the hearing board decides? Even if the agency head were to adopt the finding of the board as his own as a matter of policy, it would still seem wise to insulate him completely from the kind of pressure to which agency heads have been subjected in the past.

The Committee's final recommendation concerns the rights of applicants and probationary employees. Under present programs applicants about whom adverse security information is already on file may be denied employment without any explanation. The report well describes their plight:

In consequence, such applicants may be continually denied positions, perhaps throughout their lives, because of adverse security information contained in their personnel files about which they know nothing and to which they could give a completely satisfactory answer if opportunity were afforded. (p. 186)

The Committee finds their treatment both unfair and wasteful. It recommends that an applicant for a position covered by the programs who is denied employment should, upon request, be furnished a statement of all adverse security information concerning him or a statement that there is no such adverse information. The applicant is to be given the right to file an affidavit denying or explaining the information, and the affidavit is to be made part of the file. If his employment by the agency is deemed important by its general counsel, an applicant can get an informal interview to explain adverse security information. This last privilege is also extended to probationary employees, who already enjoy the first two.

The recommendations would effect a significant reform. But why not extend to applicants and probationary employees the same right to the screening procedure and the hearing as that enjoyed by permanent employees? The Com-

mittee weighs the possibility, but concludes that extension would be a danger to effective administration:

Many persons could avail themselves of these procedures when prospects for employment were almost nonexistent, or only for the purpose of clearing their records with no intention of pressing the application for employment after clearance. It is desirable to avoid adding to the burden of government by making security procedures available to all applicants. (p. 187)

The argument here is quite weak. It rests on nothing more than an assertion as to what many people *could* do, and even that without any indication as to how many "many" amounts to. But suppose that there are literally thousands who are anxious to clear their names and who are willing to use the machinery of the programs for that purpose. Should they be denied the opportunity to do so for no better reason than that the burdens of government would be thereby increased? If the added burden can be discharged by the appointment of additional screening and hearing personnel, that course obviously ought to be followed. It is conceivable, though not likely, that in the beginning a flood of requests by applicants for hearings could temporarily disrupt orderly operation of the programs. But that problem could be solved by awarding priority to cases involving permanent employees and taking applicants and probationary employees on a first requested, first heard basis.

It is always difficult to quarrel with the generous over their not having given more, and that is the uneasy task of any critic of the *Report*. The aim of the *Report* was high—nothing less than the reconciliation of the competing claims of security and freedom in very fearful days. If the mark was not quite reached, the fault is doubtless with the times.

BERNARD J. WARD
