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Book Reviews

THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY PHILOSOPHERS. By Carl L. Becker. New Haven: Yale University Press. 1932. pp. 168. \$2.

HERE is a book so simple, so light, so clear that one feels didactic in pointing out that it is really a scholarly study in the history of ideas, and a bit ponderous in assessing it (as it must none the less be assessed) a classic. It is cast unmistakably in an enduring mould. Into it a lavish scholarship has been poured, but with a hand so deft as to conceal everything except the significant. Those who seek the tortuous in thought and the magistral in style will do well to avoid this book. They will be cruelly duped by its effortless clarity and will conclude that what is so smooth in the reading cannot have been weighty in the writing. For Mr. Becker has attained here that final simplicity by which the idea and the word are but phases of each other and move to an easy and seemingly inevitable rhythm. In this book he reveals more fully even than in his previous writing a maturity and a wisdom that flow lightly from his experience, but for which the rest of us must strain and sweat. He has achieved that most difficult of all victories for the scholar—a knowledge of what to omit as well as what to include. Here is no mere emptying of note-books but the distillation of a mind.

And since it is a distinctive mind we may be grateful that through it the author has written his world, his generation, himself into this account of the ideas of the eighteenth century Philosophers. Reading the book one is impressed with the truth of Maitland's remark that the best history is written backward. The author starts with the preoccupations of his contemporary world; in the light of them he has turned the ideas of the Philosophers about in his mind until they have revealed exactly those facets that hold the greatest interest for our own generation. This brilliant, heroic and slightly ridiculous band of Philosophers—Rousseau, Diderot, Hume, Herder, Gibbon, Voltaire and the others—who have undoubtedly changed the shape of our thinking and therefore of our history, have been written about copiously and in a variety of ways. Be certain that wherever you have seen some glowing and plentifully capitalized account of the Age of Reason, or the Enlightenment, or the great Humanists, or the growth of Freedom of Thought, or the Increase of Tolerance, or the history of Progress or of Liberty, you have come unavoidably upon their names. And they have been invested therefore with that somewhat unctuous association that comes from always being found on the side of the angels, especially when those angels are nineteenth century and Whig. There was indeed a period in which a slight tang of scandal still attached to them, the scandal of being atheist and revolutionary and mostly French; but that was before the full effects of the libertarian influence of Auguste Comte and John Stuart Mill had been completely felt. More recently, there has been a period in which we have stipulated a dissent from their theories of natural law before we could quite accept the rest of their doctrine. But in the main the valuations made of the Philosophers have incorporated and expressed nineteenth century intellectual experience, and have been curiously unreceptive to the tremendous change that had come upon our thought since the World War.

Mr. Becker is far from being an intellectual Whig, although I have read somewhere else his expression of his political faith as a liberal. This is, I take it, one aspect of the importance of his book on such a subject, aside from the sheer delight of it. The detached, remote, slightly acidulous manner in which he inspects the Philosophers and their entire baggage of ideas—their execration of priests and kings, their attempts to become harmonious with Nature, their theories of progress, their eager glances at Posterity—flows not only from the author's shrewd insight into the springs of human conduct. It is the product of our entire present generation—a generation which has not only learned to question existing institutions but, whether out of philosophy or out of despair, has become skeptical of the very questioning itself. The author's approach to the eighteenth century is not therefore that of the attack direct. He achieves a more telling effect by raillery than could be achieved by heavy artillery. Instead of blowing the age to smithereens he stands it gaily on its head. His central thesis, expressed also in his title, is a paradox: the Philosophers, who thought that they were using reason to destroy faith, were really constructing a faith of their own, and found finally that they had reared for themselves a new and gleaming City of God.

It is all a little like the two sides of a man's face that are supposed to reveal contrasting aspects of his character: look at one side and it is reason you see, look at another and it is faith. This dual visage in the system of the Philosophers the author presents with a skill that is at once our admiration and our despair, so subtly has he worked out the logical—or perhaps we should say the psychological—development of their thought. They are shown as a group of men intent on setting things right; to do this they find it necessary first to remove the obstacles that have stood in the path of human development. They find those obstacles to be chiefly superstition, ignorance and authority. Accordingly they deliver a frontal attack on church and state, on priests and kings; they expose to the merciless scrutiny of their intellect institutions which God and man had taken centuries to build up; they find their most effective weapon in the cold power of reason, but in the process the very coldness of their reasoning becomes an enthusiasm with them, their hatred of priests and kings a demonology, their love of humanity and their projects for its reform a religion. They find in the concept of nature a satisfying mechanistic explanation of life, which makes unnecessary the old theological explanations; they embrace it eagerly, try to come into harmony with it—only to find that they have replaced an old God with a new one. When they try to follow their naturalistic theories through to a logical conclusion, they come squarely up against atheism and immorality; trapped, they have recourse to distinctions, and proceed to separate what is essential and noble in nature from what is base and degraded. They set out on a magnificent research of history, in quest of the something that is essential to human nature, so that on the basis of it they may reconstruct human society; they find in the past certain intervals of lucidity, especially the *quatre âges heureux*, but in the main they find only a wasteland dominated by "the triumph of barbarism and religion," for "in a very real sense they never pass the frontiers of the eighteenth century"; they have only projected their own reformist scale of values into the past, and their "new history" has been "philosophy teaching by example." Having thus ransacked the past for Hell they turn to the future for Heaven; they find that to fight the Christian religion they must construct a picture of human life as dramatic as the Christian story, for "it is true of ideas as of men that they cannot fight unless they occupy the same ground." Accordingly they evolve the concept of social progress, to which they dedicate themselves; and

in the process they discover "the uses of posterity," for the martyrdom suffered in the struggle for refashioning society is rewarded by immortal life in the memory of succeeding generations.

This picture of the eighteenth century mind drawn for us in vivid strokes by the author is, some will fear, perhaps too brilliant to be fair and too pat to be sound. The direct question of its authenticity as an analysis would require a far more immediate acquaintance with eighteenth century writings and the personalities of the Philosophers than most of us would be able to muster. But more important perhaps than the authenticity of the analysis are its implications. And it is these implications that cut completely across the boundaries of academic specialties, and make this as fitting a volume for the Storrs series of lectures at the Yale Law School as any of the earlier volumes which have confronted directly the problems of legal philosophy. Of the rich mass of these broader issues that the book raises, for law as for other social studies, we may select three groups that seem most significant.

The first has to do with the method that the book presents for the study of the history of ideas. That method is not the traditional one. It has been, as we all know, too true in the past that the history of ideas has been written genealogically, in the manner of Deuteronomy. It has been for the most part an exercise in chain-making: link has been added to link in tracing the "development" of some doctrine or theory, each great thinker being represented as having just so much sounder a view than his predecessors and passing on his accumulated advantage to his successors. And the entire development is generally traced within some group of ideas, such as economics or law or politics. What Mr. Becker succeeds amazingly in doing is to capture the mind and mood of a whole age. He compasses this partly by his skillful use of the concept of the "climate of opinion," partly by his subtle understanding of the anatomy of an entire system of thought and the interplay within it of emotional and intellectual elements. He develops the idea of the climate of opinion by contrasting the things that seem obvious and the things that seem strange to an ordinary man in the day of Aquinas and Dante, in the day of Voltaire and Hume, and in the day of Einstein and H. G. Wells. The enormous advantage of such an approach in the history of ideas is that it enables the author to deal with things unseen as well as things seen, to discuss those preconceptions of an age which may be more important than its expressed beliefs. Mr. Becker charts not only the things the Philosophers thought and talked about and the ideas they were obsessed with, but also the things they did not talk about, either because they deemed them too obviously true to need discussion or statement, or because they had not yet glimpsed them as separate entities. Related to this is the opportunity that such a method offers for studying the way an age hangs together—the relation of its literature, its law, its religion, its philosophy and its politics. Not in the hands of every writer will this relation be presented as artfully as in this book; were the learning carried less lightly it would have led to the introduction of an horrendous apparatus. But it is a valuable technique, and in the history of legal ideas especially its organic quality will be useful. For legal history is notoriously tortuous, paradoxical, erratic. To try to trace it outside of its integral relations with the rest of the climate of opinion will make it merely whimsical; and to sever the crabbed logic of its development from the rich emotional growths of its time will make it what it was never intended to be—merely a black-letter study.

Mr. Becker's own handling of this method in his book is so effective that it may seem carping to quarrel with it on some scores. But I feel that he

would have given his picture of the eighteenth century mind a greater air of conviction for us if he had introduced into it some of the roughnesses and loose ends that we see around us in our own age, and had been less insistent on making out of it a paradox within a unity. Such an oversimplification is probably the price we should have, under any circumstances, to pay for the precision of the analysis. But it is emphasized by several further facts. The system of the Philosophers is, quite rightly, constructed from materials scattered over the century, from Bayle and Fontenelle to Robespierre and Madame Roland. These people span several generations; they were addressing their thought and their words to widely variant situations; and unless these situations are expressly taken into account, the unity of the thought is attained at the cost of some dislocation. Moreover, they were only intellectuals, and the sum of what intellectuals think does not—as some of us have learned to our sorrow—add up to the mind of an age. When you talk of “the age,” says Emerson in his essay on *The Times*, you mean your own platoon of people. The Philosophers undoubtedly labored under a similar illusion. They were indeed the men of letters, the men of learning, to some extent the “men of sense” of the age. But they represented only themselves, and to some extent the middle class whose road to power they were smoothing. They did not represent either the classes whom they were seeking to depose nor the masses whose plight they could scarcely estimate. And it is here that we reach the gravest criticism that may be made of Mr. Becker’s method. He leaves out of account the whole play of economic and political forces out of which ideas grow. He is so concerned with giving us the climate of opinion that he forgets about the soil of opinion.

The second group of issues that the book raises has to do with the theory of natural law. Nature is of course the principal protagonist in the intellectual drama built around the Philosophers; it is in a sense both the hero and the villain of the piece. The Philosophers, says Mr. Becker, were through all those years putting God on trial: “the affair was nothing less than the intellectual *cause célèbre* of the age.” In the same way we may say that throughout the book Mr. Becker is putting Nature on trial, and in this he is also reflecting our own suspicion of natural law and the whole concept of the natural. From this angle the experience of the Philosophers with “the laws of Nature and of Nature’s God” is of real relevance to our own situation. The appeal to natural law by the eighteenth century was an appeal from the positive law of church and state, which was held to be impeding cultural progress. In the American experience of the last half century the appeal has also been from the positive law, but it has been made not in the name of cultural progress but in the name of stability, and it has been used by the Supreme Court against the more democratic legislative programs of the states and of Congress. Mr. Becker points out an extremely significant progression in the intellectual odyssey of the Philosophers. The natural law that they finally arrived at did not belong to the nature with which they started. That nature they took from seventeenth century science, and its spirit was matter-of-fact and non-ethical, much like our present science. But when they followed up its implications it led either to a complete acceptance of what is, which would have defeated their reformism, or to the denial of morality which would endanger the whole social fabric, including any new one they might construct. They retreated therefore to a natural law that was founded upon human nature in its best aspects—something essential to man which they hoped to discover by their historical research. This was, Mr. Becker points out, far from the complete atomism involved in Locke’s denial of innate ideas. It was rather the rediscovery of mediaeval

"realism"; and "the innate ideas which Locke had so politely dismissed by way of the hall door had to be surreptitiously brought back again through the kitchen window." Does this have some relevance to our own situation? The social effects of the application of natural law concepts by the Supreme Court have produced such a revulsion among our jurists and other intellectuals that they have fled to an atomism which would deny that there is anything at all "essential to man" by which positive law must be judged. Can we too rediscover something approaching mediaeval realism and believe in it? Thus far in our quest for "man in general" we have had to rely on a psychology no further advanced in this respect than that of Locke and Hartley, and a real natural law must first of all await an adequate psychology. From another direction, the possibilities of the Marxist historical analysis for jurisprudence have not yet been incorporated into our thinking, but one may read between Mr. Becker's lines the warning that is implied in the fact that in a somewhat similar historical research the eighteenth century Philosophers never once stirred from the closed chamber of their own minds.

The book raises finally a group of issues that is tied up with the problem of social change in the eighteenth century and in our own time. The period of the Philosophers was a period remarkably like the present. It was an age of intense disorganization, of changing intellectual horizons, of preparation for a social upheaval. The book, being a study of the minds most active in this context, is therefore most significant as a study in the dynamics of intellectual revolution. And our attempt to appraise the revolutionary thought of an age so like our own, to examine its consistency, to see to what extent these thinkers were gigantic minds and to what extent they were merely deluding themselves with dreams of a heavenly city, is in reality so much more than history; it is an attempt to orient ourselves with regard to our own intellectual instability. Mr. Becker's scalpel lays bare two principal weaknesses in the anatomy of the Philosophers' thought: the religious, almost messianic, character of their rationalism; and the fact that, although they affected to despise morality and religion, when they found that their fight might through the assault on these lead to the destruction of the social fabric, they pulled their punches. With the first of these the author deals the more effectively. In a very significant section in the last chapter he points to the religious ritualism of the French Revolution as the logical sequel to the heavenly city of the Philosophers, and then turning to the communist movement and the Russian Revolution he shows the fundamentally religious character of Marxist agitation and thought and the religious symbolism involved for example in the apotheosis of Lenin. This is of course outwardly true, but it may be pointed out that Mr. Becker's analogy between the Philosophers and the communists ignores a real contrast. The enthusiasm of the first was largely *Schwärmerei*; it was the sort of day-dreaming and project-making that intellectuals have always been prone to, and on which incidentally the best of our intellectual achievement has been built. But the religious fervor of the communists has a mass base; it springs, as all of us recognize, from the passion arising out of a desperate economic situation. It is for that reason that Mr. Becker's second indictment of the Philosophers—that in the crucial moment they pulled their punches—is even less applicable to the present revolutionary movements. The Philosophers were interested enough in an intellectual revolution, so long as it did not involve a real break with the social heritage. But they stopped short of social revolution because they were themselves an integral part of the world that would thus be destroyed. Hume locked his *Dialogues* up in a desk because he shrank from the moral depravity that might flow from his

strictly logical theses; Franklin abandoned his youthful atheism because, as Mr. Becker remarks, it was "not very useful to him, a respectable printer and politician living in Philadelphia." For was he not Poor Richard, the best bourgeois of them all, dependent for his career to swim on the rapidly mounting tide of middle class power? Here again a closer inquiry into the economic soil of eighteenth century ideas would have clarified and corrected some of the implications of the book. For while communist Russia is keeping a good part of the capitalist social heritage—our entire technological system, our money mechanism, our militarist and international tactics—its driving revolutionary strength is far from the compromises of Hume and Franklin and Diderot. And that strength is, we may guess, derived from a militant economic class, and not from philosophers.

New York City.

MAX LERNER.

DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS. By Dr. George Melchior. Berlin and Leipzig: Walter de Gruyter & Co. 1932. pp. xxxi, 558.

THIS is the seventh monograph so far published by the Institute of Foreign and Private International Law, founded at the University of Berlin in 1926. Four of these were primarily studies in Comparative Law and it is noteworthy that all of them undertook a comparison between Anglo-American and German law. The present work, entitled "The Fundamental Bases of German Private International Law," reminds one of Pillet's great work on the "Principes de Droit International Privé." However, the difference between the two works is fundamental. Pillet sought to develop universal principles for the Conflict of Laws. Not so Dr. Melchior. As the wording of the title indicates, his object is merely to set forth the basic principles of the German Conflict of Laws. In fact, Pillet and Dr. Melchior belong to quite different schools in their conception of Private International Law. Dr. Melchior is a nationalist. The Conflict of Laws, according to him, is a branch of private law, controlled exclusively by the local legislation. He rejects, therefore, International Law as a source. Dr. Melchior is also a realist. He emphasizes the fact that the decisions of the German courts can no longer be relegated to a subordinate position on the ground that they are not sources of the law, but involve merely applications of the rules laid down by the legislator. Because of the dearth or total absence of legislative provisions in the field of the Conflict of Laws the works of theoretical writers have had, in the past, a most notable influence upon the decisions of the courts. Dr. Melchior, however, calls attention to the fact that this is no longer so in countries like Germany, where there exists today a large body of judicial doctrine.

The author has made an exhaustive study of the decisions of the German courts with a view of extracting therefrom, so far as possible, the fundamental principles upon which they rest. Dr. Melchior's is the first work of that character in Germany, or, for that matter, in any continental country. Moreover, he states explicitly in the Preface that, in the interest of clarity, he has decided to follow Dicey's example in reducing the decisions to definite rules and exceptions.

Dr. Melchior considers only the German cases relating to the Conflict of Laws which deal with the more general aspects of the subject. The ordinary topics comprised in the Anglo-American books do not appear in this volume,

with the exception of contracts in general. Instead we find a detailed consideration of such topics as conflict of laws and intertemporal law, change of sovereignty, what is foreign law, the theory of qualifications, the *renvoi* doctrine, preliminary questions, currency, foreign acts of state, public order, self-imposed limitations upon the local conflict of laws, application of foreign law, and nationality, including the nationality of corporations, vessels and aircraft.

Some of the topics just mentioned, for example the first two, deal primarily with German conditions, resulting from the World War and the adoption of the Civil Code. These have, of course, no direct bearing upon problems before our courts. The subject of nationality also figures only to a very slight extent in Anglo-American Private International Law. As regards some matters the author found little of direct aid in the existing literature, so that he was compelled to hew out his own course. Whenever he touches upon more familiar ground Dr. Melchior not infrequently takes the less popular side. Thus he approves the *renvoi* doctrine, in the sense that the German courts should reach the same decision as would the foreign court, without reference to the fact whether or not German law would be applied. To the general rule Dr. Melchior admits three exceptions or qualifications: (1) By virtue of Article 11 of the Introductory Law to the Civil Code, relating to the formalities of legal transactions, such transactions are valid if they satisfy either the local law of the place where they are executed, or the formalities prescribed by the rules of the Conflict of Laws of the *lex loci*; (2) so far as the law to be applied is determined by the intention of the parties, it is to be presumed that they refer to the local law; (3) so far as the law applicable is determined by treaty, it is to be presumed that the local law is meant. In the matter of contracts the author defends without hesitation the position of the German courts, according to which the intention of the parties controls, even in the matter of validity. With respect to mandatory provisions, the parties are free, according to Dr. Melchior, to choose between the laws that have a sufficient connection with the contract.

Dr. Melchior's discussions are always illuminating, and, maintaining throughout a sane point of view, he makes the work helpful to the student of the Conflict of Laws in any country.

Yale School of Law.

ERNEST G. LORENZEN.

BENTHAM'S THEORY OF FICTIONS. By C. K. Ogden. New York: Harcourt, Brace & Co. 1932. pp. clii, 161. \$3.50.

THE THEORY OF LEGISLATION. By Jeremy Bentham. Edited by C. K. Ogden. New York: Harcourt, Brace & Co. 1931. pp. lii, 555. \$2.75.

TALLEYRAND'S comment on Bentham in 1830 still rings true: "Though all the world has stolen from him he remains still rich."

Few indeed are the characteristic ideas of contemporary legal thought that cannot be found set forth in his writings. The programs of "sociological," "institutional," "scientific," and "realistic" jurisprudence are all permutations and combinations of four principal Benthamite theses: (1) that the meaning of legal concepts and legal rules is to be found not simply in their systematic relations to other concepts and rules but in their human consequences; (2) that legal science is therefore dependent for its basic materials upon social statistics and upon all the social sciences; (3) that the reality of a rule of

law consists in its enforcement and not in its goodness; (4) that judges, at least under the Common Law, make the law they are supposed to "discover" and "enforce."

Mr. Ogden's two volumes, *Bentham's Theory of Fictions* and *The Theory of Legislation*, are generously "introduced" and annotated in the attempt to indicate how much of the collected material is still on the front line of legal and philosophical progress, how much of it is now accepted and taken for granted, how much of it is outgrown, how much of it stands refuted. The analysis is carried out with patience and with imagination. Unfortunately, however, the traditional English insularity in law and philosophy circumscribes the scope of Mr. Ogden's efforts. The discussion of functionalism and operationalism in philosophy is carried on with complete disregard of the work of Rudolf Carnap, Charles S. Peirce, John Dewey, and C. I. Lewis, and with only the most perfunctory reference to Ludwig Wittgenstein. In fields more strictly legal one finds in full sway the English policy of non-recognition towards American law reviews. A few casual references to works of Duguit, Stammler, Petrazicki, Cardozo, Pound, Kocourek, Hutchins, and Zane constitute the only explicit recognition of modern legal thought beyond British frontiers on the subjects of Bentham's writings.

The Theory of Legislation, compiled by Dumont from Bentham's scattered manuscripts, translated by Hildreth, and now edited by Mr. Ogden, presents, at least in outline, all the fundamental tenets of Bentham's theory of law and law reform. Dicey scarcely exaggerated when he said that "the history of legal reform in England in the nineteenth century is the story of the shadow cast by one man, Bentham"; and the force of Bentham's contributions to enlightened law reform is not yet spent. Today a good deal of Bentham's individualist faith in the ultimate coincidence of self-interest and social welfare seems definitely reactionary, but the name of radical cannot yet be denied to one who advocated the use of the inheritance tax to equalize wealth and preached the duty of the state to provide a minimum of subsistence for all its citizens. And a Fabian Socialist gives Bentham no more than his due when he writes: "He had espoused the cause of every struggling class; he had advocated freedom for every struggling people; he had fought for every persecuted sect."¹

If contemporary jurisprudence has advanced beyond Bentham in important respects, having at its disposal a more adequate body of social theory and social fact, there are still seminal ideas in *The Theory of Legislation* which can fertilize arid wastes of contemporary controversy.

Discussion of the imperative element in law has not yet digested Bentham's perception that laws, such as those of inheritance or of the passage of title in sales, are humanly significant because they are footnotes to the criminal law, explaining the command that *A* refrain from taking *B*'s property. When the essential incompleteness of most rules of property law, of the law of domestic relations, and the like is generally recognized, American law schools may outgrow the disdain of criminal law. By visualizing the criminal sanctions which every legal rule engenders, they may see more clearly the coercive, non-voluntary aspects of law and the need for social justification of such coercion.

We have heard a good deal, in the last twenty years, of the need for examining the consequences of legal rules, but "sociological jurisprudence" remains in large part a pious program rather than a record of achievement. At the root of this failure is the lack of any definite criterion of importance

1. VICTOR COHEN, JEREMY BENTHAM (1927) 18. (Fabian Tract No. 221).

which will dictate which of the infinite consequences of any legal rule or decision deserve to be investigated. Such a criterion of importance can be supplied only by an ethical system. But thus far, none of the advocates of sociological jurisprudence believe in any ethical system; or, if they do, no word of it is spoken before company. It is Bentham's peculiar virtue not to have been ashamed of the ethical system in which he believed. His analysis of the effects of legal rules upon the happiness and suffering of individuals thus gives a constant and precise focus to his vision of what the law actually is, as well as to his vision of what the law ought to be. Despite the limited social data at his disposal, Bentham's functional analyses of rules of incest, of property distribution, and of the choice of penalties, are unsurpassed contributions to sociological jurisprudence.

A third contribution to contemporary legal thought contained in *The Theory of Legislation* is the emphasis upon law-enforcement and law-obedience as the life of the law. Obedience to law presupposes general legal education (whence the advantage of codification). Education, to be effective, must be dramatic (whence the advantage of "characteristic" punishments). Above all, the problem of enforcing a law must be seen as a problem in diminishing the opportunities that permit and the social influences that induce its infraction.

Bentham's Theory of Fictions is an attempt to make explicit the philosophical method that underlies Bentham's legal thought. Though the scattered writings which Mr. Ogden has pieced together fall far short of presenting a coherent philosophical theory, they do foreshadow in striking terms the most important philosophical doctrines of the last fifty years.

The focus of Bentham's attack, in his development of a theory of fictions, is in the realm of legal nonsense. The attack is simple enough when it is directed against the ancient and venerable nonsense of sham bail, common recovery, trover, ejectment, and the whole firm of Doe, Roe, Jackson, and Titmouse. But Bentham finds more insidious nonsense in the common use of such concepts as right, duty, property, and title. The task of distilling meaning out of masses of ambiguity, however, demands logical instruments not found in the traditional logic with which Bentham was familiar. Nothing daunted, Bentham went ahead to create what is now called the functional approach. Beginning with those aspects of common experience which to him seemed most indubitable: bodies existing in time and space; Bentham challenged the rest of the intellectual world to show its legitimacy by tracing its descent from such sensible objects. The challenge is directed not only at so-called legal fictions, but at all qualities, classes, and relations.

To call everything fictitious that is not a definite, particular, physical thing is, of course, nominalism. It would be easy to show that many of Bentham's statements on this score lead to patent self-contradiction. But it is only fair to recognize that Bentham's nominalism is methodological rather than categorical, a rule of evidence rather than a rule of substance. It amounts, in effect, to setting up a rebuttable presumption that any term which does not directly refer to some existing physical object is nonsensical, i.e. devoid of meaning. The presumption can be rebutted by a definition of the challenged term as a construct or function or "psychic arrangement" of terms that do have a direct physical reference. The concept of a legal right wins admission to the category of reality when it is defined as a function of judicial behavior, as "a disposition on the part of those by whom the powers of government are exercised, to cause him to possess, and so far as depends upon them to have the faculty of enjoying, the benefit to which he has a right." (p. 119). One thinks of the origin of "realistic jurisprudence" in the phrase of Holmes, "A

right is but the hypostasis of a prophecy," and remembers that Holmes is the child of Austin, and Austin the child of Bentham.

There will be disagreement enough, among philosophers and among jurists, as to the mechanics and the direction of this analysis which separates nonsense from meaning. The physical objects which to Bentham seem the primary base of intellectual operation appear to many philosophers to be themselves complex logical constructs of something simpler, as, for example, events or sense-data. The joys and pains to which Bentham tried to reduce the analysis of legal rules appear to many jurists to be themselves unreal fictions. There are intimations in *Bentham's Theory of Fictions* that no absolute answer to this question of the ultimate nature of analysis is possible. But even if each of us must build the world with a different set of blocks, there are some common laws of architecture that Bentham and Holmes and their followers are formulating in law, while philosophers, mathematicians, economists, and sociologists pursue their own versions of the "functional approach."

New York City.

FELIX S. COHEN.