

MY PHILOSOPHY OF LAW

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Myself, when young, did eagerly frequent
Doctor and Saint, and heard great argument
About it and about, but evermore
Came out by the same door where in I went.

The Rubaiyat

WHEN I FIRST HEARD that this book was going to be published, I expected of course to be invited to do a piece for it about my philosophy of law. I knew that there must be thousands of people, myself included, who would be anxious to know what my philosophy of law is, and I stood ready to yield to popular demand. I must confess that I was distinctly miffed, in a nice kind of way, when it turned out that I wasn't asked. I had all the feelings of the boy who brought his harp to the party and wasn't asked to play. I even considered writing a polite sort of letter about it to the Julius Rosenthal Foundation, which was getting out the book. Now that I see the list of those who were invited to contribute, of course I can understand it. The list includes Joseph Walter Bingham, Morris R. Cohen, Walter Wheeler Cook, John Dewey, John Dickinson, Lon L. Fuller, Leon Green, Walter B. Kennedy, Albert Kocourek, Karl N. Llewellyn, Underhill Moore, Edwin W. Patterson, Roscoe Pound, Thomas Reed Powell, Max Radin, and John H. Wigmore. When it comes to these gentlemen, I can see that I am just not in their class. Now that I come to think of it, I can't recall that any one ever came to me and asked me that direct question, "What is your philosophy of law?" I suppose that that must happen to these gentlemen all the time. I imagine that some of them are so pestered with inquiries that they haven't time to eat lunch. It must have been a positive relief to them to have the opportunity to put it all down in print where people can go and read it. And besides that, there are even a couple of deans on that list. Obviously I don't belong there at all.

Now that I have been invited to review the book, I am of course very glad of the chance. For one thing, I have been given a free copy, which is the way that law reviews get books reviewed. It is a very nice looking book indeed, all bound in some kind of brown leather-looking stuff, with cream-tinted pages and the kind of rough edges that

really high-class publishers put in their really high-class books to show that they are really high-class. The type is very nice and legible, and the whole thing just radiates elegance. There are even photographs of all the sixteen contributors, each of them occupying a full page in glossy print, with a blank page on the back; and one or two of them are certainly very handsome and distinguished-looking men. The book is going to improve greatly the general tone of my bookshelves, which are all cluttered up with broken-backed copies of Ames and Smith's *Cases on Torts* and Mr. Roughead's *Enjoyment of Murder*, and things like that. I have been badly in need of something pretty to point out to visitors, and this book is just the thing. And besides that, the invitation to review it gives me the opportunity to satisfy popular demand, and give the public what it has been clamoring for, my own philosophy of law. Book reviewers always write about their own ideas while they are reviewing the book. I know, because I have just published a book and had it reviewed.

Before starting this review, I read the book. I know that some reviewers don't believe in doing that, but in this case I thought it would be rather a decent thing to do, since the book was such an expensive one and I got it free. For my purposes, however, it turned out to be a mistake. These gentlemen have got me all mixed up, and now that I come to write about my philosophy of law, I don't know what it is.

It isn't as if I didn't know something about philosophy. Back in 1914, when I was a freshman at Harvard, I had course in it under Professor William Ernst Hocking, who was supposed to know a great deal about it. I don't remember that course very well, the way I remember the formula for nitroglycerine and the date of the Congress of Vienna and a lot of other useful things that I learned in college. As I recall it, I was pretty well mixed up even then. The philosophy people all used a lot of words like theological and categorical imperative, and they all disagreed with one another most hideously. I can see from this book that they still do. I remember that there was a fellow named Bishop Berkeley who had the idea that when a bell rang it would make no sound unless there was somebody around to hear it, and that if you feel a pain in your toe you have no assurance that there is any pain, or any toe. I suppose the equivalent of that for present purposes would be the current notion that the opinions of courts are optical illusions and don't mean what they say. Then there was a Frenchman named Descartes, who started out with the proposition that "I think, therefore I am," and proceeded to build up a philosophy from there. I remember that I was finally willing to concede his major premise, and even his initial conclusion, but that some of his ensuing syllogisms got a bit obscure. Then there was William James, who was the brother of Henry, *not* Jesse, and was driven to the conclusion that any philosophy that works well enough to let you get away with is all right. I know some lawyers who seem to me to be proceeding on that theory. There were also a couple of men named Spencer and Hume, who spent their time proving that you can't prove anything, and ended by proving, to me at least, that you can't prove that you can't prove anything, because, you see, they proved it to me; and there were also Kant and Hegel, who, I recall, were extremely hard to read in German and harder still in English, so that I finally read them, for examination purposes, in the *Encyclopedia Britannica*, and got an A, which proved that the *Encyclopedia* was right, and thus cast further doubt upon Spencer and Hume.

Then by way of extra-curricular research, I discovered for myself a philosopher who wasn't in the course. He was a Persian named Omar, who made tents for a living, and took up philosophy as a sideline, probably because there wasn't enough money in it

as a regular job. His philosophy was simple, and easy to comprehend and apply, which may have been one reason that it appealed to me. His theory was that you couldn't possibly figure it out anyway and it was a waste of time to try, and that the thing to do was to forget it and go out and get drunk. This seemed to me to be a very sound idea at the time-although of course I have attained years of discretion since.

The principal thing that I remember about philosophy, however, is the definition of a philosopher. I am sure that everyone knows it: a philosopher is a blind man in a dark cellar at midnight looking for a black cat that isn't there. He is distinguished from a theologian, in that the theologian finds the cat. He is also distinguished from a lawyer, who smuggles in a cat in his overcoat pocket, and emerges to produce it in triumph. This is a very helpful definition, which throws a flood of light on the whole situation.

Now each of these learned gentlemen in this beautiful book, except one, reports that he has found the cat. According to definition, that makes them all theologians, and not philosophers at all. I wouldn't want to go further and say that it makes them lawyers, because I have too much respect for that intellectual integrity of every one of them to suppose that he would smuggle anything in. Most of them, I realize, are in fact lawyers by profession, but I don't want to suggest that they are writing *as* lawyers at all; I think it is perfectly clear that they are writing in a purely non-professional capacity, and I should be the first to maintain it. Well, that leaves theology, which is something that I am not qualified to talk about because it was not in Professor Hocking's course. Even then, what perplexes me most is that they have found fifteen different cats. They are not even the same breed of cats. Some of them are not even black. I can recognize four or five Maltese, several Angoras, at least a couple of Siamese, an Alley or two, and one Manx, which is a cat without a tail. I am rather modest about my qualifications as a cat-fancier, so I will not attempt to specify, but I am sure that the reader will be able to pick them out for himself. Each learned author, of course, insists that his is the original and only genuine Cat. Without wanting to cast any reflections or aspersions or doubts upon anything or anybody, and in the best spirit in the world, all that I can say is that there seems to have been an astonishing amount of feline miscegenation going on in that coal cellar.

So, as I said, now I am all mixed up. I have always supposed that law was the product of a lot of pulling and hauling in society, a set of rather inadequate compromises brought about by very headstrong mules all going in different directions, and that the reason that it is in a mess is that society is in the same kind of mess. I had thought that our law was merely a facet of our civilization, about as multifarious, scrambled and altogether unsatisfactory as our civilization itself, and about as difficult to do anything effective about. The lawyers and the judges and even the legislators seemed to me to be a group of struggling opportunists trying to get along and doing their best in the face of specific jobs from day to day; and if they had no particular idea or plan or philosophy about it, and no very sensible pattern was discernible, it was not at all surprising, because look at the rest of the world. In particular, look at it just now. I never have seen any reason why law should make any more sense than the rest of life; and I think that the attitude of those of us who have anything to do with it should be that of the familiar sign in the western dance hall, "Don't shoot the piano player, he's doing the best he can."

None of the learned authors in this nice book says anything like that at all, with the single exception of Professor Thomas Reed Powell, who, if I understand him aright, says it and says it very well.

So when I come to write about my philosophy of law, I find that I haven't any, and that overwhelming popular demand will just have to be disappointed. About all that I can say, with great humility, is that I can't discover even one cat in that cellar, let alone fifteen. The whole thing has revived my old appreciation of the philosophy of Omar the Tentmaker, who may have had something like the right idea about a philosophy of law after all. There seems to me to be more than a vague hint of a similar point of view in the piece written by Professor Thomas Reed Powell.

Oh, many a Cup of this forbidden Wine
Must drown the memory of that insolence!

Are you with me, Tom?