

POWER, LAW, AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW. By Edgar Bodenheimer.<sup>1</sup> New York: Crane, Russak & Company, Inc., 1973. Pp. viii, 202. \$9.75.

Jurisprudence is entering a golden age. After fitful progress through the centuries, legal philosophy has been raised, with studies of the last couple of decades, to heights of importance for our understanding both of law itself and of societal and ethical obligation. "Law" is beginning to look much more complex than it ever appeared to Bentham and Austin, and the complexity provides a rich tapestry for our understanding of social control. In recent years, Hart<sup>2</sup> and Dworkin<sup>3</sup> have demonstrated how classical positivism must be refined—if not changed—to understand constitutional and statutory interpretation, while Fuller<sup>4</sup> has launched a frontal attack on positivism itself. Other writers such as Edgar Bodenheimer have been less concerned with the meaning of law than with how law works. In his latest book, *Power, Law, and Society*, Professor Bodenheimer criticizes the view that law is an instrument of the strong to dominate the weak (as Thrasymachus put it in a Platonic dialogue)<sup>5</sup> or, in modern terms, an instrument of

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2. See H.L.A. HART, *THE CONCEPT OF LAW* (1961); H.L.A. HART, *DEFINITIONS AND THEORY IN JURISPRUDENCE* (1953); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967); Hart, *Varieties of Responsibility*, 83 L.Q. REV. 346 (1967). See also Taylor, *H.L.A. Hart's Concept of Law in the Perspective of American Legal Realism*, 35 MODERN L. REV. 606 (1972).

3. See Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L.J. 640 (1965); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Dworkin, *Philosophy, Morality and Law—Observations Prompted by Professor Fuller's Novel Claim*, 113 U. PA. L. REV. 668 (1965); Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972).

4. See L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457 (1954); Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). See also Breckenridge, *Legal Positivism and the Natural Law: The Controversy Between Professor Hart and Professor Fuller*, 18 VAND. L. REV. 945 (1965).

5. THE REPUBLIC OF PLATO 18 (F. Cornford transl. 1941):

[I]n every case the laws are made by the ruling party in its own interest; a democracy makes democratic laws, a despot autocratic ones, and so on. By making these laws they define as "right" for their subjects whatever is for their own interest, and they call anyone who breaks them a wrongdoer" and

the "establishment." The ethical roots of his concern are manifested by his treatment of two basic problems: stability/change in the law, and equality.

In a way, these are age-old problems, but Professor Bodenheimer illustrates the new approach to jurisprudence by the multidisciplinary tools he brings to his analysis. He delves into quantum mechanics and relativity theory, Adlerian and child psychology, and physical and cultural anthropology. In a fascinating first chapter, the author relates Nietzsche's conception of the chaotic flux and essential meaninglessness of human striving to the view that many young people today have, who are "turned off" about law. Nietzsche presciently foresaw the modern cosmological theory of the cyclical universe, starting with a "big bang" of condensed matter, exploding stars creating their own "space," and expansion over billions of years until the point where gravitational forces overcome the momentum of the initial explosion and contraction occurs.<sup>6</sup> The forces of contraction eventually pull all matter together in a huge, indefinitely dense mass which again explodes, repeating the cosmological cycle. There is no "progress" in this view, no room for a teleological or religious view of the purpose of the universe. Nietzsche concluded that we might as well grab all we can at anyone else's expense in this valueless and absurd world. "Law," to Nietzsche, was an instrument of the power-grabbers, which they break whenever it suits their self-interest (something like the staunch law-and-order henchmen of President Nixon).

Professor Bodenheimer goes on to argue that the Nietzschean view is wrong cosmologically, that a certain order reigns in the universe, and that the universe is governed by physical laws. Citing Max Planck,<sup>7</sup> among others, the author concludes that Nietzsche's eternal chaos "does not, therefore, hold up as a tenable scientific proposition."<sup>8</sup> Yet I am not convinced that the author has proved his case, particularly in his discussion of quantum mechanics. It is hard to find any "law" in a causal sense for subatomic particles, but Professor Bo-

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punish him accordingly. . . . [I]n all states alike "right" has the same meaning, namely what is for the interest of the party established in power, and that is the strongest.

6. See generally W. KAUFMAN, *NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTI-CHRIST* 206-15 (1950).

7. M. PLANCK, *WHERE IS SCIENCE GOING?* 68-98 (1932), cited in E. BODENHEIMER, *POWER, LAW AND SOCIETY: A STUDY OF THE WILL TO POWER AND THE WILL TO LAW* 22 n.18 (1973) [hereinafter cited as BODENHEIMER].

8. BODENHEIMER 22.

denheimer brushes this aside by saying that when these particles are aggregated, matter behaves according to laws with which we are familiar, such as gravitation. But macro-phenomena seem to behave according to Newtonian-Einsteinian laws only because we see a fraction of reality, because our sensory inputs and our measuring instruments are so crude and gross that we cannot measure the uncertainties of the fundamental building blocks of matter. Under Heisenberg's uncertainty principle,<sup>9</sup> we can never determine the position and momentum of any elementary particle.<sup>10</sup> Moreover, we necessarily interfere with whatever position a particle may have by our very act of measuring it; for example, the electromagnetic wave of an electron microscope cannot "see" a subatomic particle in theory without moving it. More basic, perhaps, is our growing recognition that our very language is totally inadequate to describe what these fundamental particles may be.<sup>11</sup> Indeed, they may not be "particles" at all, or even "waves;" there is nothing like them in any experience we can have, so we have no words to describe them. We can only "view" quantum mechanics through the crude classical language that we have developed for macro-phenomena. To say that there is any "law" governing quantum mechanics in the causal sense of that term is to use language that is fundamentally inappropriate to the description of the subject.<sup>12</sup> Perhaps the comfort we take in the laws of physics is simply a product of our extremely limited knowledge of the universe; self-centered as we are, we assume that the entire universe is governed by Newtonian principles.

I have considered the author's arguments seriously and at some length because I accept his premise that these sorts of questions bring home to us the true context within which we should approach legal philosophy. I would offer as an alternative to the author's refutation of Nietzsche the hypothesis that we simply do not know whether the universe is governed by the laws of physics as we know them. Our

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9. See W. HEISENBERG, *NATURAL LAW AND THE STRUCTURE OF MATTER* (1970); W. HEISENBERG, *THE PHYSICIST'S CONCEPTION OF NATURE* (A. Pomerans transl. 1958).

10. See 1 R. FEYNMAN, R. LEIGHTON & M. SANDS, *THE FEYNMAN LECTURES ON PHYSICS* 37-9 to -12 (1963).

11. See N. BOHR, *ATOMIC THEORY AND THE DESCRIPTION OF NATURE* (1934); *QUANTUM THEORY AND BEYOND* (T. Bastin ed. 1971).

12. See Schumacher, *Time and Physical Language*, in *THE NATURE OF TIME* 196 (T. Gold ed. 1967).

problem then is: Can we construct a jurisprudence on such an uncertainty? My proposal for something stable as a foundation for jurisprudence is moral philosophy. Ethics may be some sort of a human constant even in a chaotic world. I might even draw such an inference from Professor Bodenheimer's rather exact and absolutist view of "justice" that pervades his book. He seems to assume almost blindly that his readers share with him certain basic notions of justice and, while he does not analyze this assumption, I think he is correct in holding it. But the inquiry as to universals in moral philosophy opens a vast area which I think is already starting to be explored and will pick up momentum in the next decade.<sup>13</sup>

Even though Professor Bodenheimer uses justice and morality as a basis for criticism rather than turning his attention to these concepts directly, his writing is obviously animated by a strong feeling that law works in the direction of morality.<sup>14</sup> In discussing stability/change in the law, he argues well that if the law did not change over time to reflect new social concerns with new opinions regarding justice, it would soon become irrelevant.<sup>15</sup> Our Constitution, for example, has had to be interpreted as a "living Constitution" for its old language to expand to meet new feelings against discrimination, economic inequalities, and governmental interference with private life. But in what sense does the "law" survive if it changes? Here I think the author's many examples are more impressive than his courageous attempt to cope with the linguistic problem involved. Not wanting to be overly concerned with defining law, at one point he simply refers to "law" as "an aggregate of standards designed to control private and official conduct."<sup>16</sup> But then, when law changes do the standards change? When a court overrules a precedent, what has happened to the earlier standard? Should law be called a set of changing standards? If so, a basic self-contradiction seems to need further analysis. Suppose an old standard based in law is that a married woman cannot hold real property in her own name; then a court overrules that standard, or a legislature replaces it with a new law to the opposite effect. Can we really say that "law" has survived? Perhaps the author only

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13. Already, the hallmark of this return to moral philosophy is J. RAWLS, *A THEORY OF JUSTICE* (1971), and the critical reaction it has engendered.

14. See L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

15. BODENHEIMER 120-27.

16. *Id.* at 122.

means that law as an institution has survived, rather than a particular law. But then we are confronted with the term "legal institution"—what is it? A set of changing standards? Maybe there is something akin to Heisenberg's uncertainty principle operating in our attempt to describe what we mean by law that changes over time, and I think a great deal more careful analysis still is needed regarding this problem.

I am somewhat uneasy over a definitional matter in the author's treatment of the second large area of his concern, that of equality. In his extended discussion of this basic problem of justice, he considers in turn slavery under Roman law, women's rights, and the rights of employees. Defending "law" against those who today view law with cynicism, Professor Bodenheimer attempts to show that when gross inequalities were taking place, the "law" was not to blame for them. For example, as to slavery:

Roman law, in the earlier phases of its development, stopped at the threshold of the Roman household or slave estate, barring its entry into the field of master-slave relations by an "off limits" sign. Without authorizing or legalizing any use or abuse of power by the slave owner, the law simply refrained from extending its sway over this area of social life.<sup>17</sup>

The early absolute rights of a slave owner over his slave, of a husband over his wife, and of an employer (contractually) over his employees are "held to be outside the realm of the law" because they are "wholly arbitrary and oppressive systems of domination."<sup>18</sup>

But let us consider what "law" means in the author's image of law which stops at the threshold of a Roman slave estate. What makes the law stop there? Is it the law itself that posts and enforces the "off limits" sign? If the barrier is of the law's own choosing, then surely the law cannot escape blame. Indeed, we know from the author's careful analysis that over the years the law chipped away at inequalities regarding slaves, women, and employees; therefore, the law

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17. *Id.* at 136.

18. *Id.* at 138. The author writes with the modesty of older stylistic schools in his refusal to use the first person. A troubling result is occasional difficulty in determining whether an argument in the book is the author's or is shared by many. In the sentence quoted, to say that these rights are "held" to be outside the realm of law is to suggest that some impartial outside body has so "held." But further struggle with the sentence indicates that it is only Professor Bodenheimer who is so "holding."

must have been overcoming its own barriers, and only to the extent that it did so is it worthy of approbation.

Yet Professor Bodenheimer seems to view "law" as stopping at the threshold of the slave estate due to lack of *power*. The law stopped at the threshold because the state did not at this time have the power to intervene in strong households. Later, when the state became more powerful vis-à-vis enclaves of entrenched interests (such as slave estates or factories), then the law came to be a factor promoting equality.

The trouble with this power-oriented view of law is that it contradicts the author's own concept of law as a "set of standards."<sup>19</sup> If "law" is the same thing as state power, so that the law that lacked power stopped at the threshold, then anything the state does is coextensive with "law." A state can only act legally; officials can only act legally; Hitler's acts were all legal. Law cannot be a set of standards designed to control *official* conduct, yet this is precisely what the author defined law to be in a different part of his book. It would certainly be fair for a critic of law to say that if law is a set of standards (as defined by Professor Bodenheimer), then the law itself countenanced a standard of arbitrary power for the slave owner in refusing to limit his discretion. One of the legal standards of those times, therefore, was that slave owners could do anything they wanted to their slaves without penalty. Only with the greatest artificiality could we argue that the law was not responsible for the slaveowner's rights over his slaves.

But despite my criticism of the author on this issue, I am in strong sympathy with what he is trying to do. He wants to save the idea of law for something that is somehow interconnected with morality, so that when there are *no* standards or *unjust* standards, we should conclude that there is something lacking in the appropriateness of describing the situation as "legal." Law, in short, is somehow inherently opposed to gross inequality such as slavery. Law and injustice do not mix well and when they do mix, the result is a gradual eroding of injustice over time. This seems to be the author's true message, and it comes out in his discussion of the gradual amelioration of the injustices of slavery, the position of women, and the position of laborers.

Perhaps Professor Bodenheimer resists articulating his position as

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19. See *id.* at 28-33.

calling for the interconnection between law and morality because he does not want to be pushed into Fuller's camp. Like Dworkin, Professor Bodenheimer seems to be an uneasy positivist. He leans toward the idea of law-morality but refuses to embrace it head-on. Yet his students and his readers may take the plunge. There is, these days, a great revival of interest in moral philosophy, and the best works build upon the advances to linguistic precision that logical positivism has fostered. Ironically, that very precision now seems to be undermining positivism itself, much as Wittgenstein foresaw in his *Philosophical Investigations* (1953).<sup>20</sup> In this context, *Power, Law, and Society* may be seen as an important bridge between the older style of positivism and the new concern for morality. The humanistic, wide-ranging examples brought forth by the author attest to the morality that Fuller argues cannot be separated from law.

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JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW. By Joseph W. Bishop, Jr.<sup>1</sup> New York: Charterhouse Books, Inc., 1974. Pp. xvi, 315. \$8.95.

If there is a lack of scholarly treatises on military law, there is none of popular polemics on the subject.

J. BISHOP, *JUSTICE UNDER FIRE* xii (1974)

[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . [A] military trial is marked by the age-old manifest destiny of retributive justice.

O'CALLAHAN V. PARKER, 395 U.S. 258,  
265-66 (1969) (DOUGLAS, J.)

If, as widely believed, experience is the best teacher, certainly Justice William Douglas offers unimpeachable credentials in the pure art and high science of the detection of legal systems which are "singularly inept in dealing with the nice subtleties of constitutional law." His

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20. See H. PITKIN, *WITTGENSTEIN AND JUSTICE* 50-70 (1972).

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