

Jurisprudence: The Philosophy and Method of the Law

By Edgar Bodenheimer. Cambridge:
Harvard University Press, 1974.



Reviewed by Vincent Luizzi
Dept. of Philosophy
Southwest Texas State University
San Marcos, Texas.

For the legal profession in America, a treatise is a comprehensive study and description of an area of law. Whether the treatise be on torts, contracts, property, or evidence, it will be a compilation and organization of the rules and principles of the field, together with a presentation of cases and statutes in which they are articulated, of the rationale for and debate surrounding these rules, and of their history. In law the treatise seeks to establish no particular thesis as correct, and thus essentially it differs from a philosophical treatise whose purpose is one of arguing for the truth of a particular position.

Insofar as the late Edgar Bodenheimer's treatise on jurisprudence stands for a rejection of any rigid separation of legal and philosophical treatises, it is an interesting analogue to a natural law theorist's rejection of any rigid separation of law as it is and law as it ought to be. In effect, Bodenheimer is unwilling to make a statement of what jurisprudence is, without an inclusion of his view on what it ought to be. What makes this analogy even more interesting is that Bodenheimer's views on the nature of jurisprudence and law are those of a natural law theorist.

Says Bodenheimer, "no jurisprudential treatise should bypass or ignore the burning questions connected with the achievement of justice in human relations.... It is submitted that the theory and philosophy of the law must remain sterile and arid if they fail to pay attention to the human values which it is the function of the law to promote." (vii) As for his view on the nature of law understood as a legal system, Bodenheimer tells us that "a legal system acts as a mediator between social ideals and social reality. In terms of average social experience, it may be said to hover in a twilight

With wishing to give a rigid or an all-embracing definition of natural law, I would in general use the term to denote certain fundamental principles of justice whose recognition and observance is indispensable, or at least highly necessary, in a workable order of society.... It is my opinion that a solidly grounded philosophy of law must pay attention to the problem of natural law...which...forms a rock bottom on which the edifice of law and justice must rest.... Natural law thinking should be nondogmatic, flexible, and open-minded.

—Edgar Bodenheimer, *VERA LEX*, vol. V, no. 1

zone between normativity and actuality." (191)

However much Bodenheimer's treatise is distinctive for its inclusion of this natural law component, the first part of the treatise is largely a descriptive account of the history of jurisprudential thought. Besides this section devoted to history, Bodenheimer structures his discussion with sections on the nature and functions of the law and on the sources and techniques of the law. In his historical introduction to the philosophy of law, Bodenheimer includes chapters on the theories of ancient Greece and Rome, of the middle ages, and of the classical era of natural law, along with chapters on German transcendental Idealism, historical and evolutionary theories, utilitarianism, analytical positivism, sociological jurisprudence and legal realism, and the revival of natural law and value-oriented jurisprudence.

It is in the next parts of the book that Bodenheimer veers from this descriptive narrative and assumes at times the voice of critic and advocate. The part on the nature and functions of the law includes chapters on order, on justice, and on law as a synthesis of the two. Bodenheimer also devotes a chapter to distinguishing law from other agencies of social control. Another is devoted to the advantages and disadvantages of the rule of law. In the last part of the treatise, Bodenheimer includes chapters on the formal and nonformal sources of law and on the techniques of science and the judicial process.

Prof. John B. Oakley, a colleague of Prof. Bodenheimer's at U.C. Davis Law School, observed in his tribute on the occasion of Bodenheimer's death in 1991: "Throughout his long career in jurisprudence, Edgar relentlessly championed the importance of human rights to the validity of law and the legitimacy of legal systems." ("Tribute," *U. C. Davis Law Review*, vol. 26, no. 3, Spring 1993, p. 504.)* Bodenheimer's treatise on jurisprudence, with its inclusion of Bodenheimer's natural law views about jurisprudence and law, stands at once as an illustration and a confirmation of what Prof. Oakley observed.

*See "In Memoriam", *VERA LEX*, vol. XI, no. 2, 1991. ♦

Hegel and Legal Theory

By Drucilla Cornell, Michael Rosenfeld, David Gray Carlson (eds.). New York: Routledge, 1991.

Reviewed by John Hund
Dept. of African Law
University of the North
Northern Transvaal, South Africa.



The editors of this volume are law professors at the Benjamin N. Cardozo School of Law in New York City. They think that the birth of Hegelian studies in American legal scholarship can be traced back to a