Louisiana Law Review

Volume 15 | Number 2
The Work of the Louisiana Supreme Court for the 1953-1954 Term
February 1955

PHILOSOPHY OF LAW, by Paul Sayre. State University of Iowa, Iowa City, 1954. Pp. 148.

Edgar Bodenheimer

Book Reviews

PHILOSOPHY OF LAW, by Paul Sayre. State University of Iowa, Iowa City, 1954. Pp. 148.

In 1951, Professor Sayre published a little volume entitled *Introduction to a Philosophy of Law*, in which he enunciated some of the basic tenets of his jurisprudential faith in the compressed space of twenty-one pages. He has now undertaken, in his *Philosophy of Law*, to develop and elaborate the ideas expressed in the earlier volume and to branch out into some areas of legal philosophy previously left untouched. The new work consists of four chapters bearing the captions "Value Judgments and the Law," "Normative Elements in the Law," "Law in Action," and "Law Judgments and the Good."

The choice of these chapter headings furnishes some insight into the general attitude which characterizes Professor Sayre's approach to the problems of legal philosophy. The first and last chapters deal at some length with the ethical aspects of the law, especially its relations to the concept of The Good, and seek to clarify the significance of moral valuations in the administration of justice. One chapter discusses the normative side of the law, but is chiefly designed to demonstrate the subordination of this element to the social and ethical forces operative in the life of the law and the futility of a purely analytical approach. The third chapter, "Law in Action," contains a commentary on the notion of the author that "law is action in conduct under sanctions." (p. 47)

This reviewer, while greatly in sympathy with the value-oriented spirit of the book, finds himself troubled by many questions relating to the specific suggestions or solutions offered by the book. How helpful is it to describe law, as the author repeatedly does, in terms of "action"? Do we thereby bring to light a peculiarly characteristic element in the concept of law? Nobody would deny that "action is always involved in every judgment of every court" (p. 105), but unless we ascertain the relative weight of the various determinants of this "action" (such as respect for precedent, traditional attitudes, the desire for a just result, etc.), we have perhaps not advanced very far toward an understanding of the complex phenomenon called law.

Turning to another problem, is Professor Sayre correct when he regards legal norms merely as the "skin" or "formal side" of factual situations? (pp. 37, 44) Assuming that norms in many instances are more than mere mirrors of social practices, do they not possess a substantive, regulatory quality which legal philosophy should refrain from minimizing? Even though it must be admitted that law is not exclusively a system of rules and frequently requires the exercise of what we might call "controlled discretion," do we not overshoot the mark if we make the individual conscience of the judge the ultimate arbiter of legal controversies? Can we follow Professor Sayre when he says that "the judge, again perhaps in the sense of action, makes the value judgment through the determination of his own mind and writes it into his decision" (p. 10) and that "each judge is free to use whatever factors appeal most to him in reaching his results"? (p. 12) It is true that Professor Sayre wishes to recognize qualifications with respect to the subjectivity of judges; he is willing to concede, for instance, that the assumptions and postulates of our present civilization have an impact on the judicial decision and that each judge should avail himself of the wisdom of past experience. And yet, the whole drift of his argument appears to support the thesis that the active conscience of the judge should take precedence over ascertainable community standards. (pp. 18, 55) Such a result would perhaps be tolerable if it were true that "there is considerable general unanimity on many moral issues now." (p. 20) If this assumption is questioned, there is danger that Professor Sayre's solution might lead to a juridical pluralism fatal to public confidence in the administration of law. In view of the present state of uncertainty of the law—which is, however, denied by Professor Sayre (p. 11)—an increased stress on normativity may be needed, although certain limitations and weaknesses of the normative principle are obvious and its subserviency to fundamental demands of justice must be recognized in every healthy legal system.

It can easily be seen that the problems presented in Professor Sayre's book far transcend the scope of intelligent discussion in a book review. We are grateful to Professor Sayre for raising them squarely and frankly, realizing that these issues will be with us for a long time and are not capable of being solved in an easy and dogmatic fashion.

*Edgar Bodenheimer**

* Professor of Law, University of Utah.