Perspectives on Perennial Problems of Jurisprudence

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To a certain degree, law is a reflection of the social environment in which it exists. Since a multiplicity of forces is constantly at work to produce stresses and tensions that serve to keep society in an incessant state of flux, the law also finds itself in continual need to adjust and readjust. Traditionally, the contemplative jurist in search of aid in the solution of novel social problems has turned to philosophy. Despite the increasing popularity of the auxiliary disciplines of sociology, psychology and other behavioral sciences, it is inevitable that philosophy will continue to rank high on the list of extra-legal source materials which the lawyer can utilize in adapting his legal knowledge to the demands of a technocratic and dynamic social configuration.

The books under review represent the contributions of three philosophically oriented jurists to the understanding and possible solution of a whole series of contemporary and eternal problems. Bodenheimer has put together a well balanced and harmonious study of the nature of justice, probing seriously the feasibility of articulating certain carefully selected and objectively valid criteria of justice. Friedmann, in this latest edition of a work which first appeared in 1944 and which has since become a classic, continues to examine socio-legal reality through the prism of Radbruchian relativism and Holmsian ethical agnosticism. Wortley, an English scholar who is clearly concerned with the challenges to which his country is now exposed in relation to the Civil Law systems of the Common Market countries, has reviewed a number of topics from this somewhat tendentious and comparative point of view, stressing the universality of the basic legal concepts of Western Christendom.

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Since it would be impossible in a review of this nature to discuss more than a handful of the ideas raised, treated and suggested in these three books, the following topical arrangement has been selected with a view toward presenting a comparative insight into the philosophical views of the authors.

I. THE BASIS FOR THE IMPOSITION OF PENAL TREATMENT

The quality of life in a country may be measured by the way in which the state handles those of its citizens who are accused of crime. In no other field of law is the conflict between the claims of individual right and social need brought into focus more dramatically than in the area of criminal justice. For it is precisely here that the state, acting through its representatives and agents, is moving to deprive the individual citizen of his liberty and property. And for what reason? What purpose is being served by the administration of criminal justice? Is there a significant discrepancy between the ends which the state is theoretically seeking to achieve and the actual practice corresponding to the realities of criminal law and procedure in action? These and other questions running to the essence, nature and function of our system of criminal law are intimately related to the basis for the imposition of penal treatment.

We are witnessing today a whole series of events which reflect the profound changes which are affecting the moral consciousness of large and noteworthy sections of our society. According to Justice Abe Fortas, Winston Churchill once made this observation:


2. It has become commonplace to take notice of the remarkable growth of interest in crime, criminal law and criminal procedure in United States universities. As Jerome Hall, Theft, Law and Society—1968, 54 A.B.A.J. 960, 963-64 (1968) has pointed out, a good deal of what passes for socio-legal research in this area is little more than highly subsidized fact grubbing which only too often comes up with an end product in the nature of "a tiny mouse" for all interested observers to view. One of the great weaknesses of the sociological approach to law is that the enormity of the undertaking necessitates a division of labor which often results in the postponement, and even complete avoidance, of axiological conclusions suggested by the accumulated and processed data. Cf. Lepaulle, The Function of Comparative Law With a Critique of Sociological Jurisprudence, 35 Harv. L. Rev. 838, 851-52 (1922).

3. The phenomenon is international. It would be a serious mistake to dismiss the crisis in authority as evidence of some form of social "sickness" which will go away in
is possible that we are standing on the threshold of a new era, with all the hope and anxiety that that term connotes. Encouraged by skeptical dissenter's to think through basic concepts to their essential foundations, many people, especially among the youth and disaffected minorities, are challenging the propriety of established and previously never questioned ways of doing things. Some of the skeptical have become radical, rejecting outright the basic premises and moral precepts on which society and state are founded. They have become spiritual revolutionaries who, depending on constitution and temperament, either "drop out" of society to pursue existentialist joy, or join together with those of similar persuasion to work toward the destruction of the established order. Constructive reform to these spiritual revolutionaries is undesirable and useless. A certain nihilism, quite akin to anarchy, is mixed in with the anger and

time if treated with adequate doses of rest and relaxation. Vigorous and prompt action by those in positions of authority is necessary in order to channel the revolution fed by rising expectations into positive and constructive activities. At the same time, responsible community leaders should identify and remove the causes for just and reasonable grievances, acting in concert with responsible complainants if possible, acting alone if necessary. For an example of a determined and decisive policy, see Theodore M. Hesburgh, Dealing With Campus Chaos, U. S. NEWS & WORLD REPORT, March 3, 1969, at 34.

4. The study of sociology has been instrumental in encouraging this kind of skeptical dissent. August Comte, acknowledged founder of the "science of social facts," was searching for a scientific dogma whose common acceptance would give rise to a new social order. Cf. E. Gilson, The Unity of Philosophical Experience, at 257 (1937). Similarly, compare the contemporary appraisal of S. Lipset, The Political Thrust Motivating Campus Turmoil, SATURDAY REVIEW, March 1, 1969, at 23-24, with H. Marcuse, Reason and Revolution 327-28 (1968): "Comte explicitly stated that the term 'positive' by which he designated his philosophy implied educating men to take a positive attitude toward the prevailing state of affairs. Positive philosophy was going to affirm the existing order against those who asserted the need for 'negating' it." Marcuse nevertheless recognizes the critical spirit which is promoted by the study of sociology and other social science disciplines. In an interview published as "Marcuse Defines New Left Line," he states: "there is a vast difference in behavior between the students in the social sciences and the humanities on the one hand and the natural sciences on the other... in the study of these social sciences they have learned a great deal. The nature of power, the existence of the forces behind the facts. They have also become very much aware of what goes on in societies. And this awareness is absolutely impossible for the vast majority of the population, which is, in some sense, inside the social machine." N.Y. Times, Oct. 27, 1968, (Magazine) at 29, 92.

5. The radicalism of recent vintage has given rise to considerable comment. See, 364 ANNALS (1966), and especially Forster, Violence on the Fanatical Left and Right, 364 ANNALS 141-48 (1966). See also Bradley, What Businessmen Need to Know About the Student Left, 46 HARV. BUS. REV. 49 (1968); Glaser, Marcuse and the New German Left, 20 NATION’L REV. 649 (1968). For a sober appraisal by one of our most respected diplomats see G. KENNAN, DEMOCRACY AND THE STUDENT LEFT (1968).
frustration which accompanies involuntary membership in an impersonal society, the decision-making processes of which are deemed to be both too complicated and too remote for the dissenter to relate to in any meaningful fashion. 6

Does criminal law have an important role to play in all of this? How is the "spirit of the times" affecting the substantive and procedural law of crimes? What can we expect of criminal law in the future? In the 1967 Report by the President's Commission on Law Enforcement and Administration of Justice, very little space is devoted to considering the possibilities of improving the substantive criminal law. 7 Not that the President's Commission was satisfied with the existing state of affairs. A shift in the moral sense of the United States academic legal community has prompted its more articulate spokesmen to argue for substantive changes in the law relating to so-called "victimless crimes" and other offenses involving conduct which is deemed to fall more properly within the cognizance of other public agencies of social control. The main point here is that the President's Commission is underscoring the limits to the results which can be expected from

6. One is reminded of the nihilistic and anarchistic movements that swept through certain strata of pre-revolutionary Russian society. In Fathers and Sons (1862), Turgenev created Bazarov, man of action and hero of the young generation, a thoroughgoing nihilist who rejected everything of the then existing social structure. Cf. I.S. TURGENEV, ROMANY 421-588 (1961).

Other Russian intellectual figures in the nihilist-anarchist tradition include: Michael Bakunin (1814-1876), an outspoken anarchist totally opposed to any system of authority; Sergei Nechaev (1847-1882), a protege of Bakunin's, remembered more for the remarkable revolutionary code of ethics which he expressed in his The Revolutionary's Catechism than for his anarchism. Cf. MAX NOMAD, APOSTLES OF REVOLUTION 214-56 (1961); Peter Kropotkin (1842-1921), a nobleman who, despite a family geneology that could be traced back to the time of Rurik, was passionately opposed to the Tsarist regime of his day. P. KROPOTKIN, MEMOIRS OF A REVOLUTIONIST (1962); Compare the following statement by Dmitry I. Pisarev: (1840-1868), literary critic and destroyer of the idealistic myth of Pushkin, in CLARKSON, A HISTORY OF RUSSIA 323 (1961): "Here is the ultimatum of our camp: What can be smashed, must be smashed; whatever survives a blow has value, whatever flies to smithereens is rubbish; in any case, smash right and left, it will and can do no harm," with DER SPIEGEL, Feb. 10, 1969, at 24 where the following statement, painted on the classroom wall at the University of Hamburg appears: "Die Freude an der Zerstorung ist eine Schoepferische Freude." See generally PAUL AVRICII, THE RUSSIAN ANARCHISTS (1967).

7. THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 126-27 (1967); THE COURTS: A TASK FORCE REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 97-107 (1967). The Report consists of nine volumes of informative material on various aspects of crime, e.g., Organized Crime, Drunkeness, Narcotics and Drug Abuse, etc., plus an additional volume representing a condensation of the most significant features of the other nine Task Force Reports.
the administration of criminal law. Impatient observers, dissatisfied with the effectiveness and financial efficiency of criminal law in the prevention of crime, have been attracted to the promises of other behavioral approaches to the problem of controlling, reducing and hopefully eliminating socially harmful conduct.\textsuperscript{8}

The prevention of crime is clearly a desirable societal goal, but thinking and responsible citizens are entitled to ask our social engineers how they propose to achieve it. What price in human values are they prepared to pay in leading us down the road to freedom from want and fear? At stake here, of course, are the fundamental values of our civilization. A shift in the disposition of antisocial conduct from punishment under the criminal law to treatment under administrative discretion runs the risk of an eventual breakdown in state respect for the dignity of the individual.\textsuperscript{9}

The model of a self-reliant, free and independent citizen, ready, willing and able to take care of himself, even after he has fallen into the net of criminal justice, is an important component in the effective implementation of the rule of law. Well-meaning efforts to create another model based on an indefensible disciplinary amalgamation of sociology, psychology and medicine are bound in the long run to perform a disservice in the building of a more humane society. The model of the dependent, deprived and irresponsible victim of society who is deemed to be in need of treatment from one of the “helping” organs of public administration is a necessary conceptual prerequisite to the establishment of the technocratic and therapeutic state.\textsuperscript{10} A

\textsuperscript{8} For a balanced study, see H. Packer, \textit{The Limits of the Criminal Sanction} (1968).

\textsuperscript{9} Thus, the issue raised by Herbert Wechsler, when he asked which “behavior can be prevented by the methods of the criminal law, without causing more harmful consequences than the prevention achieved is worth?” may also be projected into the area of noncriminal administrative controls. Wechsler, \textit{A Caveat on Crime Control}, 27 J. Crim. L. 629, 630 (1937). A valuable discussion of these and other aspects of penal treatment appears in J. Michael & H. Wechsler, \textit{Criminal Law and Its Administration} 4-20 (1940).

\textsuperscript{10} State paternalism may be benevolent or despotic, but it always tends to restrict individual freedom of choice and action. Harold Berman views Soviet law as essentially parental, treating “the individual as a child or youth, as a dependent member who needs to be trained and guided in the interests of the whole as conceived by the state.” H. Berman, \textit{Justice in the U.S.S.R.} 380 (1963). Soviet jurists are less than enthusiastic about this characterization of their legal system. \textit{See} V.A. Tumanov, \textit{Failure to
personal model so conceived is poorly equipped to demand respect for his civil liberties. He will be deprived of his personal freedom and subjected to organized attempts to re-make his personality in order to meet the felt needs of society. His benefactors by definition know what is best for him, and his protestations to the contrary will only be interpreted by his guardians to be signs of poor judgment.\textsuperscript{11}

Friedman is clearly alert to the potential dangers to individual liberty which are inherent in the exercise of broad administrative discretion. Writing in 1959, almost a decade prior to the decision of the United States Supreme Court in \textit{Application of Gault},\textsuperscript{12} he stated:

As corrective and educational procedures have become intermingled with criminal and quasi-criminal processes, so the fear has grown that benevolent, but autocratic authority may be able to deprive persons falling under its jurisdiction of liberty, for indefinite periods, without the judicial safeguards attending criminal trial. Criticism has been particularly vociferous in states which, like California, have gone far in the substitution of corrective for criminal procedures in regard to juvenile offenders. The title of a recent article is: 'We need not deny justice to our children' while a California judge has written that the juvenile court is 'fast developing into a complete system of Fascism, as dangerous to our institutions as Communism.' Such complaints are based on the vagueness or elasticity in the procedure of a juvenile court in regard to such essential safeguards as the powers of the police to arrest, the precise formulation of the offence, the right to trial by jury, the right to refuse testimony, the acceptance of hearsay evidence or the right to counsel.\textsuperscript{13}

\textit{Understand or Unwillingness to Understand}, 4 \textit{Soviet Law and Government} 3, 8-9 (1966), where the author labels Berman's "paternal" theory "a libel against Soviet man." Truth would seem to be a good defense to libel, even where the charge is made in a professional journal. Cf. Berman, \textit{A Reply to V.A. Tumanov}, 4 \textit{Soviet Law and Government} 11 (1966).


\textsuperscript{12} 387 U.S. 1 (1967).

\textsuperscript{13} \textit{Wolfgang Friedmann, Law in a Changing Society} 183 (1959).
The *Gault* case and its progeny\(^{14}\) represent the initial steps of United States jurisprudence in attacking the problem sketched by Friedmann. But in guaranteeing to the youthful offender certain carefully selected Constitutional rights and privileges during the initial stages of his contact with the law enforcement machinery of the state, our high courts are placing the system of juvenile justice on the horns of a dilemma.

On the one hand, the extension of the Fourteenth Amendment and the Bill of Rights to youthful offenders serves to protect them from arbitrary and unfair procedure. On the other hand, it brings with it a good deal of formal, contentious and technical argument into the whole process, so that quite probably it is now necessary to abandon completely the notion that juvenile delinquency proceedings are non-adversary. When the youthful offender receives the process which the United States Supreme Court has held to be his due, it is problematical that the interpersonal dynamics of at least the adjudicatory phase of the proceedings can contribute in any significant way to the noble goals of rehabilitation and ‘guidance for the wayward child.’

To be sure, Justice Fortas, author of the Court’s opinion in *Gault*, was careful to point out that the holding in that case was not intended to impair any of those “unique benefits” of the juvenile system.\(^{15}\) And addressing himself to the question of informality, Fortas, citing the results of social science studies as authority, came to the not surprising conclusion that a formal and fair procedure contributes more to the rehabilitation of the youthful offender than one which is informal and unfair.\(^{16}\) The same holds true, of course, for the adult criminal, and the logic of this argument might be pushed even into the post-conviction correctional phase, an area which will continue to receive the increasing attention of the courts. This is so, because, as Friedmann has correctly observed, the solution to the abuse of administrative discretion is not to abolish the administration, but rather to work out safeguards against such abuse within the

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\(^{15}\) 387 U.S. 1, 22 (1967). Separate treatment in a denominated “civil proceeding” would theoretically still avoid the social stigma of criminality.

\(^{16}\) *Id.* at 26.
framework of the rule of law. This is a tremendous task, but one which must be mastered if we are to succeed in guaranteeing a minimum of order with justice in an age when the inevitable solution to a whole series of profound social and economic problems involves the intervention of the state into the private lives of its citizens.

State administrative intervention into the criminal process is not a major source of concern for Wortley in the volume under review. Indeed, he seems to have embraced the idea that criminal offenders are primary subjects for state administrative therapy. Speaking of the role of the state in the application of penal treatment, he reasons:

A doctor seeks not to cause the death of, but rather to cure his patient, however unpleasant that patient may be; the State should regard itself as being in the same position.

The remark was directed toward the issue of capital punishment, but the sentiment is equally valid as a basis for the imposition of state control over the liberty of the criminal offender even in non-capital cases. Consistent with a therapeutic approach to the tasks of penal treatment, Wortley considers medical men to be in a superior position to laymen in identifying legally relevant mental abnormalities. When the issue before the court is whether the litigant is capable of a free act, Wortley explains:

Legal responsibility, merit and demerit, are then matters which depend on the conception of the possibility of a free act. The exceptional cases, where there is no possibility of a free act, can be recognized by medical men who can detect, not only obvious drunks and epileptics, but also neurasthenics, hysterics, abnormal people, psychopaths and neurotics who may appear to others to be normal. Advances in psychology and psychiatry have, logically, led to extending the categories of persons who are not capable of meeting the full responsibility which the law presumes . . . .

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18. "The welfare of the people in particular has always been the alibi of tyrants, and it provides the further advantage of giving the servants of tyranny a good conscience," Albert Camus, as found in T. Szasz, Psychiatric Justice 19 (1965).
20. Id. at 357. For a similarly optimistic estimation of the value of psychiatric testimony, see Comment, Psychiatric Evaluation of the Mentally Abnormal Witness, 59 Yale L.J. 1324, 1338 (1950).
This is saying a good deal more for the abilities of our expert witnesses than is justified from the record. Moreover, it seems to assume a frictionless and harmonious relationship between the testimony proffered by the medical-psychiatric witness and its usefulness to the trier of fact. In reality, it has been a task of enormous proportions to fashion a workable system of evidence, satisfactory both to those responsible for the administration of a value-laden system of law as well as to those sometimes value-free social and physical scientists, whereby the talents of the latter can be applied meaningfully to the judicial process.

As an example of this, the Circuit Court of Appeals for the District of Columbia, perhaps the most venturesome of our appellate courts in experimenting with new and untried substantive and procedural approaches to the problem of criminal capacity, has recently, after a period of granting to the

21. Compare Hall, Science, Common Sense, and Criminal Law Reform, 49 IOWA L. REV. 1044, 1049 (1964): "whatever expertise psychiatrists have, it does not inhere in any special competence to recognize persons suffering from extreme mental illness." In United States v. Naples, 192 F. Supp. 23, 40-41 (D.D.C. 1961), Judge Holtzoff, citing Connecticut Mt. Life Ins. Co. v. Lathrop, 111 U.S. 612 (1884) and Queenan v. Territory of Oklahoma, 190 U.S. 548 (1903), held that a lay witness may express an opinion based on his own observations as to whether a person is of sound or unsound mind. The court there cited with approval the Judicial Committee of the Privy Council in Attorney General for the State of South Australia v. Brown A.C. 432, 452 (1960), where it was judicially observed that "The previous and contemporaneous acts of the accused may often be preferred to medical theory." For other cases which have recognized the correctness of permitting a lay witness to testify from personal observation concerning the mental competency of the defendant in a criminal matter see State v. Garver, 225 P.2d 771 (Ore. 1950), noted favorably in Pederson, The Opinion Evidence Rule in Oregon as it Relates to Cases Involving Medical Matters and Insanity, 33 ORE. L. REV. 243, 262-71 (1954); Noble v. Sigler, 244 F. Supp. 445, 451 (D. Neb. 1965), aff'd 351 F.2d 673 (8th Cir. 1965); Kaufman v. United States, 350 F.2d 408, 411-12, 414-15 (8th Cir. 1965), cert. denied 383 U.S. 951 (1966). The problem has provoked considerable editorial commentary in the legal periodicals. Cf. Dieden & Gasparich, Psychiatric Evidence and Full Disclosure in the Criminal Trial, 52 CALIF. L. REV. 543 (1964); Symposium, The Doctor in Court—Expert Medical Testimony, 13 MD. L. REV. 283 (1953); Louisell, The Psychologist in Today's Legal World, 39 MINN. L. REV. 235 (1955); Salzman, Psychiatric Interviews as Evidence: The Role of the Psychiatrist in Court—Some Suggestions and Case Histories, 30 GEO. WASH. L. REV. 853 (1962); Lassen, The Psychologist as an Expert Witness in Assessing Mental Disease or Defect, 50 A.B.A.J. 239 (1964). In California, Section 870 of the Evidence Code permits certain qualified lay witnesses to testify as to a person's sanity, CAL. EVID. CODE § 870 (West 1966). In Pfingst v. Goetting, 96 Cal. App. 2d 293, 215 P.2d 93 (1950), even an unqualified lay witness testified. This was held to be admissible, not as an opinion on mental sanity, but rather to show rational or irrational appearance.

22. It is sometimes said that the Durham "Product" Rule, adopted in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), is the same as that embraced by New
medical-psychiatric witness the greatest leeway in expressing himself on the witness stand, restricted the scope of such expert testimony. Suffering from a syndrome of "conclusory labels," and fearful that the expert witness was preempting the essential function of the trier of fact, the court, speaking through Justice Bazelon, said:

The trial judge should limit the psychiatrists' use of medical labels—schizophrenia, neurosis, etc. It would be undesirable, as well as difficult, to eliminate completely all medical labels, since they sometimes provide a convenient and meaningful method of communication. But the trial judge should insure that their meaning is explained to the jury and, as much as possible, that they are explained in a way which relates their meaning to the defendant.23

The final chapter in this socio-legal experiment will never be written. Restless dissatisfaction with the results produced by the adaptation of new tests for criminal capacity to ageless patterns of criminal behavior may someday prompt an agonizing and sobering reappraisal of the rationality and value of the much criticized M'Naghten rule.24 Indeed, there are signs that even Judge Bazelon seems to be having second thoughts about the wisdom of Durham25 in opening up the legal issue of criminal capacity to the probing scalpel of the behavioral scientists. He concluded his opinion in Washington v. United States with the following personal observations:

It may be that this instruction [restricting the scope of psychiatric testimony] will not significantly improve the

Hampshire in State v. Pike, 49 N.H. 399 (1870). The Durham court itself referred to its "Product" Rule as "not unlike" New Hampshire's. In a perceptive article, Reid, Understanding the New Hampshire Doctrine of Criminal Insanity, 69 YALE L.J. 367 (1960), the author points out that, although virtually identical in language, the New Hampshire and the Durham "Product" Rule differ in that the former is a rule of evidence governing the scope of evidence to be admitted, while the latter states a rule of substantive law. The Circuit Court of Appeals for the District of Columbia took cognizance of this in Blocker v. United States, 288 F.2d 853, 857 n.3 (D.C. Cir. 1961).

24. M'Naghten Case, 8 Eng. Rep. 718 (1843). If the future should witness a return to the rationality of M'Naghten, much of the credit therefore will be due to those legal scholars who understood the nature and spirit of our Anglo-American system of Criminal Law and who defended it against the seductive embrace of irrationalism. Cf. J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 449-528 (2nd ed. 1960); Mueller, Mens Rea and the Law Without It, 58 W. VA. L. REV. 34 (1955).
adjudication of criminal responsibility. Then we may be forced to consider an absolute prohibition on the use of conclusory legal labels. Or it may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . But at least we will be able to make that decision on the basis of an informed experience. For now the writer is content to join the court in this first step.26

Since Bazelon did not then have the opportunity to elaborate on his concept of a legal system from which the defense of insanity would be altogether eliminated, it is difficult to envisage the realization of that in the concrete. To do so might very well represent a retreat into the utilitarianism of absolute liability which was temporarily popularized by Justice Oliver W. Holmes.27 Bodenheimer, aided by the perceptive insights of Professor Jerome Hall,28 has contributed a very valuable discussion of this aspect of Holmesian penology:

Holmes' positivism was accompanied by a strong belief in psychic determinism which strengthened his conviction that personal culpability should not be made the foundation of criminal liability. . . . Holmes felt that an accused criminal, after having been driven into his crime by forces beyond his control, could be compared to a soldier marched into battle and sacrificed if necessary, to the interests of the state. 'The law does undoubtedly treat the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense,' and Holmes considered this course of action perfectly proper.29

The abolition of the defense of insanity would open the door to the possibility of abandoning any and all tests "of guilt and moral responsibility in favour of a purely utilitarian and socially determined elimination or confinement of persons dangerous to society."30 With this theory it is possible to punish the sane

26. 390 F.2d at 457, n.33.
28. HALL, supra note 24, at 147-170.
30. FRIEDMANN, THEORY, supra note 17, at 61.
together with the insane, or in the alternative, to involuntarily treat administratively determined dangerous or potentially dangerous individuals with various measures of social hygiene. As Friedmann has correctly observed:

Such a philosophy can lead to the exposure of weakling children—as in ancient Sparta—or to the extermination, confinement or sterilization of entire nations, races or other groups of people as hostile or obnoxious to society—a philosophy largely practised in National Socialist Germany.32

To some, such an observation may seem to be an intellectual gratuity, too obvious to merit treatment in a book on jurisprudence. If only that assumption were true! Unfortunately, as Santayana so pungently put it: “Those who cannot remember the past are condemned to repeat it.” For those who never knew, as well as for those who knew and who have since forgotten, it is necessary to emphasize the potentiality for evil which is latent in a legal system inspired by expedient utilitarianism and divorced from a serious and meaningful commitment to civilized standards of morality, ethics and justice.33

Bodenheimer makes this point quite effectively in his chapter on “Penal Justice.”34 Before an individual can be convicted of a crime, the state has the burden of proving beyond a reasonable doubt that he, by a voluntary act, was the human agency by which some legally proscribed social harm was caused. In addition, and most important of all, the state has to prove the requisite mens rea, or blameworthy state of mind. To find a person guilty of crime without first establishing a conscious and knowing intention to do harm to some legally protected personal or proprietary interest is, however expedient it may seem to be as a device to take some of the work load from the weary shoulders of the prosecutor, unfair and unjust. It means to sacrifice a morally innocent actor in the hope of thereby satisfying some social claim which is deemed to be overriding. As Bodenheimer argues in his lucid discussion of the theoretical aspects of strict

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31. As used here, the words “sane” and “insane” are intended to have legal, as opposed to medical, significance.
32. Friedmann, Theory, supra note 17, at 61-62.
liability in the criminal law, such a philosophical position is "wholly indefensible upon considerations of justice." 35

The rationale for the imposition of punishment on those who have been convicted of crime is that they are morally responsible for their conduct. To be sure, a rapidly changing technology is only one of the many factors which are at work in influencing the attitudes and practices which prevail in our society. At the time of this writing, some Negro leaders are denouncing the middle class morality of white America as racist, while at the same time demanding recognition of their own claims to a black separatism. 36 It is not difficult to identify other sub-cultural groupings which have developed moral attitudes at odds with those which prevail in the country at large. 37 To the extent that individuals from these groupings, in acting out their moral commitments, breach legally imposed duties which they owe to state and society, they subject themselves to punishment by state organs charged with the administration of criminal justice. The fact that they truthfully believe that what they have done is not wrong is no defense in a criminal proceeding. They are held to be morally responsible according to the standards and social conscience of the community. The collective voluntary will of the community has already expressed itself in the enactment into law of a positive prohibition of such conduct. If

35. Id. at 206.
36. N. Hare, The Case for Separatism: ‘Black Perspective’, NEWSWEEK, Feb. 10, 1969, at 56. If recognized, such separatist claims could lead to serious problems in the effective communication and exchange of abstract concepts such as justice and freedom between the separated white and black groups. Such recognition, if it should involve state action, might be unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. Narrowly construed, Brown v. Board of Education, 347 U.S. 483 (1954) must be confined to public educational facilities. Its spirit, however, is much broader, pointing toward an integrated America in which racial differences would be a neutral factor in the allocation of rights and duties. Moreover, separatism could lead to a reverse discrimination by private black citizens against whites, something which, if it were to involve the enjoyment of some public accommodation, would seem to be prohibited by the 1964 Civil Rights Act. A further danger in separatism is the possibility that it may act as a catalyst to encourage black demands for separate institutions of justice, including separate codes and separate courts. There is historical precedent for this in Roman, Western Medieval and Ottoman practice. In the Ottoman Empire, the religious heads of non-Moslem Communities called millets were responsible to the Ottoman state for the administration of their own laws and courts. See H. GEHR & H. BOWEN, ISLAMIC SOCIETY AND THE WEST 212-61 (1960). Whatever may be said in favor of such an arrangement, it is strange to the United States legal tradition.
37. Informative background sketches of such groups and their leaders may be found in D. WALKER, RIGHTS IN CONFLICT 18-33 (1968).
the statutory enactment is not clear enough in plain language to convey that meaning, then a court of law will hand down a clarifying and dispositive statutory interpretation.\(^{38}\)

Acceptance of the concept of individual moral responsibility for personal conduct necessarily precludes a widespread recognition by the law of the various theories that have been developed to deny the existence of free will and to explain how an individual's conduct is the product of forces over which he has little or no control. Bodenheimer's treatment of determinism and criminal responsibility\(^{39}\) is very well done and deserves a prominent place on assigned reading materials for students enrolled in courses in Criminal Law. After a balanced explanation of the theories of Kant, Freud, Bohm, Adler, Schopenhauer, Hartmann and others, Bodenheimer concludes that free will does exist, even if in a qualified sense:

Although the empirical evidence strongly points toward the possibility of volitional freedom, there can be no doubt that man's freedom of self-determination is by no means absolute... Persons who are not mentally ill in the psychiatric or legal sense may be incapable of offering resistance to causally determined factors anchored in their past, which drive them into anti-social conduct or crime.\(^{40}\)

This qualified existence does not prevent the imputation and imposition of criminal responsibility in marginal cases, although it may require legal recognition of "various shadings and degrees of responsibility."\(^{41}\) Only where it can be shown that, from all the various determinants at work in a given case, the autonomous determinant was beyond the control of the accused, will criminal responsibility not be imputed by the law.\(^{42}\)

Wortley likewise is not a strict determinist. Despite his emphasis on the penal goals of prevention and deterrence of

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38. In a short but penetrating analysis see H. Hogan, *The Supreme Court and Natural Law*, 54 A.B.A.J. 570, 572 (1968). The author approvingly refers us to the ultimate and final contemporary arbiter of our national conscience, the United States Supreme Court. Sensitizing and directing the conscience of the nation is just one of the functions which are performed by the United States Supreme Court. See Kauper, *The Supreme Court: Hybrid Organ of State*, 21 Sw. L. J. 573, 586-87 (1967).


40. *Id.* at 187-88.

41. *Id.* at 188.

42. *Id.*
leading to the conclusion that the proper function of imprisonment should be environmental reform and re-education, he nonetheless stresses the pre-custodial importance of a conscious, volitional act involving a choice among possibilities. Further, he subscribes to a system of criminal law that holds the individual responsible for his conduct. The citizen is "presumed to have a will and to be able to exercise it rationally. It is this will, and this presumption of rationality, which traditional legal philosophy ascribes to man as distinct from other animals which, though they have will and a degree of intellect, are not held responsible for their acts, as are human beings."  

Friedmann, noting that "the great majority of the modern legal systems and of legal philosophers reject the total abandonment of individual responsibility as a criterion of criminal ... liability," concludes that it is socially necessary to assume that the individual possesses free will if a legal system is to be able to perform the function of bringing some measure of order into the social life of the community. Further, and to the extent that law is a reflection of the moral consciousness of the members of society, it must punish those who are found to be guilty of acts which shock the conscience of the community. He stresses the need for increased recognition of the various degrees of responsibility. From the be-

43. WORTLEY, supra note 19, at 436.
44. Id. at 356.
45. Id. at 357. It is important and necessary to differentiate man from the various sub-human members of the animal kingdom. The worst kind of mischief can result from the mistaken view "that man is only a high-grade gorilla," Brendan Brown has correctly stated in praising Wortley for his Aristotelian, Thomistic, common law notion of the nature of man. Brown, Book Review, 12 NATURAL L. FORUM 232, 233 (1967). Scholars who refer to animal behavior as relevent in explaining the human condition run the risk that others, consciously or unconsciously accepting the analogy, will make official policy brutally consistent with such an overemphasis on the biological side of human nature. See D. MORRIS, THE NAKED APE (1968). For an outstanding example of such monkeybusiness; see also Waelder, The Concept of Justice and the Quest for a Perfectly Just Society, 115 U. PA. L. REV. 1, 5-6 (1966) (reference to the behavior of chickens and baboons).

46. FRIEDMANN, THEORY, supra note 17, at 65-66. The concept of criminal guilt which is part of Soviet law is explained by G. K. Bol'shakova (ed.), SOVETSKOE UGOLOVNOE PRAVO, CHAST' OBSCHCHAYA (Soviet Criminal Law, General Part) 124-26 (1964) as embodying a deliberate choice to commit a socially harmful act that could have been avoided. By substituting social danger for moral culpability, it has been possible for Soviet jurists to continue to use the Criminal Law for maintaining order in society while working on the formation of a new Soviet morality. See N.F. KUZNETSOVA, UGOLOVNOE PRAVO I MORAL' (Criminal Law and Morality) (1967); H.J. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 32 (1966).
behavioral sciences we can hopefully learn humility and avoid that arrogance which often accompanies an attitude of moral superiority:

The men who, as legislators, judges or administrators, lay down the conditions of legal responsibility can and should do so, not from a posture of moral superiority, but as executants of a social and legal order which has not yet found any alternative to the criterion of free choice between right and wrong as a basis of legal sanctions. And it is at least possible that, at some time in the future, such insights may modify the collective relations between nations, which still operate in their mutual intercourse on a psychological level that civilized societies have long abandoned in their internal affairs, and that mature individuals would feel ashamed to apply in their personal relations.47

II. THE CONCEPT OF INTERNATIONAL LAW

Insights from the behavioral sciences may indeed be of aid in the solution of the manifold human and institutional problems which manifest themselves on the international scene. At least many current scholarly observers believe so, and several have attempted more or less thorough study projects with such a goal in view.48 The authors of the books under review have devoted some attention to international law and to past and present attempts to impose a measure of reasoned order on international intercourse.

Friedmann provides us with only sporadic and a largely descriptive treatment of international law in this edition of Legal Theory,49 a circumstance which to some extent at least is explainable by reference to the fact that he has developed his ideas on this theme elsewhere. In 1964 he published The Changing Structure of International Law,50 an elaboration of

47. FRIEDMANN, THEORY, supra note 17, at 67.
49. It is generally the international law theories of the great legal philosophers which are described and criticized. This style is continued even in the brief last section entitled “Legal Theory and International Society.” Cf. FRIEDMANN, THEORY, supra note 17, at 161, 164, 188-89, 288-89, 550-55, 573-80.
Chapters 14 and 15 of his 1959 title, Law in a Changing Society.\textsuperscript{51} Quite convinced of the need of an inter-disciplinary approach to the study of international law,\textsuperscript{52} Friedmann to date has wisely contented himself with a modest but nonetheless valuable legal-political analysis of his subject matter. Drawing on his considerable reserves in erudition, perception and judgment, talents which he has acquired through intensive and extensive existential and professional experience in many countries, Friedmann has offered us the following analytical pattern with which to study the law and international relations:

During the early formative era of international law, conflict was deemed to be the principal instrument at the service of national interest. Because of this, traditional theories of international law were almost without exception devoted to a regulation of this conflict, and took on much of the aura of an international law of coexistence. Lately, the emphasis in international relations has shifted from conflict to cooperation as a means of achieving the national interest. There is already impressive evidence of a developing international law of cooperation, especially where the formation of regional supranational groupings have reflected a growing awareness of common interests and values.\textsuperscript{53}

This split-level approach to international law has been suggested by other Western scholars\textsuperscript{54} and forms part of a definition proferred by the late Soviet Professor E. A. Korovin:

International law can be defined as the aggregate of rules governing relations between States in the process of their conflict and cooperation, designed to safeguard their peaceful coexistence, expressing the will of the ruling classes of these

\textsuperscript{51} FRIEDMANN, supra note 13, at 417-81.
\textsuperscript{52} Addressing the American Society of International Law in 1966, Friedmann concluded: “The essential need, in our generation, is for a greatly widened training in international law, and an equally great extension of interdisciplinary collaboration on the governmental, academic and private levels,” reprinted as The Relevance of International Law to the Processes of Economic and Social Development, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW at 15 (1966).
\textsuperscript{53} W. FRIEDMANN, supra note 50 (thesis paraphrased).
\textsuperscript{54} Schwartzzenberger, Aron and Carr are mentioned as intellectual predecessors by McDougal & Reisman, Book Review, 65 COLUM. L. REV. 810, 812, n.8 (1965). F.A. Mann suggests the Friedmann distinction between the law of coexistence and the law of cooperation may be “simply one of fact, i.e., between the less developed ‘political’ and the infinitely more elaborate ‘technical’ international law.” Mann, Book Review, 81 LAW Q. REV. 305, 306-307 (1965).
States and defended in case of need by coercion applied by States individually or collectively.\textsuperscript{55}

Friedmann's version of it is coupled with what Falk has called a "pragmatic idealism,"\textsuperscript{56} and with what F. A. Mann has discerned to be "a deep sense of justice, including social justice, morality and righteousness."\textsuperscript{57}

While praising Friedmann's contributions to international legal study in general, other observers have been critical of Friedmann's failure to present a well-developed theory comprehensive enough to explain and extrapolate the world social process in a manner that would be of aid to those engaged in the decision making process.\textsuperscript{58} Adept at identifying certain aspects of social change and the impact which those have had on norms and institutions of international law, Friedmann has yet to formulate and defend a goal-oriented observational standpoint from which to view the behavior of those who are subjects of international intercourse.\textsuperscript{59}

Perhaps this is because he fears that the creation of such a substantive and methodological system would tend to produce a certain axiological rigidity which he suspects would work to the detriment of a beneficial and progressive social order. As Bodenheimer has pointed out, the goal-oriented "policy-science" approach of McDougal and others to the study of law and life is essentially a natural law philosophy because, despite McDougal's claim that his values are objectively those which are held by the majority of the community as determined by empirical social science surveys, he nonetheless insists that the values which he has identified ought to be shared as widely throughout the world as possible, "resting on respect for human dignity as a supervalue."\textsuperscript{60}

Whether Friedmann would agree with Bodenheimer's

\textsuperscript{55} Cf. \textit{International Law} 7 (E. Kozhevnikov, ed., 1957) (emphasis added).
\textsuperscript{57} F. Mann, \textit{supra} note 54, at 307.
\textsuperscript{58} Cf. especially, M. McDougal & W. Reisman, \textit{supra} note 54. See also Miller, Book Review, 65 \textit{Colum. L. Rev.} 836 (1965).
\textsuperscript{59} Horvath, Book Review, 16 \textit{Amer. J. Comp. L.} 440, 442 (1968) calls Friedmann's contribution to legal philosophy "an unfinished symphony."
\textsuperscript{60} E. Bodenheimer, \textit{Jurisprudence} 143 (1967). After reading the McDougal & Reisman review, \textit{supra} note 54, one is tempted to conclude that it is necessary to add as another "supervalue" to the McDougalian system the imperativeness that legal research scholars accept and carefully apply McDougal's "policy-science" methodology!
classification of "policy-science" or not, he is distrustful of natural law thought and has called it "... human arrogance cloathed in supernatural wisdom." Sympathetic to the relativist pragmatism of Holmes, Friedmann has stated:

The life of mankind has been a continuous struggle for the implementation of conflicting philosophies and principles of life, and it requires a remarkable degree of self-assurance to know that one's own political philosophy, whether implemented in a majority or a minority of legal systems, represents the order of God or Nature, while the rest of mankind stands condemned.61

While rejecting the conceptualism of natural law, Friedmann has used some very abstract phrases himself in explaining his approach to international law. As noted above, Friedmann's conflict-cooperation analysis is understandable in terms of a search to achieve "the national interest." What does "national interest" mean? And who shall determine what this phrase means, Friedmann or someone else? How is such a decision made? What conflicting values are at stake? Is "national interest" another way of restating the Thomistic concept of the "common good"? The conscious and explicit development of value preferences as they relate to the normative elements of a scholarly analysis is not only helpful to the interested reader or decision maker; it is absolutely vital. Articulating some of his values, Friedmann states:

It may indeed be maintained that all law is a law made by human being for human beings, and that the respect for the human being, as an individual rather than an object to be disposed of at will, is a foundation of all social, and therefore of legal, relations. This may lead to a condemnation of such extremes of barbarism as the Nazi extermination decrees leading to the murder and degradation of millions of human beings, in gas ovens, concentration camps and slave labour establishments, as not deserving of the attributes of any legal order, as contrary to "natural law." The same result may be reached, however, by stating that murder or torture are international crimes, since all civilised legal systems treat them as criminal offences of the gravest kind. Beyond such elementary postulates, the manner in which political societies

62. W. FRIEDMANN, supra note 50, at 79.
have, since the dawn of civilisation, regulated their economic and social affairs, is a matter of clashing philosophies, values and interests. Any attempt to stamp a particular social order as being consonant with nature, and correspondingly, another as being contrary to nature, is a disguised way of giving the halo of perpetuity and sacrosanctity to a particular political or legal philosophy.\footnote{Impliedly, Friedmann is suggesting his preference for a positivistic yet flexible ordering of international affairs. He seeks to avoid the intellectual arrogance that has sometimes characterized the dogmatic assertion of natural law thinkers that their reasonable solutions to human problems represent the will of God or the reflection of some natural universal principle of human nature. Such striving for humility can only be admired and commended. Honestly, consistently and conscientiously pursued, it is doubtless more pleasing to God than the uncharitable imposition of human will in the name of divine wisdom. But the embrace of natural law need not necessarily lead to arrogance and intolerance. It depends on the total constitution of the thinker, including his complete psychological and intellectual make-up.}

In searching for the rule of law, men have endeavored to base their decisions on some factor other than their own naked power and authority. Principles of truth, right and justice have been articulated and given concrete meaning by the decision maker, whose decision may or may not be reviewable before the bar of civil society. Someone has to decide, and the question would seem to be how to avoid making the wrong decision. Rules and abstract principles are absolutely necessary, but they are not self-operatively adequate. So Friedmann stated:

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\text{\ldots there are deep disagreements as to the extent to which the norms of international law should be regarded as a superior set of values, where they conflict with what the particular author regards as national interest}.\footnote{Id. at 77-78.}
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Here, Friedmann recognized the ambiguity of the phrase ‘national interest’ and goes on to criticize the use\footnote{Friedmann, Law and Politics in the Vietnamese War: A Comment, 61 A.J.T.L. 776, 778 (1967) [hereinafter cited as Wolfgang Friedmann].} of abstract

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\text{\ldots there are deep disagreements as to the extent to which the norms of international law should be regarded as a superior set of values, where they conflict with what the particular author regards as national interest}.\footnote{See Moore, The Lawfulness of Military Assistance to the Republic of Vietnam, 61 AM. J. INT’L L. 1 (1967).}
McDougalian expressions such as “minimum world public order” and “fundamental community prescriptions”:

[I]n the absence of third-party determination, “minimum world public order” means Humpty-Dumpty-like, what the policy-maker wants it to mean, a catch-all phrase to justify whatever action the writer wishes to justify.66

Is this a manifestation of what Pound has referred to as a ‘give-it-up’ philosophy?67 Or is it more particularly an attempt to point out the semantic shortcomings to which even a carefully developed goal-oriented policy-science is prone?

Moore, in replying to this critique by Friedmann, counters:

No formula or approach, whether policy-oriented or the most pedantic search for “black and white” rules, guarantees “correct” results in analysis of complex issues of international law or the same result when applied by different scholars. All suffer alike from the absence of third-party determination. Yet Professor Friedmann’s suspicion of policy analysis suggests both that he believes that a search for ‘black and white’ rules offers greater certainty of “correct” results and that he thinks consciously or unconsciously that policy justification is unnecessary and even dangerous. But there are strong reasons for suggesting that the available range of complementary norms of international law makes a simplistic rule application a more dangerous exercise (dangerous in the sense of ease of manipulation of result) when dealing with complex major issues than the conscious application of norms in the light of their function.68

After following this exchange, one is reminded of President Levi’s query “of whether philosophy of law has anything to contribute to the good of the legal profession, the law, or the world.”69 The Moore-Friedmann exchange is not even resolved in the presence of a third-party determination, for the same issues would clearly confront the third party! Those interested in the outcome of the decision of this third party would certainly like

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66. Wolfgang Friedmann, supra note 64, at 783.
to know who he is and to what value system he subscribes. It is thus impossible to separate ethics from the law.\textsuperscript{70}

Wortley, in his book under review, outlines an historical development of theories of international law from the ancient world to the present day, concluding that "The international legal order is composed of the family of States; its rules are designed to secure peace with justice."\textsuperscript{71} To learn what the author means by justice, the reader has to wait until a later chapter, when that theme is discussed within the context of a hypothetical judicial decision influenced by Aristotelian ethics.\textsuperscript{72} So Wortley: "A discussion of the nature of justice is best introduced by considering the function of the impartial judge in any legal order."\textsuperscript{73} The author believes that the starting point of an international lawyer "is that there can be, in objective justice, an answer to any human conflict."\textsuperscript{74} To quote a famous diplomatic dispatch:

There is indeed no mystery about international law: it is nothing more than the recognition between Nations of the rules of right and fair dealing such as ordinarily obtain between individuals and which are essential for friendly intercourse.\textsuperscript{75}

There are plenty of rules; the problem is "to reconcile them into some just form of co-existence and of harmonious relationship," a task which the author dispatches in the ten pages of Chapter 9!

\textsuperscript{70} Cohen, \textit{Transcendental Nonsense and the Functional Approach}, 35 COLUM. L. REV. 809, 849 (1935) interprets as follows:

The positive task of descriptive legal science cannot, therefore, be entirely separated from the task of legal criticism. The collection of social facts without a selective criterion of human values produces horrid wilderness of useless statistics. The relation between positive legal science and legal criticism is not a relation of temporal priority, but of mutual dependence. Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without the guiding light of a theory of values. It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched. It is loyalty to this union of distinct disciplines that will mark whatever is of lasting importance in contemporary legal science and legal philosophy.

\textsuperscript{71} B. WORTLEY, \textit{supra} note 19, at 162.

\textsuperscript{72} \textit{Id.} at 349.

\textsuperscript{73} \textit{Id.} at 355.

\textsuperscript{74} \textit{Id.} at 162.

\textsuperscript{75} \textit{Id.}

Theoretically, Wortley's heart is in the right place. The Aristotelian and Thomistic principles to which he refers are eternally sound. But he does not even begin to make a systematic application of them to the contemporary problems of international living. For example, consider the Thomistic doctrine that war may be validly waged for a just cause and a just intention. Or, examine therewith the ancient Roman rule granting the right of self defense as a last resort, a principle which seems to be incorporated into Article 51 of the United Nations Charter. How would Wortley apply these rules to decide the respective claims of Israel and her Arab neighbors with respect to the Six Day War of 1967? While his short answer to such questions would be interesting, the detailed methodology which he might employ in reaching the answer would be of even greater significance. The values expressed by Aristotle and Aquinas are fine in the abstract. Who could take exception to them? They have been carefully and thoroughly thought through by two of the greatest minds who have ever contributed to the development of human knowledge. The task for this generation of jurists is to relate them in detail to each value process, taking each potential decision to see whether, in immediate as well as potential future effect, it corresponds to the ethical goals of the socially responsible analyst.

Bodenheimer, while recognizing the conceptual and practical difficulties in formulating and implementing a system of international law, is nonetheless mildly optimistic. His version of international law is one in which the pursuit of justice and order go hand-in-hand. Addressing himself to the question of whether the national sovereign has exclusive jurisdiction over his subjects, or whether some extra-national juridical entity may validly

76. Id. at 145.
77. Id. at 160. Article 51 of the United Nations Charter states:

Article 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.
intervene in the international affairs of a state which allegedly is denying fundamental human rights to its citizens, Bodenheimer states:

The history of the doctrine of humanitarian intervention shows that human beings in one national unit are by no means disinterested in, or impassive to, the treatment of human beings subject to another sovereignty. Men are by nature disinclined to consider sovereign state power as a supreme, ultimate fact of international life which eclipses or eliminates the need for concern with individual human values and well-being. As civilization advances, men come to feel to an increasing extent that “fundamental human rights are rights superior to the law of sovereign states.”

To be sure, such intervention would have to be restricted to cases involving “extreme instances of outrageous governmental conduct,” and whatever value it might have in preventing the alleged abuse of human rights would have to be weighed against the disadvantages inherent in the risk of provoking war. International agreements providing for such intervention would constitute the best technical manner of validation, provided that adequate procedures for the enforcement of such covenants are also made available. Bodenheimer additionally perceived the need for “an almost worldwide campaign designed to strengthen the conscience of mankind” before such ideas can bear fruition.

Thus, identification of the common conscience must first be preceded by a tendentious effort to shape it. This presents a task of enormous difficulty and complexity. How are U.S. jurists, for example, to strengthen the conscience of Soviet leaders with respect to alleged violations by the Soviet Union of the fundamental human rights of individual Czech citizens? There is considerable evidence that the August 1968 Soviet-led invasion of Czechoslovakia resulted in the loss or drastic curtailment there of what we here in the United States call first amendment rights. The Russians felt that they were restoring an intolerable situation to “normalcy.” From their point of view (Russian, Marxist, Leninist, Stalinist) they doubtless felt that what they did was

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78. E. BODENHEIMER, supra note 29, at 235-36.
79. Id. at 236.
necessary. But was it compatible with the international legal doctrine of non-intervention in the internal affairs of other sovereign States?

Speaking to the American Society of International Law in Washington, D.C. in April 1968, some four months before his country’s troops invaded Czechoslovakia, Evgeny N. Nasinovsky, Legal Adviser of the Soviet Mission to the United Nations, explained:

With regard to such a cardinal principle of international law as the principle of noninterference in the internal affairs of other states . . . the USSR has assumed a noble role of its guardian and of the champion of its strict observance.\(^1\)

And further:

The Soviet State, supporting the concept of universally recognized international law has been consistently defending the principle of noninterference in the internal affairs of other states; it strongly rejects the idea of imposing revolution from abroad; it will never send a soldier to impose its will on another country.\(^2\)

Another Soviet representative, Yuri Zhukov, the foreign editor of Pravda, the official organ of the Communist Party of the Soviet Union, told the Dutch political weekly Haagse Post two months later that NATO was “a completely useless affair.” He further suggested that the same might be said of the Warsaw Pact, the provisions of which were of course invoked to supply an aura of legality to the Soviet-led occupation of Czechoslovakia. Zhukov’s proposal:

We must dissolve the two blocs and organize a system of European cooperation, economically, scientifically, culturally and even politically.\(^3\)

To informed observers of Soviet foreign policy and of Soviet-West European relations in particular, the statements of Nasinovsky and Zhukov should come as no surprise. Even if he had actually known of plans to occupy Czechoslovakia by military force, Nasinovsky would probably not characterize them as violative of

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82. Id. at 195.
the principle of noninterference at all. Where the mutual relations of socialist states are concerned, Soviet jurists apply a special Marxist-Leninist principle of self-determination of nations which, coupled with the objective content assigned to the concept of non-intervention as it applies to nations within the socialist commonwealth, provide, as Ramundo has noted, "an institutional basis for interference in internal affairs in the greater interest of the socialist commonwealth."\(^{84}\) Zhukov's remarks to the Dutch journalists reflect a long-standing objective of Soviet policy vis-a-vis the European Economic Community, namely, to de-emphasize the positive features of regional economic cooperation in Western Europe, emphasizing the even greater benefits which would allegedly result from an all-European effort in which the U.S.S.R. would play a leading role.\(^{85}\)

Rather surprising, however, was Zhukov's misreading of the then contemporary scene,\(^{86}\) in particular his assessment of the viability of the doctrine of military intervention based on a regional defense pact. Perhaps also surprising, in light of the alleged desires of the Soviet leaders to foster a spirit of fraternal

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\(^{84}\) Ramundo, *The Socialist Theory of International Law, Institute for Sino-Soviet Studies of George Washington University* 41 (1964). This institutional base was subsequently incorporated into the post facto Brezhnev Doctrine: "The Soviet Union asserts the right to intervene in any member country of the Socialist Commonwealth where the purity or supremacy of the party might be threatened," *Time*, October 18, 1968, at 29; *see Newsweek*, November 25, 1968, at 46. The Brezhnev Doctrine must be regarded as important supplementary codicil material to the Warsaw Pact, Articles 1 (renunciation of the use of force to settle disputes) and 8 (nonintervention in internal affairs) of which would otherwise seem to condemn the Soviet-led move into Czechoslovakia as violative of that agreement. See Lawson, *International Regional Organizations* 207, 209 (1962).

\(^{85}\) This stance was evident at the time when the Common Market was being established. In 1957 the Soviet Ministry of Foreign Affairs expressed concern for the political and economic future of Europe and called for the establishment of organizations designed to integrate and coordinate the entire European economy. See the statement to the press by the Soviet Foreign Ministry concerning the European Common Market and Euratom, March 16, 1957, in *Documents on International Affairs* 448 (N. Frankland, ed., 1960). "The Soviet Union is convinced that a genuine solution of the economic problems affecting each European country . . . cannot be found through the establishment of new exclusive organizations by this or that group of countries opposed to the other European countries. This solution can and should be found on an all-European basis through the use of the already existing organizations of an all-European nature or through the establishment of new European organizations on terms acceptable to all European countries regardless of their social system."

\(^{86}\) Already by June, 1968 the liberalization program of the Dubcek government in Czechoslovakia was drawing heavy fire in the Soviet press, including Pravda. *See Merrill, Czechoslovakia's New Course, New Republic*, May 18, 1968, at 19-23.
cooperation among countries, is the following reportorial account of how Soviet representatives treated the leaders of the Czechoslovak state:

Gradually, what had really happened in Moscow was made known and the humiliation of Dubcek and the government exposed. On the morning of the invasion, Soviet troops had kicked their way into the room where Dubcek was meeting with the other leaders. The Soviets hauled them out of their chairs and frisked them roughly for weapons. Then they forced Dubcek and the others to lean against the wall, supporting themselves on their hands and remaining in that painful position for more than two hours. During that time, a Soviet officer stole Dubcek’s wristwatch. Later in the day, the Soviets clamped Dubcek and the others into handcuffs and took each of them to separate places of internment. Abused, ill-fed, not knowing what fate awaited them, they were kept in total isolation for three days.

As John Hazard once observed: "The nature of socialist international law is determined, then, not by the norms it applies, but by the aims it seeks to achieve." 87

From the events of August 1968 in Czechoslovakia the world has been afforded some insight into the nature of socialist international law. 89 It is certainly goal-oriented, the goal being the preservation and enhancement of the welfare of the Soviet Bloc as that is interpreted by the leaders of the Communist Party of the Soviet Union. And that assessment of common welfare is inevitably bound up with self-defense. Perhaps the Russians are overly sensitive to the risks and potential danger of an attack on their way of life from the West. 89 But how can we convince them

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87. TIME, September 6, 1968, at 34.
89. The Soviet position is briefly outlined by Reis, Legal Aspects of the Invasion and Occupation of Czechoslovakia, 59 DEP’T STATE BULL. 399-400; and forms part of the discussion by Cooper, U.N. Legal Committee Discusses the Question of Defining Aggression, 59 DEP’T STATE BULL. 664-72 (1968).
90. National self defense and Realpolitik are sometime bedfellows. See Kahn, How to Think About the Russians, 78 FORTUNE, at 124 (1968), where the author discourses, inter alia, on the fear of the Russian military that the United States might encourage West Germany to attack the U.S.S.R. through Czechoslovakia. Former U.S. Secretary of State, Dean Acheson, made the following comment:

I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions
that these fears are groundless? How can we influence their collective conscience so that it will recognize the suppression of individual freedoms as a greater evil than the threat to their security which the exercise of such freedoms entails? That would require an extraordinarily talented campaign and it is more than probable that our own leaders would like to know how to wage it!

Even if our leaders were to enter into a formal multilateral written agreement with the U.S.S.R. and other countries renouncing, for instance, the use of force to settle disputes and affirming the doctrine of nonintervention in the internal affairs of other countries unless intervention were deemed to be necessary in order to protect human rights, difficulties would eventually arise in the interpretation of such provisions. This would be so even if all signatory powers were heirs to the principal ideals of our Judeo-Christian civilization. The problem is compounded when the disputants are of different social and economic systems. As an example of the dangerousness of agreeing with the Russians on the basis of concepts such as “justice under law,” George Kennan has given us the benefit of his impressions of the 1945 Potsdam Agreement:

It will be understood, against the background of these convictions, that I viewed the labors of the Potsdam Conference with unmitigated skepticism and despair. I cannot recall any political document the reading of which filled me with a greater sense of depression than the communique to which President Truman set his name at the conclusion of those confused and unreal discussions. It was not just the knowledge that the principles of joint quadrupartite control, which were now supposed to form the basis for the administration of Germany, were unreal and unworkable. The use in an agreement with the Russians of general of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. One would be surprised if practical men, trained in legal history and thought, had devised and brought to a state of general acceptance a principle condemnatory of an action so essential to the continuation of pre-eminent power as that taken by the United States last October. Such a principle would be as harmful to the development of restraining procedures as it would be futile. No law can destroy the state creating the law. The survival of states is not a matter of law.

language—such words as “democratic,” “peaceful,” and “justice”—went directly counter to everything I had learned, in seventeen years of experience with Russian affairs, about the technique of dealing with the Soviet government. The assertion, for example, that we and the Russians were going to cooperate in reorganizing German education on the basis of “democratic ideas” carried inferences wholly unjustifiable in the light of everything we knew about the mental world of the Soviet leadership and about the state of education in Russia at that time. Even more shocking was the announced intention on our part to collaborate with the Soviet government in reorganizing the German judicial system “in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens without distinction of race, nationality or religion.” For the further statement that “democratic” political parties would be not only permitted but “encouraged” to function throughout Germany “with rights of assembly and of public discussion” it is difficult to find any ameliorating explanation whatsoever. Anyone in Moscow could have told our negotiators what it was that the Soviet leaders had in mind when they used the term “democratic parties.” Not even the greatest naivete could excuse the confusion worked on public understanding in Germany itself and the other Western countries by the use of this term in a document signed by Stalin as well as Messrs. Truman and Attlee.91

This is American Legal Realism in action! It points out in dramatic fashion the inadequacies of a jurisprudence of concepts. It underscores the need for all negotiating parties to make absolutely clear to everyone just what it is they intend to accomplish with the agreement. Agreements are technical methods for achieving desired goals. Negotiation should be primarily goal-oriented; secondarily rule-oriented. Only on the basis of such a theory is it possible to conduct meaningful negotiations with the Soviet Union.92

92. See also Cooper, supra note 89, at 668, citing the September 25, 1968 issue of Pravda, wherein the Soviet press explained away charges that the occupation constituted a violation of Czechoslovakia’s sovereignty and international law, concluding with the following statement: “Laws and legal norms are subjected to the laws of the class struggle, the laws of social development. These laws are clearly formulated in Marxist-Leninist teaching. . . . Formal juridical reasoning must not overshadow a class approach.”
CONCLUSION

The books under review represent the considered reflections of three competent and capable academicians on some of the most engaging and perplexing problems of jurisprudence. We are indebted to them for the imaginative and perceptive manner with which they have treated the complex subject matter of profoundly difficult areas of intellectual endeavor. All write with clarity, a circumstance which cleanly reveals the strengths and weaknesses of their epistemological and axiological postures. Friedmann's succinct summaries of the principal contributions of the leading legal philosophers are excellent. Bodenheimer's search for objective standards of justice is bold and thought-provoking. Often this reviewer found himself in agreement with the author, even when Bodenheimer was making the most dogmatic conclusory statements. Wortley's vigorous affirmation of Thomistic legal philosophy is refreshing and stimulating, especially coming from a country the majority of whose jurists are still suffering from an exaggerated exposure to Austinian positivism. A more complete reaction to the sweeping currents and cross-currents of the ideas and men which are discussed in these books would extend beyond the confines of an already lengthy review. The reader is urged to form his own impressions by settling down with these informative, enlightening and valuable books.

93. Bodenheimer has also done an outstanding job in this respect. See supra note 60, at 3-157. Based upon their brevity, selectivity, and fairness, I strongly recommend both to my students in Jurisprudence as collateral reading.