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Present Status of the Philosophy of Law and of Rights

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Present Status of the Philosophy of Law and of Rights, by William Ernest Hocking, 1926. Yale University Press. New Haven. pp. vii, 97. Price \$2.00.

If this little book did no more than to furnish a brief and clear summary and criticism of legal rights according to Stammler and Kohler, it would be a great service to the profession. Both Stammler and Kohler have just claims to the title of "philosopher"; and both Stammler and Kohler were trained in the law so that they were professional lawyers as well. Indeed in the case of Kohler it must be conceded that he was a philosopher who had a remarkable accomplishment in the field of legal work both in writing on straight legal subjects and the holding of judicial office. He brought all his professional learning and his professional experience to his work as a legal philosopher where he could synthesize his vast data for his philosophic product. Professor Hocking, who is a philosopher without being a technically trained lawyer, approaches these two men and analyses their doctrines with a completeness, and simplicity, and mastery that has not been given to their writings hitherto. Professor Hocking does not make his conclusions so guarded as to render them meaningless. He is courageous in fixing upon the points at issue and separating them from the other material. He clearly and simply places the differences side by side and evaluates the conclusions of each.

But we are not to assume from Professor Hocking's modest title and the brevity of his book that it contains only a discussion of the work of others. Indeed most of the book is given over to a development of Professor Hocking's own theory of rights. He takes the position that rights in contemplation of law are presumptive rights and that presumptive rights cover what the law expects may be true in the future although it is conceded not true at present. Thus he indicates that the law presupposes equality of man and reasonable actions under given circumstances, although it is well known that men are not equal and do not act reasonably under all circumstances. Professor Hocking considers that any determination of legal rights or values upon the past or upon the present is inevitably inadequate and erroneous. "Man never is but always to be blessed." Thus we are told that the important thing is not the rights that we have had in the past or the present interests that require protection, but rather what is necessary for the future development of individual man. Thus the one inevitable natural right that every man has is the right to his own fullest development. Professor Hocking says that we must talk in terms of absolute rights and that in so far as man has an absolute right to his own development, it can never be curtailed. He indicates, however, that the absolute rights of a man to his own fullest development could never interfere with the fundamental social developments in the future. Perhaps it may be suggested that a contest between these two will at least appear to exist when particular problems come up for decision; consequently the judge and the lawyers will have to make a decision between the apparent claims or absolute rights in the individual and the apparent conflicting claims of society. It seems that for one to say that individual rights and social interests will never conflict does not necessarily prevent them from conflicting at least in appearance if not abstractly. And if it is mere appearance, this remains the great difficulty, for the courts to decide actual cases as they appear at the time of decision, and if the philosopher gives the court no guide by which he can resolve this apparent conflict there is little to be gained by assert-

ing an abstract harmony. Then, of course, if we concede that it is important to consider man's further development as a part of his legal claim we have still the question of what particular development he is entitled to and how to prevent one kind of development over another. Thus one's fullest development may turn him into a saint or a murderer and it is for the law to decide which shall be approved. We must have some guide for preventing one kind of development or the other and Professor Hocking does not give us this except in so far as he says that the individual must have his fullest mental and moral development. Of course "mental" and "moral" are vast words which are not helpful in the work of the law unless the philosopher puts some content into them. Perhaps we may feel that the lack of content in these concepts leaves us in fact much the same uncertainty which Professor Hocking complains of in other philosophies of law.