BOOKS

GROUNDS OF LIABILITY: AN INTRODUCTION TO THE PHILOSOPHY OF LAW. By Alan R. White [Clarendon Press, Oxford, 1985, 125 pp.]

Introductions to the Philosophy of Law deal mainly with the concept of law, and this book offers a refreshing change. After two chapters devoted to "Jurisprudence as the Philosophy of Law" and "Analytical Jurisprudence", the book moves on to deal with the fascinating subjects of "Act", "The Nature of the *actus reus*", "Voluntary conduct", "Intention", "Negligence and Recklessness" and "Future Truths". Unfortunately, as one quickly learns in Chapter 1, the book consists of a series of conceptual studies, and the author's conception of conceptual analysis is itself rather narrow. Thus the book provides yet another opportunity to prove that analysis is very important, but that it is never enough. The book contains a lot of useful information and analysis, but I have not found in it insightful illuminations of either legal liability or of the concepts with which we describe its ascriptions.

In the first chapter White explains why jurisprudence should be seen as the philosophy of law (a point of no obvious importance to the purposes of this book), and why he will confine his study to the *conceptual-analytical* component of legal philosophy, to the exclusion of *scientific* (historic, sociological or psychological) and *evaluative* accounts. Division of labour and unity of pursuits are clearly legitimate intellectual constraints, yet the freedom to isolate conceptual studies from either empirical or evaluative enterprises depends on some strong presuppositions about the nature of conceptual analysis and its functions. White supports his decision to deal exclusively with analysis by arguing that analysis, like empirical studies, and unlike evaluative pursuits, invokes existing standards which need to be *discovered* rather than subscribed to. Consequently, empirical studies and conceptual analysis can both be either true or false, whereas evaluations are positions of a different kind. White prefers to deal with analysis only since there are others, *viz,* the scientists, who take adequate care of the empirical studies.

Had White been right about the nature of conceptual analysis, there would be no fault with his chosen agenda. It seems to me, however, that

White's picture of conceptual analysis is not adequate, and that there is a direct connection between this inadequacy and the shortcomings of the work.

I do not think conceptual analysis is a self-sufficient occupation invoking existing standards like the empirical studies. Our concepts are our tools of thought and communication. We need them to form pictures of the world (questions which belong to the science department in White's classification) and to evaluate it. The adequacy of our concepts must therefore be judged as part of these broader enterprises. On the other hand, both the scientific and the evaluative enterprises presuppose some conceptual analysis and clarification if the questions posed are to be meaningful and the answers relevant. This is particularly true when we are talking about concepts which do not refer to identifiable individuals, but to intangible notions, which operate in many and diverse practical contexts, such as intention. Conceptual analysis thus stands in an uneasy in-between place between recording of actual usage (an empirical enterprise), a stipulative decision about the scope of certain concepts, based on considerations of utility and fruitfulness, and judgments about the "realistic" features of the phenomenon the concept aspires to describe. The adequacy of a particular exercise in conceptual analysis must be judged by the context in which it is undertaken and the functions of its result and product. It is unlikely that abstract "conceptual analysis" will prove very helpful. Indeed, it seems questionable whether we can decide how to conduct conceptual analysis in the abstract.

White tries to do just that in Chapter Two in which he gives a general discussion of his conception of analytical jurisprudence. The essence of a concept is, according to White, that "the identity of a concept is given by its position relative to other concepts and ultimately to the kind of material to which it is applicable" (p. 8). He points out some logical fallacies in conceptual analysis, but then repeats his "realistic" picture of concepts: "The actual behaviour of the concept is itself the test of the rightness of theories about it, just as the properties of a chemical substance furnish the criterion of scientific theories about it" (p. 13). Philosophers may have different conceptions of, say, justice, but they all must have the same concept of justice, a concept which is a given to them just as objects are given to the scientist.

This is an interesting, but in no way a necessary way of looking at concepts. It is true that some concepts have been used by individuals for a long time, but it does not follow that they reflect some unchanging reality which the philosopher must seek to discover. Those ancient concepts (such as knowledge or justice) do indeed reflect eternal human quests. It

does not follow that the concepts are entities whose "behaviour" is the source of theories about them just as the behaviour of Man is the source of theories about human nature. I, for one, find this theory about the status of concepts counter-intuitive. It is difficult to see whether White's argument for it is persuasive, because on this central point, as on most of the other crucial and controversial statements he makes, there is no argument. White thinks, it seems, that his position is self-evident, so that mere assertion is enough.

The tension between White's view that conceptual analysis is a logical matter and his view that the adequacy of such an analysis is judged by its consistency with the "behaviour" of the concept (its use in fact?) becomes clearer when we move to the unique features of *legal* analysis. Lawyers, especially judges, might be glad to know that a philosopher thinks that the best and only source of conceptual analysis of legal concepts are judicial opinions! Since the law is at least in part a matter of experience, not logic, and we know that in many cases legal developments were achieved through creative modifications of basic concepts (such as possession or ownership), why should we expect that surveys of cases over time must yield a coherent analysis of any concept? And if the use of a concept is changed, does its analysis change too? And how does this square with White's claim that concepts never change?

White is aware that most legal concepts have an everyday counterpart, and that this fact is not accidental but a necessary consequence of the fact that legal language seeks to guide the behaviour of regular speakers of the language. He is also aware of the fact that some legal terms have nonetheless developed a "technical" meaning different from their everyday meaning. His hypothesis is that despite these differences most of the legal concepts are the same as the everyday concepts, but that most of the current jurisprudential analyses of these concepts are mistaken (p. 22). This he seeks to prove by suggesting the correct analysis of the everyday concept, identifying the analysis of the cases, and comparing the two with each other and with alternative jurisprudential analyses.

My feeling is that the whole enterprise is misconceived. The cases are, more often than not, a hopeless source for a coherent analysis. White cannot but be aware of this: in his discussion of negligence and recklessness, for example, he argues (correctly, I think) that these are standards different in quality, not in degree, since the one is subjectivist, the other objectivist. Yet he himself notes that the cases sometimes blur the distinctions between the two (pp. 109–110).

Similarly, everyday use is often confused. What White suggests as the "correct" analysis is his own choice of stipulative characterization, often

persuasive, and often unargued for. Some of the concepts White discusses (notably *actus reus*) do not have an ordinary meaning. It is curious that White's sources of "ordinary use" are usually his own analysis of the term, without any reference to any uses (*cf.*, for example, the discussion of "act" in ordinary language, pp. 25–27). What is the "behaviour" of the concept which is the judge of its analysis?

In analysing the jurisprudential literature, White often agrees with it. When his criticism is most fierce, there is a feeling that he either misrepresents it or fails to understand its context and purpose. A strong example of this is White's attack on the current analysis of "involuntary act" (pp. 30–33, ch. 5). White complains that some writers say that a "non-voluntary act" is a self-contradiction (p. 30). He ascribes this mistake to Austin's and Holmes' error in requiring that all acts be a combination of a muscular movement and a volition. White says that "the assumption that all acts are voluntary confuses the objection that something is not a voluntary act because it is not an act at all and the objection that something is not a voluntary act because it is a non-voluntary (or obligatory) act" (p. 30). White's distinction is of course valid and important, but the writers who say that a non-voluntary act is not an act did not mean to exclude obligatory acts. They meant to exclude what White calls "happenings", i.e., things "done" by our bodies, but which are outside our control. "Volition" in this context did not mean an exercise of choice, but more fundamentally a relationship of physical control which makes the act "belong" to the agent. White may be quite right that the choice of words is unfortunate: it is unwise to use the same word to mean two different notions. The fact that in actual usage this happens quite a lot is in itself a warning against White's enterprise. But this inattention to usage does not mean that the analysis is mistaken. Luckily, we often think better than our use of words may suggest.

I find White's habit of presenting one view on a deeply controversial question as the only valid view upsetting. One good example is his cavalier treatment of the mind-body problem (pp. 31–32). White prefers the unitary exposition of Aristotle. He points out that the alternative view (two distinct entities) has well-known difficulties, which it does. He fails to mention that the unitary view has similar well-known difficulties, and that most scholars agree that a preference on this issue requires at least some "leap of faith". This statement is not, of course, an argument against White's position. It is only a warning that a controversial conceptual analysis cannot furnish the basis for an uncontroversial substantive position.

The book would have been much more useful had the writer employed a

methodology which explicitly acknowledges the complexity of criteria of adequacy for concepts, and argued in more detail, from such criteria, to coherent conceptual analysis, which would be useful and fruitful in the typical legal context. All the discussions would have gained a much-needed relevance and bite had they been done in some practical context. Take, for example, the question whether "act" should apply only to a basic set of movements (shooting) or also to a set of movements, attitudes and results (murder). White argues that in ordinary use both are acceptable (p. 27). He then complains that some scholars insist that only the first is "entitled" to be called "act", while the enlarged set is only an "act" in an extended sense. Surely the debate only makes sense within a normative or a conceptual framework which makes something follow from calling some piece of behaviour "an act". The attempt to decide the question on the basis of quotations from either cases or other usages seems misguided and not to the point.

I must conclude by expressing an amazed admiration at the intimate familiarity with legal materials shown by White. It is very rare indeed to find a philosopher who relies so heavily on primary legal sources. His combined and updated knowledge of broad fields in philosophy and of legal and meta-legal literature is a unique and impressive asset. I hope we shall have the opportunity to benefit from it some more.

I also hope that White's book will attract the attention of both lawyers and philosophers to this rather neglected area of thought and writing. Grounds of responsibility is a field uniquely suitable for cooperation between lawyers and philosophers. So much depends, in legal parlance, on notions of action and will. So much important work has been done in recent years on these concepts. It is a shame not to follow the path White has indicated and seek to enrich both legal and philosophical work. Lawyers are known to be less careful with analysis and the implications of consistent thought than philosophers. They excuse themselves by the constraints of practice. Philosophers could learn from these constraints and rely on the real examples which make judges cope with questions philosophers only address in the armchairs. The combination of the two perspectives which White has attempted is not an easy matter. We shall gain a great deal if we persevere in this effort.

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