Book Review: The Province and Function of Law

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should be used as the primary reference, they ought to be selected over a far wider range of topics and then linked together by the lecture method. The solution may be in a combination of the source material, the lecture, and the textual devices to broaden the range of study.

Yet these criticisms cannot be made with assurance. Because American legal history is still so experimental, the most important aspect of Howe's book is its evidence that he, a skilled historian, has found for the moment at least a method satisfactory to himself of teaching in the field. Howe concedes in his preface that "some readers" may think his concentration on Massachusetts material "bespeaks the arid enthusiasm of an antiquarian." I confess to being such a reader, though doubtless Howe makes vivid in his classroom such items as his eight excerpts from the journals and papers of John Winthrop. If old Governor Winthrop could launch not only justice in Massachusetts in the 17th century, but also American legal history at Harvard in the 20th, he is perhaps worth dusting off.

John P. Frank†


In the maze of currents and cross-currents that characterize contemporary writing on jurisprudence and legal philosophy there are not many points on which common agreement can be found. But one point on which representatives of the most widely disparate views might agree is that Julius Stone has provided us with the best general introduction to jurisprudence that has yet appeared in the English language. This is not to say that Stone has a keener mind or a more fertile imagination or a more felicitous style or a broader scholarship than Austin, Maine, Holmes or Pound. But jurisprudence, despite all the battle-cries and advertisements of the conflicting schools, is a cumulative enterprise like science or music. It is possible for a rational being to grasp the varied insights that Austin, Maine, Holmes, Pound, and many other original thinkers during the past two or three thousand years have contributed to our understanding of law. In science, it is not necessary to reject Euclidean geometry in order to make use of the non-Euclidean geometries of Riemann or Lobachewsky; we can, and do, use all three in different contexts. Just so, one may enjoy Bach and Wagner, or Homer and Swinburne, on the same evening. It is Stone's great merit that he has not accepted the popular picture of legal philosophy as a bad play wherein each actor kills off all his predecessors on the stage. Nor has Stone followed the practice made standard by his revered teacher and one time colleague, Roscoe Pound, of pigeon-holing each legal thinker within a particular century, country, and school, explaining how he got into that particular pigeon-hole, and passing on quickly to the next pigeon-hole. Rather, he has had the insight to appreciate the character of legal philosophy (and of philosophy generally) as a great cooperative human enter-

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prise stretching across many generations, a continuous and cumulative exploration of possible perspectives through which life's many-faceted problems can be viewed. This quality of intellectual tolerance or catholicity that permeates Stone's appreciation of what other thinkers have tried to say is rare enough in contemporary jurisprudence, and important enough for the jurisprudence of the future, to warrant more attention than any of the particular insights which brighten the 982 pages and 3,156 or more footnotes of this volume.

At the heart of Mr. Stone's sanity is the appreciation that two people who use the same word are not always talking about the same thing. With the help of this simple logical perception, Stone is able to avoid wasting time on the standard pseudo-questions of comparative jurisprudence, e.g., "Which comes first, law or the state?" or "What is the true definition of law?" He is able to appreciate that what Austin had to say about the difference between the commands of a sovereign and other modes of social control still makes good sense, and at the same time to appreciate Maine's or Ehrlich's exploration of the inter-relations between the many forms of social pressure that different people have called "law". In all of Stone's account, one finds no routing of a "natural law" school by a "historical" school, no destruction of "analytical" or "realistic" jurisprudence by a jurisprudence that is unanalytical or unrealistic, no gobbling up of all previous schools by a "sociological" school. Instead, there is a full appreciation of the fact that many different questions may reasonably be asked about law, that one who searches for the historical origin of a rule has no business quarreling with somebody else who seeks to dissect its logical structure, and that neither of them has any right, on the basis of his own legal studies, to contradict somebody else who seeks to ascertain the justice or injustice of the rule or to measure the impact of the rule on society. Only when any of these scholars steps outside the province of his research to denounce as worthless or invalid the efforts of others to answer other questions does the possibility of logical contradiction emerge. And while such contradictory claims are sometimes made, and, when made, help to evaluate the character of the maker, they are not, after all, a substantial part of jurisprudence or philosophy.

The synoptic vision that characterizes Stone's volume is not the superficial tolerance of an eclectic anthropologist. Nor is it a neo-Hegelian attempt to show that every significant contribution to jurisprudence incorporates and replaces all prior thinking. What gives balance and sanity to this study is the recognition that the house of jurisprudence contains many mansions. And what makes the appearance of this volume a prime event for lawyers and law teachers is that for the first time in more than a century a single person has brought together in a single treatise unsolved problems that face us in every special field of law-teaching and law-practice and has thrown some light upon the interconnections of these problems. It is not merely that the problems are thrown together within the binding of a single volume but that they are bound together by issues of logic, ethics, and social fact which a synoptic vision has brought into clearer focus. A few sentences from Stone's discussion
of "controls" illustrates the way in which the fences between the schools break down when one seeks light, from whatever source, upon a serious problem.

Lawyers are tempted . . . to relegate such discussions to "politics". It must, however, be insisted that if they are "politics" then the most renowned and well accepted juristic writings are also politics. If Professor Mannheim's thesis is "politics" (in the sense that it does not concern lawyers) then so must be Jeremy Bentham's reform programme which has, for a century, potently influenced the practical tasks of lawyers. However opposed their theses, the problem is the same. The view which opposes the extension of social control today is reasserting in the twentieth century context some main teachings of the Benthamite individualists. Such debates develop the classical juristic debates as to the nature of justice. The shades of Kant, and Hegel, and their collectivist prototypes Stammler and Kohler, of Bentham and his collectivist prototype, Ihering, haunt them. The contemporary debate, however, takes place in the fuller context of modern sociological inquiry. It touches the meaning of justice as seen by the light of hard-won understanding of the psychology and psycho-pathology of individuals and of social groups. The stress upon the dependence of law and justice on other social phenomena carries on the messages of Montesquieu, and of Savigny. The importance attributed to various types of social cohesion continues Durkheim's and Duguit's analyses. The recognition of the non-rational in individual and social behaviour takes in on the philosophical side work like that of Kohler, Henri Bergson; and on the psychological side the insights of von Gierke, Tarde, Maitland and Dicey on the one hand, and of Freud, Le Bon, Pareto, Petrazycki on the other.1

In an age of specialization when lawyers and law teachers know less and less about each other's work, this volume comes as a welcome invitation to cooperative thinking across party walls and party lines. Current problems in the law of torts, contract, property, and civil liberties are clarified by the application of insights which Stone has gathered from the literature of general jurisprudence. And the theoretical writings of Austin, Bentham, Savigny, Ihering, Maine, Holmes, Ehrlich, Pound, M. R. Cohen, Llewellyn, and Frank are equally clarified by Stone's application of them to new fields and current controversies.

The usefulness of this volume as a springboard for such discussion and inquiry is not lessened by the author's failure to offer pat and final answers to the perennial questions with which he deals. Indeed, the author's treatment of these problems strongly suggests that they are perennial precisely because they have more facets than many generations of observers can measure. This volume should be particularly useful as a textbook in jurisprudence at any law school that does not possess a final revelation which renders the study of

1. P. 768.
other people's ideas useless. But its utility is not limited to courses in jurisprudence. I know very few law teachers who would not be better teachers of their own subjects for the reading of Stone's book. In particular it can help all of us to see that objectivity in legal science is attainable not by dismissing value judgments but by making our value judgments and their alternatives explicit.

If it be true that every significant thinker exhibits the defects of his virtues, it may be said that the defect of Stone's virtue of tolerance for significant ideas is the respect he shows for high-sounding statements even when they are devoid of significant content. Repeatedly the words "with respect" trail along after his criticisms of pronouncements by distinguished writers that might better be charitably ignored. Copious references to deservedly forgotten authors demonstrate the intensity of Mr. Stone's painstaking search for enlightenment in unlikely quarters. But though they add to the weight and cost of the volume, they hardly add proportionately to its utility.

Perhaps a significant instance of this undue deference is the respect that Mr. Stone shows for the classification of "individual" and "social" interests developed by Pound, Bohlen, and others. No more than any of his predecessors does Mr. Stone explain how there can be a social interest that is not the interest of individuals. Instead of recognizing that any interest whatever may be viewed from the standpoint of one individual or all individuals or some intermediate class, Mr. Stone classifies certain interests as essentially individual and others as essentially social. Thus the social interest of all of us in hearing and appraising unsound or unpopular ideas is subordinated in this analysis to the individual interest of the orator, as if the defense of free communication rested primarily on the satisfactions of the tongue. The "interest" analysis is particularly unwieldy when the arguments for "freedom of contract" are given in a chapter on individual interests and the arguments against "freedom of contract" are given in a chapter on social interests. And when problems of labor relations, industrial concentration, and human health are divided up among chapters on individual and social interests, all the King's horses and men could hardly put the problems together again. That Mr. Stone clearly recognizes the inadequacy of these classifications hardly improves matters.²

Of course, in a volume of this magnitude, it is as easy as it is useless to pick out details for criticism. It might fairly be noted that although Stone is, quite apart from this volume, one of the outstanding original workers today in international law, and particularly in the international protection of minority rights, he hardly does justice to Vitoria and other Catholic jurist-theologians in tracing the origins of international law and the idea of the rights of man. It might be remarked that he sometimes uses the word "syllogism" without much regard for its traditional and dictionary meaning, and that he misses the simplicity of Hohfeld's fundamental idea of privilege as absence of legal restraint when he construes it as limited to those rare situa-

². See pp. 493-5.
tions where a man's conduct and third party interference with such conduct are both equally privileged. But of these and other like slips, it may fairly be said that none of the errors is original and that all of them together do not amount to much.

Perhaps the most serious lapse from the high general standards of the volume arises in connection with the author's frequent use of the pejorative suffix "ism". When he discusses utility, ideas, individuals, and evolution, he is clear and objective. But, as is the case with other writers, when the discussion shifts to utilitarianism, idealism, individualism and evolutionism, the emotional overtones of the pejorative suffix introduce serious distortions. In this again, Mr. Stone's sin is not original but one of the besetting sins of our age. Indeed, it is the great virtue of this volume that it may help us over the caricatures that revolve about all our jurisprudential and non-jurisprudential isms and may help us to see that in jurisprudence, as elsewhere, "labels are libels."

FELIX S. COHEN†


In two recent books, one a collection of past essays, the other a series of lectures, Professor Lasswell presents a convenient synthesis of his major thinking in the field of politics. Despite the diversity of the articles, both works comprise a substantive and unified study in moral and political philosophy, and it is as such that they will be treated in this review.

The major topics that I have selected for examination are among the most prominent in both books. They are interrelated, constituting the generic unity already referred to as moral and political philosophy. The sequential arrangement of treatment is one of convenience and not a ranking in order of importance. My list is as follows: (1) nature of science, particularly political science; (2) value; (3) modes of thought; (4) ordering of society. A regrouping is possible, substituting appropriate philosophical designations and varying with the particular philosophical perspective of the classifier.

The response to such fundamental questions as what kind of science is politics, what is its proper object of study, what are its ends, what methods are appropriate, and how are these derived, determine what is studied, how it is studied and why. The decision denoting the kind of entity to be described as political is fundamental to political analysis and accounts for the multiplicity of such systems.

3. See pp. 120–1. Typically a privilege (e.g., of walking on the public highway) is backstopped by a right that others shall not interfere.


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