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Book Reviews

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BOOK REVIEWS

SOURCES OF LAW. By Helen Silving. Buffalo: William S. Hein & Co., Inc., 1968. Pp. viii, 404. $20.00.

"Sources of Law" is a term of many meanings. For Coke it signified the ancient books of the common law. For the draftsmen of the *Restatement of Restitution* it meant "certain basic assumptions in regard to what is required by justice in the various situations."[1] Chief Justice Stone, before he went on the bench, urged that legal education be brought closer to the social factors, to the "energizing forces" which are constantly remaking the body of the law.[2] Justice Frankfurter has told somewhere of his own answer to a question he would put to law students on what man of the past two centuries had the greatest influence on law. His answer was James Watt who, by the invention of a practicable steam engine and its substitution of molecular power for muscular power in industry, made possible the first Industrial Revolution with the consequent transformation of society and law.

This book stresses yet another kind of source, assumptions of legal philosophy which guide their uncritical or even unperceiving adherents. On the importance of these assumptions, the book quotes a discerning judge:

> You remember Moliere's Jourdain who was surprised to learn that all his life he, like literary men, had been talking 'prose'. So it is with 'practical lawyers' who regard legal theory as a frivolous subject unworthy of their attention. In reality these 'practical lawyers' are legal philosophers, but their philosophies, their theories, are 'inarticulate'; and, therefore, they are more likely to do harm than their colleagues who are more conscious of their . . . theories (p. 204 n.80).

Made up of selected articles originally published in law reviews, the book discusses: the origin of the rule of law; several aspects of the formal materials with which lawyers are accustomed to deal, such as statutes, precedents and legal doctrine; and some philosophies of law, especially natural law and positive law. Two matters mentioned are of particular interest. One is concerned with whether judges only declare law or whether they make it. Even in a civil law country such as Germany, the author points out that the courts, employing the fine

1. RESTATEMENT OF RESTITUTION, ch. 1, topic 1, Introductory Note at 11 (1937).
2. Stone, *The Future of Legal Education*, 10 A.B.A.J. 233, 234 (1924).

contrasting terms "legal creativity" and "legal security," have held that on appropriate matters they have the authority and, indeed, the duty to make law (pp. 88-92). The Supreme Court of the United States discussed the question directly in *Linkletter v. Walker*,[3] which involved the question whether the constitutional principle of *Mapp v. Ohio*,[4] regarding the exclusion by state courts of evidence wrongfully seized, should be applied retroactively. Seemingly the Justices, though divided in decision, were unanimous in the view that judges do make law and that they could direct their consideration to what fairness and wisdom required. Similar were the opinions of the Supreme Court of Illinois in a recent case which involved the question of whether the court, which had created the rule of contributory negligence, should substitute the rule of comparative negligence, or whether so great a change should be left to consideration by the legislature.[5] Again seemingly the justices agreed that they had the power to unmake what they had made, and the difference in decision was over the value of the principle of stare decisis as to this matter.

The book is dedicated to Professor Hans Kelsen of the "Pure Theory of Law." The introduction brackets him with his apparent philosophical opposite, Justice Holmes, for his similar ability to clarify real issues:

> Proceeding from epistemologically quite different premises, Justice Holmes– peculiar as this may seem—in large measure fulfilled a similar critical jurisprudential task as did Kelsen. He freed legal thought of sham issues (p. 4).

Yet the author takes sharp issue with Justice Holmes' theory of law. The theory was taken over by Justice Brandeis and used as one of the foundations of the decision in the *Erie* case,[6] with its rejection of the misnamed federal common law of Justice Story in *Swift v. Tyson*.[7]

Justice Holmes' theory of power as the basis of law—physical power, governmental power, conceptual power—led him to grave errors in conflict of laws. The theory was derived, it is believed, from his trying experiences in the army in the Civil War.[8] If theory not

3. 381 U.S. 618 (1965).

4. 367 U.S. 643 (1961).

5. Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967). For a full discussion, see Symposium: *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 VAND. L. REV. 889 (1968).

6. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

7. 41 U.S. 1 (1842).

8. Reiblich, *The Conflict of Laws Philosophy of Mr. Justice Holmes*, 28 GEO. L.J. 1, 2-23 (1939); Address by Oliver Wendell Holmes, Meeting Called by the Graudating Class of Harvard University, May 30, 1895, in O. HOLMES, SPEECHES 56 (1913).

critically re-examined can mislead so great a man—a man ordinarily so sceptical and critical[9]—it behooves all men of law to re-examine their dearly held theories with all the aid they can find. This acute and learned book gives such aid.

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9. "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." O. HOLMES, THE COMMON LAW 1 (1881).

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LAW OF PARTNERSHIP. By Judson A. Crane & Alan R. Bromberg. St. Paul: West Publishing Co., 1968. Pp. xviii, 615. $12.00.

This book is a successor to the familiar hornbook on the law of partnership by the late Professor Judson Crane. The bulk of the text has been prepared by Professor Bromberg of Southern Methodist University, who had originally agreed to collaborate with Professor Crane as co-author and who completed the task independently following Professor Crane's death. Professor Bromberg is to be commended for having done a solid workmanlike job.

The law of partnership has received relatively little attention in published works in recent years. *Rowley on Partnership*, Willis's *Handbook on Partnership Taxation*, and the brief monographs in the series published by the ABA-ALI Committee on Continuing Legal Education are the only widely distributed recent contributions to the literature of partnership law. For this reason, Professor Bromberg's book is likely to reach a wider audience than might otherwise be expected for a hornbook. Practitioners as well as students will find it a more comprehensive text on the subject than a legal encyclopedia, and it will provide a perspective different from that in *Rowley*. One is therefore inclined to view this book somewhat more critically than would be the case with works in fields in which a wider variety of current literature is available.

Readers familiar with the first two editions of *Crane on Partnership* will recognize in this book the basic structure of the earlier volume. The first section, chapters one through three, is concerned with the nature of the partnership, its formation, and comparisons between partnership and other forms of business

association. Chapters four through seven deal chiefly with problems connected with the day-to-day operations of partnerships. Chapters eight and nine speak to the dissolution, winding up, and liquidation of partnerships. One detects in Professor Bromberg's statements a sympathetic response to many of the ideas championed by Professor Crane during the half-century that he was involved with partnership law. Professor Bromberg feels almost as strongly as Professor Crane that the entity theory of partnership law is more useful in a majority of contexts than the aggregate theory. Such intellectual kinship is not surprising, since Professor Crane had selected Professor Bromberg to work with him on what originally was to have been a third edition of the Crane text.

This book, nonetheless, is more than a revised edition of *Crane on Partnership*. The emphases of the two books often differ sharply. For example, section 23B in the second edition of *Crane on Partnership*, dealing with "choice of forms of organization," occupies just over three pages. Professor Bromberg devotes fourteen pages of highly structured, thoughtful material to this subject. Professor Bromberg also gives considerably more attention to tax consequences, although they are not fully developed, since full development would not be in keeping with the primary purpose of the book.

In addition to changes in substantive emphasis in various sections, there is a difference in the importance attached to statutes as opposed to cases. Professor Crane devoted relatively little space in his work to statutes other than the Uniform Partnership Act. Professor Bromberg, on the other hand, pays a great deal of attention to provisions of the Uniform Commercial Code, the Internal Revenue Code, and particular state variants of the Uniform Partnership Act. This emphasis is underlined by a very useful Table of Statutory References, which follows the conventional table of cases.

There are also passages in which Professor Bromberg indicates a healthy skepticism about the vehemence with which Professor Crane spoke on various subjects. One such passage deals with the "jingle rule," which Professor Crane criticized as "logically indefensible." Professor Bromberg, while he notes the intellectual inconsistencies of the rule, ends by saying, "one would be hard put to improve, in the abstract, its approximate balance." For the most part, the text is highly readable. For example, compare the following two passages:

> In the United States, the term "joint adventure" is used to describe an association for business purposes, not containing all the elements of partnership, but so resembling it as to justify the application of some of the principles of

> partnership law. Joint adventure differs from partnership factually in the matter of the extent of business undertaken.[1]
>
> A joint venture (JV) or joint adventure is a business association distinguishable from partnership (if at all) only by narrowness of purpose and scope (p. 189).

The latter statement is Professor Bromberg's version, and one cannot help being struck by the felicity of expression. At times, however, this fluency has been impaired. For example, the following sentence appears at one point in a discussion of tax problems:

> Taking advantage of the Internal Revenue Code's broad definition of corporation which includes association, some enterprising doctors formed (and agreed to be employees of) associations which, by contract, had most of the characteristics identified by the courts as corporate in earlier litigation subjecting unwilling associations to corporate tax (p. 183).

Despite this occasional unevenness, the writing on the whole is clear.

By and large, the book seems well balanced. A considerable portion of the work is spent on hard core fundamentals, as should be the case with a treatise likely to be used extensively by students who are searching for a means of untangling the web of cases confronting them in their course books.

For all its good points, one is deeply grateful. Students have a text available to them which is clear and coherent. There are, however, certain features which one is tempted to criticize. This is particularly true with regard to certain complex issues of unusual conceptual difficulty, to which this book gives relatively scant attention. Liability for fraud and misrepresentation, for example, is disposed of in two paragraphs. Since determining appropriate remedies for situations of this sort has long been a serious problem to the courts, particularly where agency theories must be employed, this hardly seems sufficient. Moreover, the mystifying situation in which the Uniform Partnership Act has left us with regard to the relative stance of a former partner, "old" partnership creditors, and "new" partnership creditors is given no real resolution in the one short passage that deals with it. Indeed, a reader might well pass through this section without ever realizing that the problem exists. In view of the tightly reasoned analysis of the problem available in a widely used casebook, one finds this deficiency hard to forgive. Similarly inadequate, it seems to this reviewer, is the very brief material concerning intrapartnership indemnification in cases where partnership assets have been used to satisfy liability incurred by the wrongful acts of one partner (pp. 395-96).

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1. J. CRANE, LAW OF PARTNERSHIP § 35 (2d ed. 1952).

One is even more disturbed by the failure of this text to seize on the opportunity to criticize certain ambiguous, poorly phrased sections of the Uniform Partnership Act. In particular the five pages on partnership by estoppel offer very little in the way of suggested alternatives for the verbal atrocity that now constitutes section 16 of the statute.

It would be unfair, however, for a reviewer to offer these criticisms without noting that they are defects far more significant to scholars than to practitioners and that they are virtually unavoidable in volumes written for the Hornbook series, in which exposition of the law as it is and concentration on the problems most likely to recur should be expected. Law review articles, briefs or monographs, and participation in activities of law revision bodies are perhaps more appropriate forms for concentration on these other matters.

Professor Bromberg has provided teachers, students and practitioners with a text which serves very well the purposes of a short text. Those interested in partnership law will find the book essential reading.

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