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Book Reviews

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BOOK REVIEWS

THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE. Edited by Clarence Morris. Philadelphia: University of Pennsylvania Press, 1959. Pp. 571. $10.00.

In most classes taught in law school the nature of the subject matter keeps the choices to be made by the teacher with respect to course content within relatively narrow bounds. This does not hold true for the course dealing with the philosophy or general theory of the law, usually offered under the name of Jurisprudence. In this field it may easily happen that the contents of two courses taught by different teachers are completely incongruous and do not touch each other at a single point. One teacher may wish to give a survey of the great political and social philosophies that have decisively influenced the historical development of the law; another may decide to concentrate on the analysis of basic legal concepts of a technical character which underlie his legal system or legal systems in general. A third teacher may weave the course around one or two classical works raising fundamental philosophical or ethical problems relevant to the law; and still another may prefer to introduce his students to contemporary court decisions dealing with vital policy issues of the day. So wide open is the choice of alternative avenues of approach, so different the scope of coverage depending upon whether the philosophical or sociological or historical or analytical-methodical components of jurisprudence, or some combinations of these, are accentuated by the instructor that it would be extremely difficult to prepare a set of teaching materials in this field which would meet with widespread acceptance.

The preferences of the author of the book under review concerning desirable course content in Jurisprudence are clear and unmistakable. His compilation is designed to acquaint the students with the work and thoughts of a number of influential legal philosophers of ancient, medieval, and modern vintage. Ancient and medieval philosophy are represented by Aristotle, Cicero, and St. Thomas Aquinas. The natural law philosophies of the seventeenth and eighteenth centuries are highlighted by a selection of thinkers exhibiting different versions of the classical natural law doctrine. German transcendental idealism and English utilitarianism are fully covered in the volume. Twentieth-century jurisprudence is represented by Holmes, Ehrlich, Dabin, Dewey, Cardozo, and Pound.

In the opinion of this reviewer, the choice of authors made by

Professor Morris is, on the whole, well considered and fully justifiable. There may be some quarrel perhaps about the question whether some additional juridical thinkers of our own epoch should have been included. Undoubtedly, considerations of reasonable size of the book set definite limits to the editor's desire and discretion in this respect. It might be argued, however, that John Dewey's main accomplishments were in the field of general rather than legal philosophy (although his pragmatic approach has influenced contemporary legal method to some extent), so that it might have been preferable to substitute excerpts from one or two recent jurisprudential works for his contribution.

The arrangement of Professor Morris' book is historical rather than topical. The legal philosophers included are presented, by and large, according to their sequence in time; substantial excerpts from their writings dealing with a host of problems are given. The consequence of this arrangement is that treatments of one and the same problem by different thinkers are scattered through the volume instead of being collected at one place under a topical heading. The objection could be raised that this organization of the materials makes it necessary for the teacher to jump across the board all the time and tends to disrupt an integrated and concentrated consideration of the great jurisprudential issues. This is an arguable point, but Professor Morris' approach has its compensatory advantages. It should not be overlooked that the work of a great thinker forms a connected whole, and that it is usually interesting and rewarding to discover the links and cross-lines between different aspects of his thought, such as the relationship between his psychology and his doctrine of justice, or his sociological assumptions and his theory of government. If the contributions of a philosopher are split up into fragments and discussed in a disjointed fashion, it is difficult for the student to obtain a full and clear view of the edifice of his thinking.

The excerpts presented by Professor Morris from the writings of each philosopher are of considerable length. This is a great merit of the book, for the work of a creative mind cannot be appraised by merely absorbing little tidbits of his exposition. On the other hand, the compilation suffers in this reviewer's opinion from the fact that in many places discourses on some legal-philosophical problems have been too heavily edited by the compiler. Sentences at the beginning, middle, or end of a paragraph in the original text have frequently been excised, and the flow of the argument has thereby been interrupted in a considerable number of places. This was undoubtedly done to save space and eliminate repetition or rephrased statements of the same point. Granting the legitimacy of this objective, the technique nevertheless has its drawbacks. While it is without ques-

tion appropriate to make a selection of problems discussed or arguments presented by a legal philosopher, the exposition of the problems and arguments chosen should not be broken up by too much cutting and pruning. This does violence to the literary and aesthetic component of an author's work. Using a comparison from the field of art, it would seem to be entirely proper for the copyist of a painting portraying several scenes or figures to confine his copywork to one or two of the scenes or figures. But it would appear to offend against the canons of proper reproduction to eliminate from the parts selected some trees, pieces of furniture, or items of dress which the copyist considers superfluous. While the fault is a slighter one in the case of literary works, it may lead to interference with the enjoyment of such works and make it hard for the reader to appreciate the style of the writer and his technique of argumentation.

With this reservation, this instructor found the book a very adequate teaching tool. What is perhaps more important, his students concurred in this judgment. Professor Morris has done a valuable service to the law teaching profession and the interested public by filling a gap in the instructional literature in the field of jurisprudence.

EDGAR BODENHEIMER*

LAW AS LARGE AS LIFE: A NATURAL LAW FOR TODAY AND THE SUPREME COURT AS ITS PROPHET. By Charles P. Curtis. New York: Simon & Schuster. 1959. $3.50.

The 1958 lectures of Judge Learned Hand at Harvard have become the departure point for a large number of shrewd, scholarly reappraisals of the role of courts in our constitutional system. Undoubtedly the forthright observations of the venerable judge, who has a penchant for describing things as they are, have shocked a good many legal minds into both thoughtful and subtle rejoinders. Among these an article and a book make significant contributions to the current literature dealing with the eternal problem of the supportable limits of judicial legislation. The article is "Toward Neutral Principles of Constitutional Law"[1] by Herbert Wechsler, Harlan Fiske Stone Professor of Constitutional Law at Columbia University. The book is *Law as Large as Life* by Charles P. Curtis. The two provide the occasion and opportunity for this review.

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1. 73 HARV. L. REV. 1 (1959).

Since Judge Hand's lectures[2] furnish the springboard for these legalistic exercises, it is well to review briefly Hand's position. He does not believe that the power of courts to set aside, as unconstitutional, the acts of the two other coequal departments of government can be found either expressly or implicitly in the language of the Constitution. Rather he thinks that the power developed out of necessity, as a practical condition for the successful operation of the federal system. He believes that, aside from keeping each of the departments and the states within their respective spheres of activity, courts should intervene to modify or nullify the substance of legislative and executive activity only on extreme occasions. Value choices are left under our system to representative assemblies. Courts are poor instruments for the achievement of social reform. He can find no definition that will explain when the Supreme Court "will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority." This state of affairs, he thinks, imperils the judicial function and perverts our system. For good or ill, Judge Hand discussed the segregation decision as an example of the kind of judicial law-making in the realm of value choices that he believed to be unwarranted by our system.

Mr. Wechsler disagrees with Hand on the permissible limits of judicial activity. He believes that the power and duty of judicial review is founded in the language of the Constitution and "is not a mere interpolation." He draws much comfort from article VI, paragraph 2, the supremacy clause, when supported by other relevant provisions of the Constitution. He has "not the slightest doubt respecting the legitimacy of judicial review, whether the action called in question in a case which otherwise is proper for adjudication is legislative or executive, federal or state."

While he accepts wholeheartedly the doctrine of judicial review, Mr. Wechsler does insist that there are standards to be followed in interpretation—criteria that may be framed and tested as "an exercise of reason" rather than an act of will. Accordingly, the limits of judicial intervention are marked by reason rather than by will. The judicial process, he insists, must be genuinely principled. To be so principled decisions must be based on grounds of adequate neutrality and generality. Judgments must be supported by *reasoned* explanations and embody principles capable of application beyond the cases from which they emerge. The virtue of a judgment depends upon the reasons that sustain it.

The reason for the failure of the "old Court," the pre-1937 Court,

2. These lectures, published as HAND, THE BILL OF RIGHTS (1958), were reviewed by Dean Lancaster last year. 67 SEWANEE REV. 123 (1959).

Wechsler believes, lies partly in its failure to articulate neutral and principled decisions. In its attempts to use due process to freeze economic relationships and to contain the scope of national authority the Court of the Thirties could not "present an adequate analysis, in terms of neutral principle to support the value choices which it decreed."

But, if the old Court's weakness and impotence lay in its failure to recognize the judicial virtues inherent in neutral principles of judicial right reason, what may be the disposition of the present Court in respect to observing such judicial standards? Wechsler finds that in several fields of adjudication the Court has been decreeing value choices "in a way that makes it quite impossible to speak of principled determinations or the statement and evaluation of judicial reasons." In one field the Court evades its duty by per curiam decisions and in another by failure to articulate and apply neatly and judiciously neutral legal principles. The crucial examples of this failure are those cases involving the application of the fourteenth amendment to deprivations based on race, namely the white primary, the restrictive covenant, and the school segregation cases. In *Smith v. Allwright*[3] the Court ruled that the Democratic Party might not exclude from its primary elections on racial grounds citizens otherwise eligible to participate in the election process. This it did on the reasoning of *United States v. Classic*[4] that primaries are an integral part of the elective process. Yet the *ratio decidendi* of *Classic* related *not* to party membership but rather to deprivation by fraud. *Classic* provided no neutral or reasoned principle for the decision in *Smith v. Allwright,* overturning *Grovey v. Townsend*[5] which had left parties free to define their membership as private associations. The decision means, says Wechsler, that the deprivation of the franchise on the ground of race or color has become "a prohibition of *party organization*[6] upon racial lines, at least where the party has achieved political hegemony." Supposing that denial of the franchise on religious grounds is constitutionally forbidden: Are religious parties to be proscribed? wonders Wechsler. If so, by what stretch of constitutional analysis?

The restrictive covenant case[7] presents to Mr. Wechsler an even more glaring example of specious reasoning. Assuming that the Constitution forbids a state, but not an individual, to discriminate on grounds of race, why is the enforcement of a private covenant which restricts the sale of real estate on racial grounds—a valid covenant in law—state action? That an agency of the state is a means of enforce-

3. 321 U.S. 649 (1944).
4. 313 U.S. 299 (1941).
5. 295 U.S. 45 (1935).
6. Emphasis added.
7. Shelley v. Kramer, 334 U.S. 14 (1948).

ment is not sufficient, for enforcement merely gives effect to a claim recognized among others by the state to be a lawful one. Such decisions as this, Wechsler believes yield "no neutral principles for their extension or support."

Finally, Mr. Wechsler comes to the school decision, which for him "stirs the deepest conflict." The problem for him "inheres strictly in the reasoning of the opinion." If it turns on the sufficiency of evidence that separation harms the negro children involved, the evidence is contradictory and judicially incomplete and possibly non-persuasive. If it rests on the view that segregation in principle is a denial of equality because choice is not available to a minority group, it involves an inquiry into the motives of a legislature not available to courts. Furthermore, it is not sound judicial practice to make the measure of the validity of legislation the way it is interpreted by those affected by it. At bottom Wechsler believes that state-enforced segregation involves freedom of association. If this freedom is denied by segregation, it is equally compelled by integration. In either case it works a hardship and involves "human claims of high dimension." In spite of his criticism, however, Mr. Wechsler believes that these cases "have the best chance of making an enduring contribution to the quality of our society of any . . . in recent years."[8]

II

In his recent book Mr. Charles P. Curtis also builds his argument around the Hand lectures of 1958. Recalling Hand's inability, putting aside any kind of Natural Law, "to frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress

8. Professor Louis H. Pollak of the Yale University Law School has written an article by way of reply to Professor Wechsler, which appeared in the *University of Pennsylvania Law Review* for November 1959. He picks no quarrel with Wechsler over the basis or scope of judicial review nor over the desirability of general and neutral standards to characterize its use and mark its limits. Nor does Pollak take issue with the Wechsler view that the Court may properly be criticized for summarily disposing of important and difficult questions "via the inscrutable per curiam." He does take issue over the problem of whether or not the white primary, the restrictive covenant and the segregation cases are based on neutral and reasonable principles capable of further application and entitled to respect by virtue of their inherent judicial worth. The doubts that worry Wechsler do not plague Professor Pollak, and he undertakes to defend the decisions as grounded on reasonable, neutral and general principles of judicial integrity.

At the very beginning one suspects, though, that there is a vast difference between the two writers in attitude and approach to law. For Wechsler judicial activity is apparently regulated by reason; for Pollak, by will. Consequently, there is too often no real meeting of the minds of the two men in respect to the matters at issue. Neutrality and principle, one suspects, have not the same meaning for the two. At any rate, Professor Pollak is hard put to frame a mentally satisfying standard for determining what the Court will declare to be state action proscribed by the fourteenth amendment.

and the States within their accredited authority," Curtis sets himself the task of satisfying himself as to whether he can succeed where Hand has failed. Discarding as unrealistic the idea of self-limitation, he can find no principle, no definition, except by falling back upon natural law—a new natural law, a natural law for today. Says Curtis:

> I am proposing a Natural Law for Today, not a revival of the natural law that Hand rejected, neither that of the Church and St. Thomas Aquinas nor that of the Enlightenment and Thomas Jefferson. I want to propose a version of natural law that is both modern and mundane . . . [that] is made up of those fundamental principles of liberty and justice which Justice Benjamin Cardozo said were 'deeply rooted in reason and in the compelling traditions of the legal profession . . . implicit in the concept of ordered liberty.' Professor Lon Fuller goes deeper and calls it 'the fundamental rules that make law itself possible.' Judge Charles E. Wyzanski, Jr., thinks of it as 'a set of basic premises,' 'a core of values,' such as are 'characteristic of our particular civilization.' Professor Benjamin F. Wright uses the word *consensus*. Walter Lippmann is convinced that there is 'a body of positive principles and precepts which a good citizen cannot deny or ignore' and calls it 'The Public Philosophy.' But definitions are but road signs. They tell you which way to go, and at the same time how far distant you are from the City of Understanding. All we need to know at the beginning is what the author is going to talk about. By the time we get through no definition ought to be necessary.
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> The two I like best, one plain and the other fancy, are these:
>
> Take the plain one first. It is in John Dewey's little book, *The Living Thoughts of Thomas Jefferson* (David McKay, 1940).
>
> 'Jefferson used the language of the time in his assertion of "natural rights" upon which governments are based and which they must observe if they are to have legitimate authority. What is not now so plain is that the word *moral* can be substituted for *natural* whenever Jefferson used the latter in connection with law and rights, not only without changing his meaning but making it clearer to a modern reader. Not only does he say: "I am convinced man has no natural right in opposition to his social duties," and that "man was destined for society," but also that "questions of natural right are triable by their conformity with the moral sense and reason of man." '
>
> The other, which is on the fancy side, comes from another great philosopher, Alfred North Whitehead.
>
> 'My own belief is that at present the most fruitful, because the most neglected, starting point is that section of value-theory which we term aesthetics. Our enjoyment of the values of human art, or of natural beauty, our horror at the obvious vulgarities and defacements which force themselves upon us—all these modes of experience are sufficiently abstracted to be relatively obvious. And yet evidently they disclose the very meaning of things.
>
> 'Habits of thought and sociological habits survive because in some broad sense they promote aesthetic enjoyment. There is an ultimate satisfaction to be derived from them. Thus when the pragmatist asks whether "it works," he is asking whether it issues in aesthetic satisfaction. The judge of the Supreme Court is giving his decision on the basis of the

> aesthetic satisfaction of the harmonization of the American Constitution with the activities of modern America.' (*Science and Philosophy:* The Wisdom Library, 1948, p. 138).

The law is full of this natural law element, this consensus of social opinion cast in vague generality that calls for prophetic enunciation. Curtis finds it superbly in the segregation case. Wherever the law must work by persuasion rather than force, wherever the opinion of the layman is worth that of the expert, wherever you find large terms with little meaning, you have natural law. The prophets by default of this natural component in our law are our judges who are little better equipped by training or temperament or experience to prophesy than are laymen. Curtis realizes, however, that "it is even more than desirable, in fact, indispensable, that there be some one to interpret this natural component of law to us, translate it into speech, lift it out of the tacit and the implicit, make it articulate." This is what the Court does when it assumes the role of a third chamber.

Who then shall articulate the consensus, the underlying moral assumption? Who shall render concrete the vague and the general? Should it be the Court, "an aristocratic enclave"? These are difficult questions for Curtis as for any fair-minded man reasonably conversant with our institutional system. Certainly there will always be under any arrangement, a large and fair domain for judicial activism, for always it is the task of the judge to apply the general to the particular. It is the protection and support of this indispensable function that gives concern to Hand, to Curtis and to all those who love the law. In our system the Court performs two functions. It monitors our federal system; it keeps each of the departments within its assigned spheres. This is its necessary function. The other function is to legislate, to be the prophet of our natural law. The force and effectiveness with which the Court performs its necessary function springs from its prestige, especially its prestige in Congress. This respect and prestige is invaluable. Without it the Court could neither monitor fairly and successfully the federal system nor legislate, as it must sometimes do, by Congressional default. Therefore, Curtis believes:

> So long as the Court permits itself, or Congress permits the Court, to legislate so freely on controversial subjects and with such an air of finality, the Court's prestige and authority are expended and hazarded for a purpose that may be useful but is certainly not necessary, the less well and the less effectively will the Court be able to exercise its indispensable function.

In the final analysis he must agree with Hand: the Court is not acceptable as the prophet of our natural law. Very reluctantly, he admits that "our natural law must take its chances without a national prophet."

What Curtis suggests is that Congress assume its proper responsibility for legislation; that Congress by a process of definition "bit by bit reduce the area in which the Court is now left to its own devices." Then the Court could become a true court of law once again, interesting itself in the "mere interests of the litigants," and leave to other departments more responsible and amenable to public opinion the duty of solving the delicate problem of the public interest.

The Court has indeed become, however, a third legislative chamber. A fair-minded man cannot deny this. But has this come about as a *coup de main,* as Hand suggests? No, argues Curtis, "the Court is absolved of its seizure of legislative power for the same reason Jonathan Wild so narrowly escaped being guilty of rape '. . . he in a few minutes ravished this fair creature or at least would have ravished her, if she had not, by a timely compliance, prevented him.' "

This Congressional compliance is most noticeable in the application by the courts to the states of the fourteenth amendment. The amendment clearly places upon Congress the power and duty of spelling out in clear terms its meaning. But Congress has been either unwilling or unable to perform this function. By default, historically the burden has been assumed by a willing Court. Furthermore, Congress has the power to overrule the Court, recall its decisions, and limit its jurisdictions. This it has not done.

On this issue Curtis makes a tight case. He does neglect to consider, however, that the inaction of Congress has often resulted from its inability to find a suitable compromise that could command the necessary support. If the representatives of the people have been unable to act, surely this very inaction spells out a lack of consensus in a wide and sectionalized land. May not inaction and temporary repose actually represent the only valid consensus in a system that puts great premium upon persuasion of minorities and respects the virtues of slow change? Under such conditions, one may ask, is it not a *coup de main* for the Court to make law in an area left by specific constitutional mandate to the Congress and for the very reason that our system is a federal system?

III

Both Professor Wechsler and Mr. Curtis have set sail from a headland chartered by Learned Hand. Wechsler disagrees with Hand on the basis of judicial review. He would not have judges abstain from those "basic conflicts of right and wrong,"[9] from those delicate decisions that determine policy. For him the limits of judicial activity are marked rather by the requirement for principled and neutral

9. HAND, SPIRIT OF LIBERTY 164 (1952).

decisions. When these cannot be articulated, judges should abstain. Curtis, to the contrary, agrees with Hand. The judicial function is too valuable to be jeopardized by the heat and clash of opposed political forces. Even more compelling is the fact that our system devolves upon representative assemblies the duty of articulating the national will. Here the political process is free and flexible; here all interests may find expression, and the balance which is thus achieved is a true and democratic balance.

ROBERT S. LANCASTER*

CASES AND MATERIALS ON JURISPRUDENCE. By John C. H. Wu. St. Paul: West Publishing Co. 1960. Pp. xliii, 719. $12.00.

Professor Wu of Seton Hall University has compiled a casebook whose structure arises out of the definition of law of St. Thomas Aquinas. A free translation of this definition describes law as "an ordinance of reason made and promulgated for the common good by him who is charged with the care of the community."[1] The author points out that this definition contains "four elements equally indispensable to the notion of law, namely, reason, authority, the common good and promulgation."[2] Turning Aristotelian for a moment, Wu remarks that these four elements represent the four types of causes:

> Reason is the formal cause of law, authority the efficient cause, common good the final cause, and promulgation the material cause. The existence and binding force of a law depends upon the convergence of all these causes.[3]

The first three hundred pages of this text expand upon Thomas' definition. Since this symposium issue already contains a study of the legal philosophy of Aquinas, no exposition of these elements will be essayed, except to say that they are here exemplified under the titles of The Principle of Rationality, of Teleology, of Authority, and of Shared Knowledge.

Chapter 5 is devoted to the principle of Adaptation which describes how the law grows and remains flexible. This section is a bridge between the working out of the meaning of law and the true love

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1. AQUINAS, SUMMA THEOLOGICA I, II, Q. 90, art. 4. Wu cites a variant translation. WU, CASES AND MATERIALS ON JURISPRUDENCE 209 (1960) [hereinafter cited as JURISPRUDENCE].
2. JURISPRUDENCE 225.
3. *Ibid.*

of Dr. Wu—justice.[4] In this section are the cases and the comments on what Cardozo called: "The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites."[5]

Law and Morals are taken up next and are discussed in accordance with the first principle of natural law that good is to be pursued and done and evil is to be avoided.[6] This principle had been previously particularized by Ulpian with directions "to live honorably, not to injure another, and to render each one his due."[7] The author uses these specifics as the basis of his demonstration of the interrelations between morals and law.

Next follows a chapter describing the impact of morality on the law governing economic relations. The general theme is the continuing development of the concept of fairness. The stage is now set and the next one hundred pages discuss justice.

The tradition followed by the author stems from Justinian through Bracton wherein justice is "the constant and perpetual purpose to render to each and every one his due."[8] This appears to base justice on will, but Judge Wu insists that behind every act of the will is an intelligent judgment. Accordingly, he asserts: "Justice has the true for its basis, the good for its orientation, and the beautiful for its quality. It has, thus, three constituent elements, the rational, the teleological, and the aesthetical, all three being rooted in Reality."[9] Having considered the teleological aspect of law earlier in the book, Wu now presents some subjective features of justice which he entitles "The Mind and the Heart." He quotes Justice Johnson to the effect that the work of a court must be directed by the head and not by the heart.[10] To show his doubts about the force of this principle, Professor Wu includes a lengthy extract from his earlier book, *The Fountain of Justice,* in which he argues that technicalities in judicial decision frequently arise from a head unprompted by the love of justice which "is the sole purpose of law."[11] He had earlier noted that there were "two fundamentally different types of judicial minds, one type hungering after certainty and uniformity of the judicial order, the other thirsting after justice and equity in the particular

4. "Jurisprudence is . . . the science of justice." JURISPRUDENCE 18.
5. CARDOZO, PARADOXES OF LEGAL SCIENCE 4-5 (1928) quoted in WU, JURISPRUDENCE 298.
6. AQUINAS, SUMMA THEOLOGICA I, II, Q. 94, art. 2. "The first principle of natural law, it is said, is 'Seek the good and avoid evil' . . . . I can think of no legal or legislative problem of American law in my lifetime that would be appreciably *advanced* toward a satisfactory determination by invoking this formula." Patterson, *A Pragmatist Looks at Natural Law and Natural Rights,* in NATURAL LAW AND NATURAL RIGHTS 55 (Harding ed. 1955).
7. JURISPRUDENCE 317.
8. *Id.* at 446.
9. *Id.* at 448.
10. The Rapid, 12 U.S. (8 Cranch) 155 (1814), quoted in JURISPRUDENCE 448.
11. *Id.* at 455.

cases before them."[12] He confesses to inclining to the latter type, but naturally does not believe that any judge must be one or the other. All he asks is that, within the required limits of stability, the judge opt justice.

There isn't any sense of history exhibited in this book. There are no suggestions of periods of strict law, as for Dean Pound, followed by a period of growth. This latter type of historical approach would give a more meaningful explanation of variations in judicial results than the figurative heart and head approach. At this point in the book, there should have been some explanation of the other values that the law may seek in addition to consistency and stability. And when there are assorted values possible, which is the heart and which is the head?

The author next devotes an entire chapter to examples of five kinds of justice: personal, commutative, distributive, public, and social. Personal justice includes retributive justice. Some discussion of the theories of punishment would have been appropriate at this point, but Mr. Wu, in his preface, admitted that he was not including "some of the burning problems of the criminal law."

The volume next includes short chapters on legal concepts and legal method, and concludes with what seems a most important one to the author—Law and Religion. The great constitutional principle of the separation of the Church and State does not go counter to the undeniable historical fact of the immense and continuing influence of Christianity upon the development of the common law. This influence is demonstrated by examples from a great variety of sources.

This book sets forth the evidence to support arguments in favor of one particular school of jurisprudence. The work exhibits what appear to be the source materials for Professor Wu's earlier book, *The Fountain of Justice,* which enjoyed a most enthusiastic reception upon its publication in 1955. The execution of the work is almost devoid of polemics. There are a few references to the false assumptions of such as the positivists, but the allusions are mild and nobody could possibly take offense. This charity, however characteristic of the author, is, as will be discussed, probably the main complaint to be registered against the book. Before considering the use of the volume as a textbook, a semantic problem that pervades the work should be noted.

The words "natural rights" and "natural justice" are not magical. They have variant meanings given by time and place. Any American judge in the first half of the nineteenth century, talking about natural justice, was more likely to have had Locke and Rousseau in

12. *Id.* at 3.

mind than Aquinas. And this natural justice led to that extreme individualism that Dean Pound has described so well and from which we are reacting so thoroughly.[13] While particular meanings are attached to these words by the author, it is not clear that the quoted passages are examples of these meanings. This is a common problem with respect to the invocation of natural law or natural justice. In the present work the practice of the author is to state the facts in a case and then quote extensively from the principles announced in the opinion. It is surprising in how many instances a reader cannot guess what was the result of the application of these principles. Dean Pound has commented on how frequently resort to natural justice leads to the legal rules already in effect in the particular writer's jurisdiction.[14]

Aquinas' definition of law with its elements of reason, common good, authority, and promulgation, without further explanation, is applicable to almost anything that Cardozo or Pound ever said about the law. They can hardly be classified as Thomists. To make clear the distinction between Mr. Wu's views and those of the sociological jurisprudents would require extended discussion of the premises implicit in the two schools. For instance, the author points out on several occasions that Aquinas claimed that the positive law should "further the common weal" (*saluti proficiat*) and that the particular determinations of how this may be done "depends on certain circumstances . . . adapted to place and time" (*loco temporique conveniens*).[15] Wu adds "that these particular determinations should be revised from time to time so as to keep abreast of the advancing civilization of man."[16] Cardozo also would argue that the law must adapt itself to social needs.[17] While these two statements appear to say the same thing, there must be more to Thomistic legal philosophy than Cardozo's social needs. The current dispute over birth control appears to be an example in which these two legal philosophies would reach different results. Wu does not make it clear how he would argue in such a case to demonstrate the greater adequacy of the Thomistic view.

13. These thoughts are not new to Professor Wu. He has remarked: "When one remembers how the term 'natural law' was being bandied about so freely, with a view to lending a cosmic sanction to all kinds of silly ideas, one can understand why jurists of strong moral intuitions became so hostile to any mention of the natural law." WU, THE FOUNTAIN OF JUSTICE 134 (1955).

14. For the philosophers, see COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 107 (1959); for the jurists, see POUND, THE IDEAL ELEMENT IN LAW 63 (Calcutta 1958).

15. AQUINAS, SUMMA THEOLOGICA I, II, Q. 95, art. 3.

16. JURISPRUDENCE 216.

17. "Sooner or later, if the demands of social utility are sufficiently urgent, if the operation of an existing rule is sufficiently productive of hardship or inconvenience, utility will tend to triumph." CARDOZO, THE GROWTH OF THE LAW 117 (1924).

The above are reservations to the book on its merits, but a wider and equally interesting problem is how to evaluate the work as a textbook in a course on jurisprudence. There isn't any doubt but that the volume should be popular in Catholic law schools. But it would appear to have drawbacks even for use in those schools. The main objections to the book are: (1) it describes rather than argues its themes, (2) it is not deep enough in the exposition of its own thesis, and (3) it does not provide enough material concerning other approaches to the field of jurisprudence.

Really to understand many of Professor Wu's arguments, a student would have to bring with him some learning in Thomistic philosophy. Without such a background, he would hardly be able to evaluate many of Wu's contentions which, as will be seen, frequently go counter to principles usually held by one trained in a modern empirical philosophy.

In view of these assertions, it might be of interest to examine why it makes such a difference to anyone that there is a particular theoretical bias in a book. It should be agreed that law is not an end in itself, but a means to an end. Law is but one of the sciences, a practical one at that. It draws its fundamental premises from a higher source, that of philosophy. Justice Cardozo has said that "implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which however veiled, is in truth the final arbiter."[18] Professor Wu agrees with this view. He has said that "there is no other way of teaching law except in the grand manner, for the simple reason that one cannot really know the law without taking account of its sources."[19] Not only cannot law be fully understood without an understanding of the metaphysical assumptions involved in the particular rules or principles at issue, but, even more pointedly, the decline in schools of jurisprudence has been attributed to their failure to provide the materials for such an understanding.[20]

Professor Wu makes no suggestion that his writings have any

18. *Id.* at 22, quoted in WU, THE FOUNTAIN OF JUSTICE 6 (1955).

19. WU, THE FOUNTAIN OF JUSTICE 5 (1955). He also quotes from his friend, Dean Miriam Rooney of Seton Hall University: "To understand law better, a fuller knowledge of logic would doubtless be desirable, but to understand both law and logic better, a greater knowledge of metaphysics is needed above all." JURISPRUDENCE 39 n.3.

20. "[I]nterest in analytical jurisprudence has sharply declined since 1930. . . . There is a clue to the actual cause, namely, the predominant interest in this half-century in an empirical science of law and, in the past decade, in the ethics of law. These interests require a congruent conceptual apparatus or 'ontology'; and it is probable that the decline of analytical jurisprudence is due to its failure to provide such a set of ideas." HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 135-36 (1958). On this specific lack in Wesley Hohfeld, see *Id.* at 32-33.

limited application. But since he agrees that metaphysics is basic here, some of his ontological views on particular points of fundamental import should be noted. A good example appears in the author's conception of law. Professor Wu asserts that a principle of law can have an "objective reality outside the mind" and an "otherness distinct from the thinking subject."[21] This philosophical realism obviously makes possible concepts of law that are not conceivable for a student trained in a naturalistic metaphysics or epistemology. At once, for example, the problem of the existence of natural law presents little difficulty to a Thomist, but would baffle or be unacceptable to a thorough-going empiricist. The author also talks of "immutable principles of law."[22] The average reader of this essay would be hard put to name one such principle.

A second example to note is the theistic character of Wu's natural law. According to St. Thomas, eternal law is that by which God, the ruler of the Universe, rules the world.[23] Natural law is the participation in the eternal law by the rational creatures of the earth.[24] By the application of the precepts of natural law, the human reason proceeds to make particular determinations. These particular determinations are human or positive law.[25] Professor Wu sums this up by saying: "the eternal law, the natural law, and human law form a continuous series. The whole series may be compared to a tree, with the eternal law for its root, the natural law for its trunk, and the different systems of human law for its branches."[26] This description illumines the remark of Dean Miriam Rooney that "the natural law undertakes to recognize and describe . . . the observable relation existing between all creation and the Creator, between creatures and God."[27] It may be inferred that the bias of this book is theistic and, more particularly, also Catholic and Thomistic.

A third aspect of Professor Wu's philosophy which might well present problems to a non-Catholic lies in his value theory. It has been previously noted how, for the author, justice is an amalgam of the true, the good, and the beautiful. This is because the "universal principles of justice are derived from the Supreme Being, and therefore are true as well as good."[28] The aesthetic qualities of justice are a function of clarity and proportion, but note that according to Mr. Wu: "The ultimate source of beauty lies in the supreme Harmony

21. JURISPRUDENCE 39.
22. *Id.* at 14.
23. AQUINAS, SUMMA THEOLOGICA I, II, Q. 91, art. 1.
24. *Id.* at Q. 91, art. 2.
25. *Id.* at Q. 91, art. 3.
26. JURISPRUDENCE 219.
27. *Id.* at 677.
28. JURISPRUDENCE 36.

of the Holy Trinity."[29] Clearly the full import of such a theory of justice requires a workable background of theology.

These special arguments over the nature of reality, religion, and ethics as set forth by Professor Wu are intended to demonstrate that, if a jurisprudence must fit into some metaphysical position, whether or not articulated, then a student using this book without a specialized philosophical training will have trouble. This sort of background should be brought into the law course. The undergraduate training is normally all a student brings with him to law school. Accordingly, it does not seem unfair to express the opinion that only the student trained in a Catholic undergraduate college would acquire the necessary scholarly background to use this book with the fullest understanding.

With this special outlook which this review has probably overstressed, the student would no doubt enjoy this text. But he would not learn much about other schools of jurisprudence, not even about other natural law schools. For example, John Austin is mainly represented by an extract from an article by Albert Kocourek about Austin.[30] The countervailing material isn't here unless it be gathered from a maximum use of the fine bibliography included by the author.

These difficulties are raised because they are present. The instructor will have to make his own choice. But there is one use for which this book is specially adapted. It is a real tool with which to combat the average student's obsession with the practical aspects of what he knows as *The Law*. The practical-minded student will be impressed with the fact that so much of the material in this volume comes from cases. These are judges talking! And the cases used here uniformly sound as though the words were truly coming from the heart. Such students may even feel that a streak of anarchy is running through all this material. For this very reason, this book could contribute to loosening the hold that the "rules" have on so many students and in providing a flexibility of outlook that will benefit both their future clients and the growing society in which they will practice their profession.

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29. WU, THE FOUNTAIN OF JUSTICE 255 (1955).
30. JURISPRUDENCE 168 *passim*.

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THE LAW AND LEGAL THEORY OF THE GREEKS: AN INTRODUCTION. By J. Walter Jones. New York: Oxford University Press, 1956. Pp. x, 327. $6.75.

The Provost of Queen's College, Oxford, has isolated ancient Greek law for a separate detailed treatment. It is an extremely welcome contribution to legal science. Similar studies have been attempted very seldom in English or by continent scholars. Since Greek legal ideas were peculiarly conditioned by life in the city-state, the author has examined Hellenic law as part of the thought that emerged in the development of Greek civilization and political life. Seventeen chapters take up among other topics the function of law, law and nature, sacral law, marriage, ownership and possession, contract, mortgages and leases, and the later influence of Greek law. The chapters are descriptive and free from polemic instead of controversial. The result is an essential work of reference for students of history, of classical philology, and of the field of law, based on an impressive command of the primary sources and of the modern scholarship relating to ancient law and legal theory.

The author has dealt excellently with the reasoning about law in philosophy and the parallel speculation in poetry and drama; and he has examined very perceptively ex parte statements of litigants or counsel in extant legal orations. His discussion rests mainly on acknowledged literary works of the classical period. The classical law of Athens predominates, though hundreds of city-states made up the Hellenic world and the law outside of Athens awaits comprehensive treatment.[1] The surviving works of literature favor that orientation, but it is a limitation that Greek law naturally transcends.

Greek legal reasoning can also be inferred from the actual practices of the Hellenic states as well as from the nascent theory about law. Presuppositions and practical solutions in legal matters are evident in the deliberative, administrative, and judicial mechanisms and procedures adopted by Greeks in various places and at various times in antiquity. Papyri and inscriptions shed light on those varieties of legal experience. Besides literature, therefore, the scholar has available for his scrutiny the *ipsissima verba* of lawgivers and statesmen, city-state and league records, marriage contracts, wills, petitions, receipts, and other documents. New ground could be broken by a comparative and collective study of the diverse and scattered

1. BONNER & SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE (2 vols. 1930, 1938) was to have had a third volume dealing with other Greek legal systems. The additions have appeared in learned journals and are not coextensive chronologically and geographically with Provost Jones' investigation.

material outside literature proper bearing on legal science. But more cannot be required from an author than he has set out to do. Provost Jones in his subtitle sets some bounds for his undertaking, while allowing himself a wide scope and not at all eschewing excellence.

The reviews of this book with good reason have been favorable.[2] The following remarks about particular points are not intended to detract from its intrinsic merits. Some additional references may be useful for prospective readers.

The ancient Greek world presents the scholar with the contrasting subjects of legal philosophy, history of law, legislation, international organization, and comparative law for study. The author has not chosen to deal specifically with international law. Strange to say, no philosopher of the great age of Greece has thoroughly considered the foreign affairs of his or any other city-state, though the problem was urgent. The historian Thucydides and the orator Demosthenes can be read with great profit about the vicissitudes experienced by the states of the fifth and fourth centuries B.C. Advances continue to be made in understanding the relations among the individual city-states of antiquity.

To the discussion on page 5 of the quotation from Simonides "the city is a teacher of men" (Diehl, fr. 53) can be added a reference to G. Smith, ΠΟΛΙΣ ΑΝΔΡΑ ΔΙΔΑΣΚΕΙ, *38 Classical Journal* 261-79 (1943). The *σωφρονισταί* are mentioned on page 6. S. Dow, ΟΙ ΠΕΡΙ ΤΟ ΔΙΟΓΕΝΕΙΟΝ, 63 *Harvard Studies in Classical Philosophy* 423-36 (1958) again takes up the education administered under the ephebia in order to settle a question relating to those officials. Plato's dissatisfaction with legislators is cited on page 7. It was not unique, though *his* generalization received immortality. Demosthenes was aware of the imperfections of the professionals (*οἱ πολιτευόμενοι*). The virulence of Plato's a priori condemnation of democracy is in marked contrast to the tenacity with which Athenian institutions persisted after his death. The innumerable preserved records supplement and modify the impression gained only from philosophical theory. Athens, which continued to use familiar machinery of government with occasional modifications until the time of Sulla, demonstrated the efficacy of its political heritage. For "stringest" on page 9 read "stringent." Discussion of the medical metaphor of political health (p. 17 *passim*) can also cite Demosthenes, *Second Olynthiac* 14. "Free and slave" (p. 57 *passim*) is sound; other scholars often exaggerate the place of slaves in Greek industrial and economic life. Isonomia (p. 85), a

2. Campbell, Book Review, 72 CLASSICAL REV. 165 (1958); Dorjahn, Book Review, 53 CLASSICAL J. 334 (1958); Harrison, Book Review, 78 J. OF HELLENIC STUDIES 167 (1958); Pritchett, Book Review, 63 AMERICAN HISTORICAL REV. 378 (1958).

democratic watchword and principle, commonly implied equal rights for all free-born native adult males in public life and private law. Political and legal equality were not always inseparable. The historical papyrus uncovered at Oxyrhynchus in Egypt enables a comparison of political institutions. In Boeotia participation in sovereign assemblies of the league was limited to citizens of the middle and upper classes without giving them any rights under private law which all free-born native adults did not also have. Athens adopted that form of isonomia for a brief time in 411 B.C., but the innovation was never repeated there. J. A. O. Larsen, *Representative Government in Greek and Roman History* 14 (1955), discusses the origin of democratic theory and democratic government, citing his own articles and those of Ehrenberg and Vlastos. Now also add J. H. Oliver, *Demokratia, the Gods, and the Free World* (1960). S. Dow, "The Law Codes of Athens," *Proceedings of the Massachusetts Historical Society* lxxi 1-36 (1953-1957) can now be added to the bibliography of chapter V: "The Sacral Law." An article on the orgeones published by the late W. S. Ferguson in the *Harvard Theological Review* is cited on page 162. Readers will wish to know that Professor Ferguson amplified his remarks in "Orgeonika," *Hesperia: Supplement* VII 130-163 (1949). Little could be done in order to punish a killer when there were no relatives to prosecute the case, Greek law being what it was. (p. 252) The author has cited Pseudo-Demosthenes (xlvii. 61-72) for an instance in which the Exegetai, the expounders of sacral law, sought to dissuade an outsider from prosecuting the killers of an elderly freedwoman without kin to press the case. In this connection should be cited the *cause célèbre* in the *Euthyphro*. Euthyphro was attempting to prosecute his father for bringing about by negligence the death of a slave who was without anyone to initiate a homicide suit. Burnet, *Plato's Euthyphro, Apology of Socrates, and Crito* 4 (Oxford: Clarendon Press 1924) regards the dialogue "as a valuable historical document, though not quite in the same sense as the *Apology*." Euthyphro was so well known that an invented story about a trial would have vitiated Plato's purpose to demonstrate the fundamental piety of Socrates.

Perhaps as many as 2,700 ancient and modern items have been mentioned in the footnotes. An index of passages cited would be eminently useful and might be considered in preparing a future edition. The debt of the student of Greek law would be further compounded.

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