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Book Reviews

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BOOK REVIEWS

A CONSTITUTION OF POWERS IN A SECULAR STATE. By Edward S. Corwin.[1] Charlottesville, Virginia: The Michie Company, 1951. Pp. 126. $2.50. — "Of all the words of tongue or pen" which have been uttered in this country in the past century, many have been concerned with the decline of our local and individual liberties and the concentration of governmental power in Washington. To impart a degree of novelty to this much discussed subject may seem, therefore, an impossible task. However, Professor Corwin has accomplished it. He has done so by grace of an unsurpassed knowledge of the subject matter in its constitutional aspects, by a characteristic facility in exposition, and by maintaining a delicate and highly successful balance between scholarly detachment and the spice of strong personal opinion.

He begins by tracing the trend toward consolidated national power from its germination in the language and early interpretations of the Constitution, to its recent flowering under the fertilizing influence of modern world conditions. It is the author's position that this historic change has been effected, not by dramatic reversals in the judicial interpretation of the words of the Constitution, but by slight shifts, at vital points, in the attitudes of the Court. The rise and step by step decline of the doctrines of enumerated powers, National-State equality, and other familiar postulates of dual federalism, are well portrayed.

In a chapter vividly entitled The Atom Bomb and the Constitution Professor Corwin treats of the next step in the process, which is the growing consolidation of power within the national government itself. The Atomic Energy Act of 1946 he characterizes as "undoubtedly the most remarkable piece of legislation in our entire national history." [2] Into the hands of an administrative agency of five members it places unprecedented power; and in time of war (including, perhaps, "cold war") the ultimate control of the agency's activities would doubtless pass from Congress to the Commander-in-Chief.

The suggested remedy for this executive autocracy is the rejuvenation of the Cabinet. Not the traditional Cabinet of department heads, whose members have long been too exclusively concerned with administrative detail to function well as over-all policy makers, but a "legislative cabinet" selected by the President from the membership of a Joint Legislative Council of the two houses is suggested. This "would be a body capable both of *controlling* the President and of *supporting* him," [3] and would tend to moderate the perpetual and debilitating feud between these branches of the Government. The more obvious objec-

1 Professor Emeritus of Jurisprudence, Princeton University.

2 Text at 36.

3 *Id.* at 74.

tions which might be advanced against his proposal Professor Corwin anticipates and undertakes to answer. And whether or not one concedes the feasibility of his plan, its presentation comprises one of the most interesting and stimulating portions of the book.

The final chapter is devoted to an analysis and criticism of *Illinois* ex rel. *McCollum v. Board of Education*[4] in which "released time" religious instruction in a public school building was held to violate the constitutional principle of separation of Church and State. The author does not discuss the practical soundness of this decision. But as to its constitutional soundness he argues with much cogency. First, he contends the interest of the appellant, Mrs. McCollum, in the constitutional issue was insufficient, under the rules long governing judicial review, to justify the Court in deciding it at all. Second, the "establishment of religion" clause of the First Amendment forbids only the preferment of any faith. Third, the decision itself invades the freedom of religion, one of the fundamental liberties guaranteed by the Fourteenth Amendment.

The first three chapters of this brief but pithy little book were originally delivered as lectures on the William H. White Foundation at the School of Law of the University of Virginia. Having been designed for the edification of law students, they may be read with understanding and enjoyment, not only by constitutional lawyers, but by "unconstitutional lawyers" and informed laymen as well. The fourth and final chapter is characterized by the same lucidity.

The seriousness of the subject is relieved throughout by appropriate touches of humor. There is a table of cases and an index, as befits a work to which most readers will wish to return.

*John D. Lyons, Jr.**

LEVIATHAN AND NATURAL LAW. By F. Lyman Windolph.[1] Princeton, New Jersey: Princeton University Press, 1951. Pp. ix, 147. $2.50.— It is refreshing to find evidence of interest in the philosophy of law, especially when it takes the form of a book written by a busy practicing lawyer. Mr. Windolph, of Lancaster, Pennsylvania, has previously displayed his literary ability in a collection of essays which appeared some years ago under the title *Country Lawyer*.[2] He now presents his reflections on law and government which are the result of forty years of reading.

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4 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

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1 Member of the Lancaster, Pennsylvania Bar.

2 WINDOLPH, COUNTRY LAWYER (1938).

He courageously proposes for himself the role of mediator between the positivists and the adherents of natural law. He would sit in on a round table discussion between St. Thomas Aquinas and Hobbes, and narrow the issues by getting admissions from both. He suggests that as Hobbes was said to have founded political positivism on the basis of the natural law, perhaps it might be said of the author that he has attempted to found a theory of natural law on the basis of positivism. This objective would, of course, be philosophically impossible since the two schools of thought derive law from different sources and define law differently. The author's treatment is really a presentation of a positivistic view of law limited by the practical necessity of conforming with the fundamental moral concepts in order to be effective. Thus, the moral law to this author is not the source of human law, but a limitation on it.

It seems to this reviewer that the author has not fully comprehended the Thomistic concept of natural law. In his introduction he states that he "had no trouble with Aquinas." [3] He quotes him as saying that the sovereign is "exempt from the law, as to its coercive power, since, properly speaking, no man is coerced by himself, and law has no coercive power save from the authority of the sovereign." [4] From this he makes a finding in favor of one of the fundamental tenets of positivism. Of course, if one reads the chapter from which the quotation is taken,[5] it is apparent that St. Thomas is speaking only of the coercive power of the law and not of its directive power. One would have to be a positivist to consider that the coercive power was the entire content of the idea of law. So I believe the author's finding of a positivistic principle in St. Thomas must be rejected as against the evidence.

Axiomatic to Mr. Windolph's philosophy is the positivistic principle that in any political society "some man or group can confiscate your property and forfeit your life." [6] He separates politics and law and morals.

While the author relates the validity of human law to natural law, because it will not work unless it conforms to the moral consciousness of the people, he does not adopt the natural law as the source of authority for human law. And so it appears that the author is not merely describing Leviathan but subscribing to it, since he posits potential absolute power as an attribute of sovereignty.

He is in accord with the "writers of the realistic school" in "insisting that natural law is not 'law in the lawyer's sense. . . .' " [7] At the same time he notes that "moral considerations are completely relevant wher-

3 Text at vii.
4 *Ibid.*
5 ST. THOMAS, SUMMA THEOLOGICA, I, quaest. 96, art. 5.
6 Text at 9.
7 *Id.* at 122.

ever human actors are involved"; and the neglect of this trust "has created a philosophic vacuum that has been quickly filled by the supporters of doctrines fraught with what seems to me a menace to civilization itself." [8] He accords a supremacy to natural law in the field of morals without accepting it as the ethical source of law. The many difficulties presented throughout the book seem to stem from the effort to reconcile the two incompatible theories concerning the source and meaning of law.

The concluding chapter contains some worthy comments adverse to Justice Holmes' skepticism and relativism and some interesting observations on natural law, the neglect of which, the author deplores.

The author apparently seeks to charm rather than convince. Notwithstanding his talent for felicity of expression, the thought is often obscure, and the book is not easy reading. One wishing to study jurisprudence seriously would crave a more systematic treatment and I do not believe the book can be considered as a contribution to this science. Its significance is rather as an indication of increasing interest among members of the legal profession in the relationship between law and morals.

*John B. Gest**

THE PROVINCE AND FUNCTION OF LAW: Law as Logic, Justice, and Social Control, A Study in Jurisprudence. By Julius Stone.[1] Cambridge: Harvard University Press, 1950. Pp. lxi, 918. $10.00. — In the words of the author, his study is primarily an interlocutory work — a challenge to further thought and discussion rather than a final profession. It is therefore in a spirit of additional discussion and further suggestions that criticism is offered here. The mere size of this volume makes it probably the most comprehensive compilation or survey of the more important legal theories thus far published in the English speaking world. To the present reviewer it seems, however, that the virtue of comprehensiveness at times proves to be the most serious defect of the book. But no matter how we may feel about its practical usefulness, the fact remains unchallenged that it is a very helpful — though at times very confusing — tool for the future legal scholar rather than a revealing account.

In order to understand more fully the majority of Stone's ideas and criticisms — even the criticisms directed against Pound — it should

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[8] *Id.* at 119.

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be borne in mind that for several years the author was associated with Dean Pound at the Harvard Law School. The paramount influence of Pound can clearly be detected not only in the general outlines of Stone's work, but also in many of its detailed expositions. Even when he takes occasional issue with Pound — something which he does not always do in the most convincing manner — this Poundean influence is manifestly noticeable. With Pound's permission the author has made ample use of Pound's many writings, particularly of the fifth edition of Pound's *Outlines of Lectures on Jurisprudence* which was published in 1943. This fact also explains a serious defect of Stone's book, the conspicuous absence of nearly all materials on jurisprudence published after 1943. In addition, Stone had access to some of Pound's private notes which the latter in his usual generosity placed at the disposal of the author. Hence, it could be contended that in one way Stone's volume is an "advance performance" of a task which long ago Pound promised to carry out himself. The real merits of Stone's book, therefore, will become manifest only when we shall be in possession of Pound's conclusive work on jurisprudence, an event which, as Pound only recently told the present reviewer, may be expected in the near future.

At the outset Stone attempts to explain as well as justify his basic pattern of discussion. After examining and rejecting various proposals made by other legal scholars as to how this problem should be approached, he adopts the following subdivision: (a) Analytical Jurisprudence; (b) Theories of Justice; and (c) Social or Functional Jurisprudence.[2] This threefold division is then discussed under the subtitles: (a) Law and Logic; (b) Law and Justice; and (c) Law and Social Control (or Law and Society). This subdivision is practically identical with the classification used by Jerome Hall in his *Readings in Jurisprudence,* published in 1938.

In his introductory remarks, where he tries to redetermine and redefine the function of jurisprudence, Stone comes to the conclusion that jurisprudence is not a "science," and that it is extremely doubtful whether one could speak of a "science of law." It appears, however, that he regards jurisprudence as a body of "facts" controlled by a series of meanings which endow these "facts" with some tangible significance. In the opinion of the reviewer it is possible to define "science" as a body of knowledge about something significant, organized and, hence, meaningful according to certain rules of reasoning or some set of values. If Stone had realized this, he would have called jurisprudence a *wertorientierte Kulturwertwissenschaft,* a term which Windelband, Rickert, Lask and Radbruch have used with great success when dealing with similar problems. The present reviewer believes that Stone, although he never commits himself completely, considers

[2] Text at 31-2.

jurisprudence something akin to a *socialwertbehaftete Kulturwissenschaft subjektivistisch-pragmatischer Farbung* — a subjectivistic-pragmatic (or instrumentalist) theory of certain socially significant and meaningful phenomena of actual civilization.

The work of Stone is all about "law." Yet, deliberately he refuses to present the reader with his own definition of "law," claiming that it seems "preferable at this date to cease hankering after some one simple criterion of 'lawness.'" [3] But it is doubtful whether in the absence of an adequate or even provisional definition of law, "lawness" can be circumscribed for the particular "purpose at hand only," or "termed 'clusters of attributes' always or almost always present, but in greatly varying proportion, and in constant change." [4] To make matters even more involved, Stone never informs the reader as to what these "attributes" are. Perhaps it might have been helpful if the author had given us at least an indication how law can be distinguished from other instruments of social control or, for that matter, from other "facts" of social life. Admittedly, it is not easy for a relativist like Stone to establish one single definition of "law" or even a single criterion to determine "lawness." The result of his failure to do so at times creates the impression that he is actually trying to expound on the general theory of legal sociology from the point of view of the legally trained sociologist.

In Stone's opinion, the following three fundamental propositions form the basis of any "scientific" determination of the province of law: (a) jurisprudence is the critical examination of law in the light of certain non-legal disciplines; (b) the results of such an examination should be used by the legal scholar for making his own classifications; and (c) these classifications are for legal purpose alone. It is here that the author should have asked himself the following crucial question: can law establish itself as the ultimate instrument of all social control, regulating all other methods by which a given society controls its many affairs? What then controls this ultimate instrument of all social control? Like all legal relativists, Stone fails to provide the reader with an adequate answer to these questions, unless we accept his suggestion of a minimum standard for all as a generally agreed upon basic end [5] as the final custodian or control which governs all social controls. This suggestion, however, sounds very much like Pound's idea that, in terms of sociological jurisprudence, law should guarantee a minimum of decent human existence. But even this proposal of a minimum of decent human existence — some people would prefer a maximum of decent human existence — is but a preachment rather than a legal principle.

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3 *Id.* at 717.
4 *Ibid.*
5 *Id.* at 773.

In place of a clear-cut definition of "law" or even a circumscription of "lawness," Stone resorts to an observation which is also indicative of his relativist-pragmatic bend of mind: "Commonplace thoughts do much of the work of the world. They will do it even if they are not, but they will do it better if they are, thoroughly understood." [6] Needless to say, this idea which reduces law to a mere commonplace legal philosophy, to a most "unscientific science," can be found in John Dewey's "Logical Method and Law." [7]

Apparently it has escaped Stone's attention that the main aim of the Anglo-American Analytical School or the German *Begriffsjurisprudenz* was to expose the *formal* structure of law rather than to deal with justice or society, the two *material* elements inherent in law. In this emphatic one-sidedness, which the author depreciates considerably, lies both the particular virtue and the peculiar weakness of the Analytical School. The theory adopted by this school, in the final analysis, is simply this: while the rules of law (the norms, according to Kelsen) are expressed in general propositions, the controversies to be decided on the basis of these general propositions are concrete situations of fact. And the determination of controversies rests on a "quasi-syllogistic" relation between the general legal proposition (the "major premise") and the concrete situation of fact (the "minor premise"). In this fashion the courts are "guided" and even "bound" by the law. This "method" guarantees a high degree of "legal stability" which, whenever a totally novel situation of fact arises, may prove somewhat disadvantageous. On the other hand, without some "quasi-syllogistic guidance" the law would fall prey to personal arbitrariness and, hence, would become a sort of "justice without law." Since Analytical Jurisprudence primarily is an effort to reduce law to a body of self-consistent propositions, it should be excused for not taking account of data which might be most relevant to the sociologist or historian, but only of limited concern to the jurist.

Stone's effort at explaining Analytical Jurisprudence in terms of law and logic, in itself, is fraught with difficulties and dangers. Aside from the obvious fact that the Analytical School does not have, and has never had, an exclusive claim to logic, the general identification of Analytical Jurisprudence with logic forces him to distort as well as to misunderstand much of the valuable work done by the Analytical School. That Hohfeld's fundamental legal conceptions are primarily patterns for a convenient legal terminology coined for general *practical* (not logical) purposes rather than something final and definite, apparently has escaped the attention of the author. In any event, it is the opinion of the present reviewer that there is not a single instance where rigid formal logic prevents the use of a convenient terminology or of a quasi-syllogistic demonstration merely for practical demonstra-

[6] *Id.* at 362.

[7] 10 CORNELL L. Q. 17 (1924).

tion or didactic purposes. It should also be borne in mind that to speak simply of law and logic can be very misleading. The use of the term "logic" by Stone is obviously indeterminate in that it seems to indicate what may be called a body of legal concepts applied in a particular type of legal reasoning, restricted to a practically effective process. Strictly speaking, the systems advanced by the Analytical School are not "logical." Analytical jurisprudence operates with certain generalizations of practical relations. But these generalizations, which are really postulational presuppositions or frames of general reference, are never elements within a consistent pattern of abstract reasoning based on some initial, conjectured hypothesis. Although they may be of practical use to the legal formalist, they are never "logic" in the scientific and accepted sense of the term.

Stone credits John Austin with holding that by the application of an "abstract syllogism" one could logically deduce, for instance, the various standards of reasonableness from such abstract basic legal conceptions as "right," "duty" or from the Austinean definition of "law." This is certainly open to serious questioning for even Austin fully realized that these "necessary legal conceptions" lack the necessary content to serve as major premises for establishing any practically meaningful "standard of conduct." Stone also objects to the proposition, advanced by the Analytical School, that sanction is logically necessary to law. He believes that in the "welfare state" (to which Stone apparently subscribes) there are also "laws" (or should we say, unenforceable preachments?) which constitute instances of benign administrative guidance, which in case of compliance, promise something good rather than threaten an evil for non-compliance. Stone seems to have forgotten that the Romans had already dealt with this problem when they distinguished between *leges imperfectae* (laws without sanction) and *leges perfectae* (laws with sanction). But they seriously doubted whether these *leges imperfectae* could properly be called *leges*. Kelsen, with whose works the author seems to be only superficially acquainted, built much of his legal theory on the assumption that the legal order essentially is nothing other than a system of sanctions or "legal threats," and that a "right" is nothing more than the ability of an individual to set into motion the consequences (sanctions) of a disregard of a specific legal norm. Holmes long ago pointed out that for the "bad man" law is always a threat. And are not at one time or another all of us "bad men?" In any event, even if we assume that the sanction may not be *logically* necessary, it is still *practically* necessary.

Despite some minor alterations and the inclusion of some additional materials or illustrations, Stone's treatment of the Scope and Nature of Sociological Jurisprudence [8] is largely influenced by the program

[8] Text at 391-417.

for a sociological jurisprudence proposed by Pound as early as 1912 in his famous paper on "The Scope and Purpose of Sociological Jurisprudence." [9] Stone's exposition in his chapter on Law as Adjustment of Conflicting Interests,[10] aside from some minor criticisms of Pound, manifests once more the author's dependence on his former teacher. He recounts here the theory of interests which Pound had developed in books, articles, lectures, and seminar sessions which both the author and the present reviewer attended during the early thirties. Stone's main criticism is directed against Pound's classification of interests as individual, public and social. The author fails here to realize that, with Pound, this classification is primarily a didactically convenient way of dealing with an extremely complex problem. Stone's treatment of Individual Interests is likewise strongly determined by Pound's classification and discussion of individual interests as the latter had developed them in the fifth edition of his *Outlines of Lectures on Jurisprudence*, as well as in several of his many articles.[11]

Barring a few rather insignificant changes, Stone's survey of Social Interests,[12] in the main, also follows Pound's *Outlines* as well as his article, "A Survey of Social Interests." [13] Stone's insistence that Pound's theory of social interests depends on his "jural postulates of civilization," seems to be a misunderstanding of Pound's original teachings. Pound's jural postulates, which are his own and not those of Joseph Kohler,[14] constitute *statements of principles* which, as Pound himself concedes, could become outmoded in the course of time. These jural postulates of Pound are postulates of the civilization of time, place and circumstances, and only indirectly the postulates of the law of time and place. The author, who seems to overlook this important distinction, feels that Pound's notion of a social interest in general human progress is much too "idealistic." He believes that the paramount social interest consists in guaranteeing certain minimum standards of individual human life. In this Stone clearly manifests his faith in the superiority of the "welfare state" over all forms of social organization. Pound's scheme of social interests is primarily an attempt to establish certain intelligent criteria of socio-practical significance, not only for the administration of justice, but also for the various "law-

9 25 HARV. L. REV. 489, 512 (1912).

10 Text at 487-504.

11 Stone ostensibly did not consult Pound's article on *Individual Interests of Substance — Promised Advantages*, 59 HARV. L. REV. 1 (1945). But it has already been pointed out that Stone, barring a few exceptions, has failed to make use of publications appearing after 1943.

12 Text at 555-603.

13 57 HARV. L. REV. 1 (1943). But Stone did not rely upon Pound, *A Survey of Public Interests*, 58 HARV. L. REV. 909 (1945).

14 It is also inaccurate to label Kohler as a "Neo-Hegelian." A Hegelian who, like Kohler, rejects Hegelian dialectics, is no longer a Hegelian, but a sort of "objective" or "absolute" Idealist.

making" processes. Since Pound refuses to assign to any one of his criteria a definite priority over the others, this scheme could remain fully operative even in a radically changing society. But to make Pound's jural postulates and his theory of social interests interdependent, as Stone does, constitutes a serious misunderstanding of one of Pound's most important contributions to jurisprudence.

One of the most grievous shortcomings of Stone's book is his failure adequately to discuss the nature and province of natural law. On about three pages he passes very lightly over nearly eighteen hundred years of legal thought. No attention is given to the theories of the Presocratics, Sophists, Plato, the Stoa, St. Augustine or the Augustinean tradition which dominated European jurisprudence for nearly eight hundred years. To state that a "potent strain from Stoic doctrine entered the teaching of the medieval church," [15] or that "St. Thomas Aquinas' *Summa Theologica* was an important attempt to put the persuasive force of reason behind the doctrine laid down by authority of the Church," [16] is almost as platitudinous and meaningless as the contention that " 'not the Devil, but St. Thomas Aquinas, was the first Whig.' " [17] Perhaps the author should have remembered here what some of the most renowned non-catholic legal minds have said about St. Thomas and his philosophy of law. Jhering, for instance admits that: [18]

> . . .this great mind [*scil.*, St. Thomas] correctly understood the realistic, practical and historical facts of moral life. . . . In amazement I ask myself how it is possible that such truths, once they were uttered, could have been forgotten so completely by our Protestant scholars? What false roads could have been avoided, had they taken to heart these truths. For my part, I would probably have never written my book [*Der Zweck im Recht*, Jhering's most outstanding work] had I known these truths. For the basic ideas over which I have pondered so long, are to be found in that gigantic thinker in perfect clearness and most pregnant formulation.

Joseph Kohler remarked that "it is the immortal achievement of St. Thomas Aquinas . . . to have formulated the problem of natural law in a manner which is closest to truth." [19] After having referred to the secular natural law systems which followed in the wake of Hugo Grotius (and which Stone seems to consider the truly great accomplishments in the domain of natural law tradition), the same Kohler exclaims: "How much wiser and profounder were the ideas of St. Thomas." [20] And finally, Kohler points out that the legal philosophy advanced by the scholastics, "particularly by St. Thomas, . . . constitutes the acme

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15 Text at 217.

16 *Ibid.* SUMMA THEOLOGIAE would be the more authoritative title.

17 *Ibid.*

18 JHERING, DER ZWECK IM RECHT 161 (3d ed. 1902).

19 KOHLER, LEHRBUCH DER RECHTSPHILOSOPHIE 38 (3d ed. 1923).

20 *Id.* at 43.

of jurisprudential discussions." [21] Only recently, Judge Jerome Frank stated that: [22] "I do not understand how any decent man today can refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas."

It should also be clear that the Historical School stands in extreme opposition to that type of natural law doctrine which gained control over jurisprudence since the days of Grotius. In particular, it objects most strongly to the "a-historical" tendencies of natural law. At the same time, the Historical School apparently rejects all forms of value differentiation and value criteria, confining itself, in a spirit of historical positivism, to a purely empirical enumeration or examination of the historical reality called "law" or "legal institutions." Because it sees in every one of the many phenomena of legal history the necessary (and, hence, justified) product of historical evolution, it values all of them equally high. The outstanding feature of the Historical School is its naive and uncritical reverence for everything that has evolved "naturally" in the long history of law. Hence, in its peculiar blindness for specific meaning, significance, value or reason, it is really a "cult" of "natural growth" rather than a distinct legal philosophy.

It would have been worthwhile to notice that Rudolf Stammler has tried to achieve a sort of "synthesis" between the "a-historicism" of the later natural law and the extreme "historicism" of the Historical School by introducing the notion of a "natural law with changing content." Stammler's "natural law," however, is merely the expression of the deontological, idealistic or "meta-empirical" nature or normativity of the highest jural postulates, while the expression "changing content" denotes a conscious awareness of the need for some "historical realism." Stone in his rather harsh criticism of Stammler's theory, insists that the latter's principles of "just law" are tautological, and that he has failed to bridge the gap between his *a priori* system of principles and the empirical or *a posteriori* actuality of conflicting interests. This criticism in itself would suggest that the author is not too familiar with the nature of Kant's philosophy in general, and Stammler's jurisprudence in particular. No wonder that he should fall victim to statements which could only indicate that he has failed to do justice to Stammler's theory of "just law." Here, as elsewhere, we may detect one of the telling deficiencies and limitations of Stone's volume: the lack of an adequate philosophical foundation. This, plus the fact that he does not fully understand the writings of certain continental jurists, perhaps explains why his accounts of their works must necessarily remain unintelligible. Apparently it never occurred to

21 HOLTZENDORFF-KOHLER, ENZYKLOPADIE DER RECHTSWISSENSCHAFT 3 (7th ed. 1906).

22 FRANK, LAW AND THE MODERN MIND xvii (1949).

Stone that Stammler's philosophical system, like Kant's, is above all a purely formalistic structure. It is a "methodology for a science of law," an attempt to show how the scientific experimenter — but never the mere experiencer — may gain valid understanding of the law by devising a single formalistic frame of reference for legal science. It was the great merit of Stammler, and at the same time his limitation, to have restored legal philosophy, rather than mere "legal positivism" by the use of Kant's methodical dualism. In doing so, he did put across two fundamental ideas: (1) that a theory of just law rather than naive legal positivism must be developed; and (2) that this theory of just law signifies only a *method* and never a system of legal philosophy. Stammler, to be sure, posed more problems than he was able to solve, but this alone should merit him some recognition.

Like the discussion of Stammler, so also the account of the legal philosophy of Immanuel Kant is quite weak. Moreover, Kant's *Metaphysische Anfangsgrunde der Rechtswissenschaft,* which is really the first part of his *Metaphysik der Sitten,* was published in Konigsberg in 1797 by Nicolovius (the second edition was published in 1798), and not, as Stone holds, in 1791.

Nor is it correct to say that Jhering did not leave behind a "school." The so-called School of Tubingen or the Jurisprudence of Interests *(Interessensjurisprudence),*[23] represented by such scholars as Philipp Heck, Max Rumelin, Heinrich Stoll and Arthur Benno Schmidt, is definitely under the influence of the basic teachings of Jhering. It should also be borne in mind that in his *Geist des Romischen Rechts,* published 1852-1865, Jhering completed and at the same time transcended the program envisioned, but never fully carried out, by the German Historical School. He transcended it by showing that the purposive intelligent human will, and not a blindly working "natural evolution," constitutes that force which is responsible for the development of the law. In this sense, he opposed a rational approach to law to the "irrationalism" of the Historical School. Hence, the full import of Jhering's work can fully be understood only in its relation to *Begriffsjurisprudence* (Analytical School) and the Historical School.

Since Stone himself seems to be a relativist, it is difficult to understand why he should ignore completely the brilliant work of Gustav Radbruch, whose *Rechtsphilosophie* [24] was published in 1932. Particularly for one who, like Stone, finds fault with Pound's theory of social interests, this omission is perplexing in view of the fact that Radbruch

23 The basic ideas of the Tubingen School can now be found in 2 20TH CENTURY LEGAL PHILOSOPHY SERIES: THE JURISPRUDENCE OF INTERESTS (Schoch ed. & transl. 1948).

24 An English translation of this work can be found in 4 20TH CENTURY LEGAL PHILOSOPHY SERIES: THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN (Wilk's transl. 1950).

bases much of his legal philosophy on the "irreducible antinomies" existing between individualism and collectivism. Radbruch, whose relativism does not avoid a definite choice among the many lego-social values, offers a penetrating exposition and analysis of the many and often fundamental conflicts between individual and society which are at the basis of all social life. Nevertheless, he hopes that these antinomies or conflicts can be solved practically, not by mere logical reasoning, but rather by an idealistic faith that human intelligence and good will shall ultimately assert themselves.

In a book of so encyclopedic a scope as Stone's, one would also expect at least some short references to the works of Petrazhitky, Lundstedt, Reinach, Lask, Cossio, Hagerstrom, Siches and some of the more outstanding Neo-Thomists such as Maritain, Dabin, Rommen and Mausbach, not to mention Pashukanis and Vizhinsky, the Soviet jurists, Carl Schmidt, the Nazi philosopher, or Rocco, the "prophet" of Italian Fascist legal ideas.

Stone's exposition of Kelsen's Pure Science of Law does not take into consideration Kelsen's *General Theory of Law and State,* [25] which is the most up-to-date and most comprehensive treatment of his legal philosophy, replacing all previous minor and frequently misleading writings on Kelsen. When the author states that Kelsen's "basic norm" is "obviously most impure" and concludes that "the very 'purity' of the subsequent operations must reproduce that original impurity in the inferior norms," [26] he displays the same lack of understanding of Kelsen's legal theory we have encountered previously in Stone's discussion of Stammler. What Stone overlooks in Kelsen is the fact that the latter dealt with the problem of supplying the courts with a supreme test for determining whether a proposition superficially called "law" or "a rule of law" is actually "law" and not merely a sociological postulate or an economic axiom. The Pure Theory of Law *(Die reine Rechtslehre),* as Kelsen has stated repeatedly, does not deal with the purity of the subject matter, but with a purity of method. This means that law cannot be examined, as Stone suggests, in the light of disciplines other than law. Perhaps it would have been instructive to point out that Kelsen's jurisprudence is a "theory of positive law" based on Kantian epistemology. It constitutes a curious combination of "legal positivism," somewhat akin to the ideas advanced by the Analytical School, and what seems to be its opposite, an idealistic, "normo-logical" theory of the *Ought* derived from Kant's philosophy. In his avowedly relentless unmasking of all legal fictions, hypostases or non-legal presuppositions, Kelsen seems to take up the old challenge made long ago

25 1 20TH CENTURY LEGAL PHILOSOPHY SERIES: GENERAL THEORY OF LAW AND STATE (Wedberg's transl. 1945).

26 Text at 105.

by Ludwig Knapp,[27] that jurisprudence must be a pure legal science, the "high police of proper legal knowledge" and as such should do away with all "legal phantasms," thus finally "destroying" itself — something which Kelsen came close to accomplishing.

The mere fact that, in the main, this review is both lengthy and often extremely critical should indicate beyond all doubt that Stone's is an important and perhaps even monumental work. The criticisms offered here are appropriate only to an achievement of more than ordinary significance. The very broadness of the task to which the author has set himself is bound to make his study somewhat unsatisfactory. Its very title suggests an extremely ambitious undertaking, and its interlocutory nature is a challenge which must be met. Its content approaches the dimensions of an encyclopedia of most of the legal theories advanced during the past one hundred and fifty years. But all this does not detract from its real importance for the legal scholar, the sociologist or the earnest student of jurisprudence. No matter what one may think of some of Stone's digressions, omissions or misinterpretations, his book, for all its imperfections — and no work of this magnitude could possibly be perfect — is, and always will be, an outstanding contribution both to jurisprudence and to the history of jurisprudence.

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27 KNAPP, SYSTEM DER RECHTSPHILOSOPHIE (1857). But see Chroust, *Ludwig Knapp: A Forerunner of Hans Kelsen*, 26 B.U.L. REV. 413 (1946).

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