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Human Law and Human Justice. by Julius Stone.

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ate superior in the State Department, Harlan Cleveland, enriches the value of this forward-looking work.

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HUMAN LAW AND HUMAN JUSTICE. By Julius Stone. Stanford: Stanford University Press, 1965. Pp. xxiii, 415. $10.00.

This is the second volume of Stone's three-volume revision and expansion of his earlier *Province and Function of Law* (1946). The latter work is subtitled *Law as Logic, Justice, and Social Control,* and in his revision Stone devotes a separate volume to each topic. The first volume, *Legal System and Lawyers' Reasonings,* reviewed in 14 Buffalo L. Rev. 347 (1965) deals with the reasoning used in the judicial process and with theories of legal reasoning. The present volume deals with criteria for evaluating law and judicial decisions.

Stone approaches the question of what justice is by examining various theories of justice, some briefly and some extensively. He begins with a short survey of Greek and Hebrew theories, and continues with a lengthy account of various natural law theories up to about 1800. Next comes a chapter on "metaphysical individualism," the idea that the aim of law is to protect the liberty of the abstract individual, with theorists from Kant and Blackstone to McReynolds J. and Hayek given brief attention. Stone then considers the philosophies of Bentham, Ihering, Duguit, Stammler, Kohler, contemporary natural law, Radbruch, and Pound. He dismisses briefly and effectively the claims of language analysis and an intuitionist "sense of injustice" to shed any new light on justice, and devotes a final chapter to his own views on justice.

Although the book is laid out in historical fashion, it is not actually a history of theories of justice. Major figures are either given bare mention or omitted completely: thus Plato and Aristotle are allowed one paragraph each, and Hegel and Marx are omitted completely, although Stone repeats some common misconceptions of the Hegelian dialectic in his discussion of Kohler.[1] Conversely, relatively minor figures like Duns Scotus, Leonard Nelson, Arthur Kaufman, and Werner Maihofer are given detailed and careful treatment. Nor are the latter three discussed merely because of their recency; other recent writers of at least equal importance—Alf Ross, Karl Llewellyn, E. N. Garlan, Harold Laski, Kelsen, and Holmes—are not discussed at all or limited to a few sentences, though Stone makes frequent footnote references to their arguments and discusses some of them in Volume 1 or 3. Plainly a selective principle

1. Pp. 186-87.

is at work. Stone selects his theories, not for their intrinsic importance and complexity, nor for their historical importance, nor even for their contemporary relevance, but for the way they fit into a theoretical scheme with which he is working.

The scheme finally appears in Chapter 10. It is a list of four central issues in the theory of justice:[2]

> 1. *Natural law* as contrasted with other (usually what is called "positivist") *theories of justice*, raises questions as to whether justice must be thought of in terms of norms transcending the human . . . .
> 2. *Metaphysical* (or *"a priori"* or "pure") theories such as Kant's, on the one hand, stand in contrast to empiricist theories such as Duguit's on the other. The former claim to impose obligation by virtue of their supposed *non*-derivation from the social facts . . . the latter claim to impose obligation by virtue of the precise contrary, their derivation from social facts. . . .
> 3. Theories which seek *absolute* standards . . . Kant's or Stammler's or Kohler's, stand in contrast with *relativist* theories, such as those of Ihering, Radbruch, or Pound. . . .
> 4. . . . . theories which seek to achieve justice by some general or universal formula (such as Kant's or Stammler's) stand in contrast with those such as Bentham's or Pound's, which are directed to the uniqueness of the judgment of justice in each particular situation.

These four issues are the ones that concern Stone throughout the book, and control both his selection and his treatment of materials. He selects for detailed discussion those theories which can best represent one or more of the eight positions, and in each discussion probes the theory for the strengths and weaknesses of the positions it represents. Thus for example in the chapter on relativism he is concerned with the relativist position in general, and selects Radbruch for detailed treatment because his is "the most comprehensive and systematic modern attempt to validate relativist theories of justice . . . ."[3] He selects for briefer discussion those theories which add some interesting variation to a position or clarify some central point in it. For example he discusses Leonard Nelson because Nelson adds a new wrinkle to the metaphysical position: "This claim to be able to *deduce* a system of ethical rules constitutes here a special interest of Nelson's neo-Kantian version of justice."[4] Theories which exemplify positions already well represented can safely be omitted or discussed in footnotes.

Stone notes that the four issues are not entirely independent but, on the contrary, cluster rather closely together. They could, indeed, be oversimplified to one basic issue: "a 'typical' natural lawyer will be embraced by the former arm of all four distinctions; a 'typical' sociological jurist by the latter arm in each case."[5] Now if we think of Stone, with Pound, as a sociological jurist this

2. P. 288.
3. P. 235.
4. P. 181.
5. Pp. 288-89.

would seem to imply that the basic opposition is between Stone and the natural law theorists. However, this is not the case. Though Stone's sympathies lie with the sociological jurists, he does not commit himself to any of the eight positions, but tries carefully to weigh the merits of each one. He is particularly careful in his probing of the natural law position, searching out all possible recent versions that would make the position more clear and more plausible, and describes himself as "a rather sceptical admirer at some distance."[6]

Stone's conclusions are as follows:

1. The natural lawyer and the positivist can, and should, co-operate in the quest for justice. Stone insists that natural lawyers have no monopoly of interest in justice and certainly do not have all the answers either. Nor is natural law theory the only way to relate law and justice to God; the Hebrew prophets had a theological interest in justice but did not use natural law concepts. But, on the other hand, Stone affirms the possibility of expressing conceptions of justice in natural law terminology, and suggests that for many centuries this was the accepted thing to do. Thus he tends to see natural law terminology as simply a convenient way of speaking about justice, and feels that positivists should not take offense at terminology. To the extent that natural law theory claims to be a distinct theory rather than just a way of speaking, Stone rejects it; for instance he rejects the contention that an unjust law is not a law at all.

2. Neither the *a priori* nor the empiricist position is valid, according to Stone. *A priori* definitions of justice cannot be made to yield specific conclusions unless empirical propositions are tacitly added to them; empiricist positions are similarly ambiguous. In addition, empiricists have not succeeded in deriving obligations from facts, and a priorists have not shown why we are obligated by a principle supposedly pure and remote from the world. The implication is that all theories of justice must preserve a tension between facts and ideals, even those which pretend to escape from one or the other pole. Also there is an inescapable emotive element in all theories of justice, since there is no indisputable cognitive ground of obligation.

3. With regard to absolutism and relativism Stone clearly favors the relativist position because it faces more directly the problem of adapting law to changing conditions; but he feels that in times of rapid change and divided societies even relativists such as Pound are at a loss. This is perhaps not so much a criticism of relativism as a recognition of the difficulty of specifying the content of justice in times of rapid change. In addition, Stone feels that relativists should continually search for absolute principles of justice, though they should never expect to find any. In the last chapter Stone presents, as his own theory, nine "quasi-absolute" precepts, clearly successors to Pound's jural postulates, which he thinks specify the content of justice at present in the indus-

6. P. 210.

trial West. Perhaps Stone's position could have been expressed more clearly and less paradoxically if he had distinguished several senses of "absolute" and "relative" instead of formulating a grand dualism and then fogging it over.

4. With regard to universal and particular, Stone argues that it is impossible to define a universal justice in such a way that it yields unambiguous results in particular cases. He contends that current definitions of justice in terms of equality, fairness, or consent are hopelessly ambiguous, and makes the same point for earlier definitions in terms of utility, interests, individual liberty, and social solidarity. On the other hand a particularized justice cannot be carried over from one case to the next. The solution here is to state precepts—the jural postulates—which are relatively particular but not completely so.

Stone supports his conclusions with numerous and detailed arguments including both standard arguments against the various positions and new ones of his own. Nearly all of the arguments and judgments seem to me to be sound, though I feel Stone has not appreciated the strength of either the metaphysical or the empiricist position, and consequently has failed to substantiate his contention that there can be no cognitive ground of obligation, either metaphysical or empirical. But I am sure the proponents of the various positions will not be convinced by these arguments. Critical arguments have two main functions: for the opponents of a position they serve to eliminate the position and remove it from one's area of concern; for the proponents of a position they serve to point out weaknesses which must be corrected. Stone's stance is that of an opponent, since his own position is different, in one important respect, from any of the eight that he discusses. He treats all the theories he discusses (except Pound's) as attempts to provide a firm cognitive foundation for justice. That is, he treats them as attempts to derive specific directives of justice from some source which has unquestioned validity—the will of God, nature, pure reason, intuition, human nature, the absolute goal of civilization, and so on. The validity of the source then will guarantee the validity of the theory of justice derived from it. But Stone's own position is pragmatic and functionalist; he holds that a theory of justice is validated, not by where it comes from, but by what it does. A good theory of justice is not one which is derived by impeccable logic from an unimpeachable source. It is rather one which performs well the tasks of a theory of justice, the task of stabilizing and preserving areas of consensus on law and the task of controlling the reform of obsolescent law.

Stone's arguments are designed to show that all attempts to derive directives of justice from a valid source are faulty. Either the derivation is logically faulty, or the results are ambiguous, or the validity of the source can be questioned. The effect of these arguments, for Stone, is to shift interest from dubious sources to clear consequences. Again and again he points out how a theory that has no adequate cognitive ground can still perform well the necessary tasks of a theory of justice in its own time and place. "[T]he significance of a partic-

ular theory of justice as a socially operative force is often a function of the problems of the social context, rather than of the intellectual tenability of the particular theory."[7]

Arguments about the cognitive validity of theories of justice are thus essentially negative and preliminary for a functionalist. They serve to shift attention from the secondary issue of logical validity to the primary issue of how well the theory performs its necessary functions. Unfortunately most of the present book is negative and preliminary, concentrating on abstract argument rather than functional evaluation. There are brief functional treatments of some of the theories of justice, and the last chapter makes a solid start at a functionalist theory, but the bulk of the book is negative.

There is, perhaps, a good reason for this. A functionalist theory of justice must be based on a "sociological" study of how law functions and changes, how it is interrelated with other social controls, and how it is related to economy, polity, and community. These topics are taken up in Stone's third volume, *Social Dimensions of Law and Justice*, and consequently that volume is the proper place to develop a positive theory of justice. As Stone observes, "For the pragmatist, especially, every sociological inquiry may become simultaneously an inquiry into justice. The severability of the two spheres, however clear or desirable in theory, tends to become impossible in practice."[8]

It remains to list the differences between the present volume and its predecessor, part II of Stone's *The Province and Functions of Law*. Chapter 1 on Greek and Hebrew ideas of justice is new, but so brief that its main value is probably as a basis for a telling argument against natural law theory.[9] Chapter 2 on natural law is about half new, and Chapter 7 on 20th century natural law completely new. Stone has changed his views on natural law theory, regarding it now not as a specific theory of justice but as a way of speaking that people used to adopt when they wished to raise questions about justice. For thousands of years natural law terminology was the traditional way of speaking about justice, and a great variety of theories were formulated in natural law terms. Stone is interested in the variety of theories of this sort, even while he rejects their claims to abstract validity and concrete precision.

Chapter 4 on Hedonist Utilitarianism is substantially the same, except that the treatment of Bentham has been changed to take account of recent scholarship. Stone now argues, in sections 1 and 11, that individualist and *laissez-faire* elements were mixed with collectivist-interventionist elements in Bentham's political thought. He also discusses additional criticisms and defenses of Bentham's ethics in sections 19, 20, 21, and 23.

Chapter 8 on relativism and Radbruch is new, and most of Chapter 9 on Pound is changed, as Stone has found new difficulties in Pound's thought as he

7. P. 299.
8. P. 4.
9. P. 293.

applies Pound's theory to the problems of the new emerging nations. The difficulties of formulating jural postulates are even more obvious in these nations then in the West, and it is even difficult to locate *de facto* interests in countries that are changing so rapidly. Thus the time-and-place limitations of Pound's theory become obvious.

Chapter 10 and 11 are almost completely new. In Chapter 10, Stone, classifying the issues among theories of justice, finds four instead of three, the new one being natural law vs. "positivism." He also adds selections on language analysis and the sense of justice. His own theory in Chapter 11 is also new. The other chapters, 3, 5, 6, are largely unchanged except for occasional brief additions and improvements in wording. For example, in Chapter 3 the awkward heading "Natural-law individualist wines in new metaphysical bottles" is replaced by the more elegant and appropriate "New metaphysical individualist wines in natural law bottles."

The most pervasive change is the great increase in number of footnotes. An average of one-third of each page is devoted to footnote arguments and citations, and the total number in the book runs over 1600. Consequently the book really moves on two different levels, one a straightforward discussion of the subject and the other a scholarly commentary on commentaries, exploration of detailed issues, and lists of references and cross-references. At its worst, as occasionally in the first two chapters, this dualism produces a text so condensed and superficial that it is nothing more than an introductory survey, and footnotes so complex and abstruse as to be of interest only to classical scholars. At its best, as in the rest of the book, it produces both a solid, rich text, and an opportunity to pursue almost every point further in the footnotes. But if one wishes to read both text and footnotes, one must be prepared for very slow going. This is a highly condensed book, packed with arguments, by a scholar usually in full command of a very wide range of materials, materials which have been so well organized that the central issues of justice remain always in focus.

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FAIR FIGHTS AND FOUL, A DISSENTING LAWYER'S LIFE. By Thurman Arnold. New York: Harcourt, Brace & World, Inc., 1965. Pp. vii-xi, 3-292. $5.95.

In this short, peppery book, Thurman Arnold has collected some sage observations concerning legal practice and social policy. The work is an attempt to use the great changes in our social and legal thought—from the dogmatic "theologies" of early 19th century economists, through the desperate changes wrought by the Depression, up to the current economic uncertainty and experimentation—as an autobiographical basis.