

Introduction to Jurisprudence and Legal Theory: Commentary and Materials, James Penner, David Schiff and Richard Nobles, editors [London: Butterworths LexisNexis, 2002, xxi+1171pp, paperback, £31.99, HK\$563.00]

When Austin became the first ever professor of jurisprudence in the English-speaking world, the “province of jurisprudence” was what the professor “determined” it to be.¹ Today, when a jurisprudence course is offered in almost all the law schools around the world, the content of this course has become so diversified that a jurisprudence teacher from Hong Kong may find him or herself lost in a jurisprudence class at LSE. No textbook on this subject dares to call itself “standard,” and no teacher can maintain that he or she is able to teach various topics covered in the course with equal confidence. To teach natural law in a profound manner and cover positivism superficially is to do injustice to the latter. However, I believe that this is what many teachers are doing. As a jurisperit, each teacher belongs to a certain “school”, excels in a particular way of legal thinking, and immerses him or herself in the depth of a particular tradition. This is good for the development of legal scholarship, but may not be good for the purpose of legal education. The purpose of a jurisprudence course is to expose the students to alternative ways of reasoning in the hope that they may develop a disciplined mode of legal thinking for themselves. The most obvious way to frustrate this purpose is to give the students an impression that there is only one way of doing legal theory, and that that is the teacher’s way. Even worse than that, the students, intelligent and independent as they are, may not be persuaded by the particular ideas which the teacher places emphasis on. They may become disappointed with the subject, learn to memorise a set of names and concepts before the exam and forget them all soon afterwards. To avoid such a failure, the first thing teachers should do is to select a good collection of introductory notes and reading materials, in which the sophisticated ideas are introduced in the forms of dialogues, debates, and conversations. The extracts should be diversified but still manageable.

The subject of this review provides an excellent collection of commentary notes and reading materials. It shows a dialogical rather than monological version of jurisprudence. The authors themselves belong to different schools – they may not agree with each other on various issues, but they have all committed themselves to a project of cooperation and dialogue. Furthermore, all of the authors are experts in a particular way of legal thinking. They have applied this way of thinking to certain practical matters, and brought their practical insights back to this jurisprudence book. In presenting their legal

¹ Here I refer to the title of the collection of his lectures, *Province of Jurisprudence Determined* (London, 1832).

thoughts as the trunk and leaves of a living tree, rather than dead wood, they trace the development of ideas to their origins, put concepts into their conversational context while maintaining their original meanings and revealing the practical implications of the theories. Accordingly, this review shall briefly touch upon the genealogical, exegetical and prudential aspects of this book.

Genealogy

Legal ideas are not *sui generis*. Every one has its ancestors, almost every one has descendents. They should therefore be understood within the context of their “families”. Moreover, the families of legal ideas are not composed of pure blood. Each generation of legal ideas is under the influence of its distinctive social, political, cultural and economic environments, thus bringing new elements into its body and soul.² Most of the chapters in this book provide us with a genealogical view, from which we can see how particular concepts and ideas develop, dissolve, or metamorphose.

Nicola Lacey, the author of the chapter on modern positivism, has just published a biography of H L A Hart.³ Her chapter offers an excellent genealogy of Hart’s conception of law. She identifies Austin, Bentham, and modern linguistic philosophy as Hart’s intellectual ancestors. As she points out, Hart used smart tools made available by modern philosophy of language to re-examine the legacy of Austin and Bentham, abandoning the obscure or blunt concepts (such as Austin’s “command”), and sharpening the valid ones (such as Bentham’s distinction between “expository” jurisprudence and “censorial” jurisprudence). She also insightfully contextualised Hart’s descriptive sociology of law, by arguing that Hart worked in and presumed the superiority of the western legal tradition. His description implies an evaluation. After all, “to obey punctually, to censure freely”⁴ presumes a society respecting freedoms of expression and press.

Exegesis

The ethics of academic debate require contestants to take theories as they are, rather than torture other scholar’s arguments in order to render a

² For this version of genealogy, denying the possibility of “pure reason”, see Michel Foucault, “Nietzsche, Genealogy, History,” in D F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1977).

³ Nicola Lacey, *A Life of H L A Hart: the Nightmare and the Noble Dream* (Oxford University Press, 2004).

⁴ Jeremy Bentham, *A Fragment on Government* (Oxford: Clarendon Press, 1891), Preface, para 16.

meaning needed as a target. But many scholars failed to obey this rule. Therefore, a good recount of debates should do justice to the distorted arguments. The authors contribute a great deal in this respect. One salient example is Richard Nobles and David Schiff's chapter on "Debating with Natural Law: the Emergence of Legal Positivism." In this chapter, Nobles and Schiff do not start by defending positivism, but by pointing out that some positivists actually missed their target. They wrongfully attribute to Aquinas that "an unjust law is not law". Relying upon John Finnis' research, they maintain that Aquinas only argued that just human laws which "oblige in conscience" have the full quality of law. Lon Fuller put forward a similar argument, that law is not an all-or-nothing matter, that there could be some half-laws, which do not have the full moral quality of law.⁵ From this clearer perspective, we can better understand where the stakes lie. Natural law has a different rule of recognition, which embodies a full range of ethical considerations. There would be no problem for most of the natural lawyers to admit evil laws as laws so-called, but they can still criticise them as lacking the ethical quality of law. The bottom line should be: when a "law" is so evil that we can find no moral quality at all in it, we'd better call it "violence" under the disguise of "law".

Phronesis

Jurisprudence is etymologically linked to prudential considerations. It is ideal for students to learn some application skills in their jurisprudence course. The authors of this book exemplified the *modus vivendi* of thinker-lawyers. For example, Anne Barron is an expert on intellectual property law; Hugh Collins distinguishes himself in both contract law and labour law; Gunther Teubner excels in various fields of private law; while Lacey, Nobles, Reiner and Schiff have made significant contributions to the scholarship and legal reform of criminal justice. They combine their theoretical insights and practical wisdom skillfully and their pragmatic perspectives have been illuminatively displayed in this jurisprudence book.

Teubner, Nobles and Schiff's analysis on contract, in their chapter on legal autopoiesis, (Chapter 18), is one of the abundant examples of this combination. Nobles and Schiff published a highly-acclaimed book on miscarriages of justice,⁶ which applied Niklas Luhmann's autopoiesis

⁵ See Lon Fuller, *The Morality of Law* (Yale University Press, revised edn, 1969), especially Ch 3.

⁶ Richard Nobles and David Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis*, with a foreword by Gunther Teubner, Oxford University Press, 2000.

theory to make sense of the interaction between media and the legal system on wrongful conviction issues. In this chapter, together with Teubner, they set off on a new journey. When contract is understood in the milieu of functional differentiation, it “can no longer be regarded as a simple exchange between two actors and their resources,” and “reappears as different projects in at least three different social worlds: legal, economic and productive” (p 912). By an easy extension, I would add a further political dimension (or “world”) to this analysis. This dimension is very important in assisting us to understand private law in mainland China, where legal formalism has never prevailed.

As argued in a recent contribution to law and development literature, “at low levels of economic development, informal contract enforcement mechanisms may be reasonably good substitutes for formal contract enforcement mechanisms. At higher levels of development, however, informal contract enforcement may become an increasingly imperfect substitute due to the presence of large, long-lived, highly asset-specific investments, as well as the prevalence of increasingly complex trade in goods and services that often occurs outside of repeated exchange relationships”.⁷ To understand the role of formal contract and enforcement in various contexts, we should give more nuanced considerations on the different dynamics and communications within different systems. For example, in mainland China, where a highly interventionist government rules, formal contracts play a different role from those in developed, liberal states. The Government is more willing to use contracts as a tool to control the production and movement of the people.⁸ With help from the highly “abstract” theory of Luhmann, we would be in a better position to perceive the complex dynamics in the development of an immensely complicated economy, and the role of contract law in it.

With the above-mentioned merits and more that are not covered in this very short review, this book provides a very good pool for both teachers and students to learn and practice the skills of legal “theorizing”.

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⁷ Michael Trebilcock and Jing Leng, “The Role of Formal Contract Law and Enforcement in Economic Development,” 92 *Virginia Law Review* 1517 (Nov. 2006), at 1518.

⁸ Zhao Xiaoli, “Governance through Contracts: How Did the Trial Courts Deal with Land Leasing Contract Cases in Rural China in 1980s,” *Social Sciences in China*, Vol. 2, 2000, pp 120–132.

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