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JURISPRUDENCE. By *George C. Christie*. St. Paul: West. 1973. Pp. xxxix, 1056. \$18.50.

Professor George C. Christie's compilation of jurisprudence readings and text is the first such book to be published by one of the major publishers of law-teaching materials in over a decade.¹ It may be viewed as a "program" for one familiar type of basic course in jurisprudence—a course Christie himself offers and which he describes as "A historical examination of the development of legal philosophy from ancient times to the contemporary period."²

Christie's materials consist mainly of extracts from writings of legal thinkers ranging from Aristotle (384 B.C.-322 B.C.) (pp. 4-77) to Roy L. Stone (1923-1970) (pp. 1024-50). Most of the authors are Anglo-American and their work is arranged in historical sequence around what Christie calls basic themes: the beginnings of legal philosophy (ch. one), the evolution of natural law thought (ch. two), the rise and development of positivism (ch. three), twentieth-century legal realism (ch. four), modern analytical jurisprudence (focusing on Hohfeld) (ch. five), and the logic of legal reasoning from earliest times to the present (ch. six). Christie introduces each thinker with textual background material and provides lengthy introductions for major subdivisions. From time to time he appends questions after an extract and occasionally adds a note consisting mainly of critical comment. In addition to this material, a few court cases are provided. The compilation reflects vast labor and remarkable conversancy with jurisprudential literature. Many instructors will find what they want inside these covers, at least for a basic survey course.³

I do, however, have misgivings about both the compilation and the nature of the course for which it is designed. I will state these

1. It is noteworthy, too, that there is not a single article over the past decade addressed specifically to problems of teaching jurisprudence. Published discussion of those problems simply seems to have dried up. On the general state of research in the subject, see Summers, *The Present State of Legal Theory in the United States*, 6 RECHTSLEHRE — (1975) (forthcoming).

2. DUKE UNIV. SCHOOL OF LAW, BULLETIN 43 (1973).

3. Chapter one includes parts of Aristotle's *The Politics* and parts of his *Nicomachean Ethics*. Chapter two includes extracts from Aquinas, Hooker, Grotius, Pufendorf, Locke, Dabin, and d'Entreves. In chapter three, Hobbes, Locke, Hume, Austin, Grey, and Kelsen are represented, with Christie supplying a note on H.L.A. Hart. The fourth chapter has extracts from Holmes, Oliphant, Hutcheson, Frank, Llewellyn, and the Dane, Alf Ross. In chapter five, Christie takes up "Legal Analysis" and includes some of his own work along with that of Hohfeld. Chapter six, on legal reasoning from earliest times to the present, incorporates writings of Aristotle, Bacon, Goodhart, Stone (Julius), Levi, Llewellyn, Stone (Roy L.), and Christie.

misgivings in a spirit of unfeigned humility, for I have no generalizable answers, and I am not sure there are any. It is never easy to design course materials that will serve well in the hands of others and there are special difficulties when the subject matter is jurisprudence. I will identify enough of them to indicate what Professor Christie was up against and to suggest why courses in jurisprudence are not widely elected in American law schools—why, indeed, the “Doctor of Jurisprudence” degree is, for many graduates, a misnomer. (This is not to say that jurisprudence can be taught only in jurisprudence courses.)

There are at least eight problems that the designer of a basic course in jurisprudence must face. First, law students vary greatly in their theoretical sophistication and in their taste for theory as such. Yet the very idea of a basic course in the subject entails some standardization of offering. For student and teacher alike, this source of frustration can run deep. Second, students often acquire basic attitudes and intellectual styles in their other law school courses that diminish their capacity to profit from even a good jurisprudence offering.⁴ Third, jurisprudential needs vary among law schools and even at the same law school from year to year. Of course, some faculties are better endowed intellectually than others. And some schools also have courses in “legal process,” or in “law and society” or the like. A “set” course, the general content and aims of which are more or less continuous from year to year (as in other subjects), may therefore be the wrong approach. Fourth, the intellectual atmosphere at some law schools is simply not a congenial one for a jurisprudence offering.⁵

Fifth, there is the problem of time. Course goals may justifiably vary with events of the day or era, but even with modern technology we cannot have a book a year. Consider these examples. If an epoch is marked by change and upheaval, the instructor may want to focus on the various mechanisms of change within a legal order—on their distinctive utilities and limitations. Or, if the age uncritically accepts some general theory of value (utilitarianism, for example), the instructor may want to stress the weaknesses of such a theory. If dogmatically held views be rampant (for example, “law always oppresses the masses”), he may wish to explore those views. Or, if recent political experience (such as “Watergate”) suggests that the basic requirements of the rule of law are only dimly understood, he may choose to dwell on some of those. The instructor thus responsive to time assumes a large responsibility.

4. An oft-noted fact. See, e.g., Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 J. LEGAL ED. 495, 503 (1949).

5. The phenomenon is not new: “Jurisprudence stinks in the nostrils not so much of the practicing lawyer as of the professional law teacher.” Kocourek, *Jurisprudence as an Undergraduate Study*, 8 CALIF. L. REV. 232, at 232 (1920).

Sixth, jurisprudence is rife with temptation, even for the relatively self-disciplined. It is all too easy for instructors to convert the basic course into a research seminar in which they indulge their special interests of the moment. Here there can be no standardization. Even a little thinking out loud from scratch will sometimes turn away law students, who are not notably tolerant of what may appear to be false starts. Seventh, jurisprudence, unlike contracts, administrative law, admiralty, and virtually every other "basic course" in the law school curriculum, is not well supplied with published teaching materials compiled by leading lights, which can "save" the beginner or the middling teacher. This means, too, that there are few "models" for the compiler of new course materials. In jurisprudence, this is special cause for concern: the raw materials and the literature of the subject comprise an embarrassment of riches. In a sense, there are too many choices, too many considerations, too many ways to go awry. Finally (and this should hardly be surprising), jurisprudence is plagued more by pedagogical subjectivism than other subjects.⁶

Thus, Professor Christie had to labor against the odds. Even so, in some respects his effort may fall short of the attainable. Some of his goal statements are disappointingly vague. For example, he wants students to read "great legal philosophers" in order to "get a feel for the nature of their thought and the manner in which they develop their ideas" (p. xiii). Goals of this generality cannot orient students, let alone inspire or motivate them. Nor can they force the compiler of materials to focus on what ought to be taught and why.

Other of Christie's goals are not only vague but, in my opinion, misconceived. He wants students to tackle the "core of thought in legal philosophy" because, he says, it "is presupposed by most serious contemporary jurisprudential writing" (p. xiii). Christie may mean that present writing "takes its problems" from what earlier thinkers have said. One is reminded of G. E. Moore's famous remark: "I do not think the world or the sciences would ever have suggested to me any philosophical problems. What has suggested philosophical problems to me is things which other philosophers have said about the world or the sciences."⁷ But if this is what Christie means, I doubt its truth. Contemporary writers in jurisprudence (at least in the United States) tend to take their problems not from what past thinkers have said, but directly from "raw materials" of the law, including current happenings in the legal world.⁸

6. Others have noted the subjectivism problem as well. See Konvitz, Book Review, 17 *YALE L.J.* 160 (1939); Patterson, Book Review, 5 *MO. L. REV.* 366 (1940); Rheinstein, Book Review, 17 *U. CHI. L. REV.* 422 (1949).

7. *THE PHILOSOPHY OF G.E. MOORE* 14 (P. Schilpp ed. 1942).

8. See, e.g., Dworkin, *Taking Rights Seriously*, in *OXFORD ESSAYS IN JURISPRUDENCE* 202 (A. Simpson ed. 1973) (prosecutorial and other policies of Nixon Admin-

Contemporary jurisprudential writing might be said to "presuppose" past writing in quite another sense: past writing might serve as a foundation on which all present work *must* build, if it is to be of real value, just as scientific research must build on existing scientific knowledge. If this is what Christie means by "presuppose," the truth of his position is still not obvious. In contemporary writing on jurisprudence, building processes do sometimes occur, but just as often they do not. And they need not, for the work to be of significant value. Jurisprudential theorizing is not science. Good work can be done on problems of theory without immersion in *any* prior literature.

But my ultimate quarrel with Christie's stated goal of exposing students to past writing "presupposed" by present writing goes deeper. For I believe that implicit in this goal are the *research* orientations of an academic working in the subject. I do not believe that the teacher of a basic course should seek to equip students to do original work, even assuming that an immersion in history would do this. Nor do I think a basic course is the place for instructors to engage in extensive original research by thinking out loud from scratch. While students should be encouraged to think for themselves with respect to problems they encounter in the course, we should not expect professional contributions and should be wary of dilettantism.

Professor Christie's goal statements lead inevitably to his choice of approach. A basic course might be organized around traditional problems, or around "schools" of thought,⁹ or around several texts of "great thinkers." Christie adopts an "historical" approach, but I am skeptical that jurisprudence is suited to this treatment. Jurisprudential theorizing, particularly about the nature of law, can be "epoch bound" and therefore irrelevant in important ways to later periods since the phenomena that are the objects of this theorizing may change, even fundamentally, from epoch to epoch. Thus, legal forms of social organization in Aristotle's day (and even in Austin's day) were not the same as those of the present day. Accordingly, what Aristotle and Austin said when they set out to characterize the nature of law (assuming they got things right for their periods) is necessarily different from what a legal theorist should say about

istration fail to take fundamental rights seriously); Greenawalt, *A Contextual Approach to Disobedience*, 70 COLUM. L. REV. 48 (1970) (recent disobedience to various American laws as stimulus); Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 CORNELL L. REV. 1 (1974) (excesses of civil rights movements and of campus disruptions on one hand and "Watergate" on other as stimuli); Wasserstrom, *On the Morality of War: A Preliminary Inquiry*, 21 STAN. L. REV. 1627 (1969) (Vietnam War).

9. I once criticized the "schools" approach at some length. See Summers, *Book Review*, 2 OTTAWA L. REV. 249 (1967).

Western legal systems today.¹⁰ Although we may still profitably read Aristotle on the philosophical problem of perception, the same is far less true of Aristotle on the nature of law. Furthermore, even where the underlying jurisprudential phenomena are sufficiently similar from epoch to epoch for an historical approach to be possible, this alone cannot guarantee its fruitfulness. The various thinkers simply may not have had sufficiently common concerns through time. One may have dealt with problem *A*, another *M*, and a third *Z*. Or, although each addressed the same problem, their common efforts may not have been sufficiently detailed or may have been on quite different levels. Such discontinuities afflict most topics within jurisprudence at least until the time of Bentham and Austin at the end of the eighteenth century.

Analogously, jurisprudential issues worthy of consideration in a basic course may not have any significant past histories in the literature, let alone roots in antiquity. Indeed, some issues are only today being seen clearly. But the historically oriented compiler of basic course materials will be more or less inclined to omit or slight such problems. Professor Christie is no exception.¹¹

Above all, the historical origins of jurisprudential theories are generally irrelevant to their validity or soundness.¹² It is generally of no importance who said what, when, and for what historical reason. While the student might understand the intent and purport of a jurisprudential theory more fully if he also grasps its historical roots,¹³ genetic investigation of ideas is notoriously difficult and is often sheer guesswork. One finds few instances in Christie's book where historical antecedents significantly illuminate the theory under consideration. A week's immersion in the relations of medieval church and state, for example, would throw light on the interpretation of Aquinas, but there is little time for this in a law school jurisprudence course. A study of history can also enhance methodological sophistication, but as I said earlier, it cannot be a prime function of a jurisprudence course to equip ordinary law students to do origi-

10. Consider, for example, the "technique" element in law, which I discussed in a preliminary way in Summers, *The Technique Element in Law*, 59 CALIF. L. REV. 733 (1971). As late as Austin's time, two basic techniques of legal action, the administrative-regulatory technique and the distributive technique, were not yet significantly developed, let alone perceived as such.

11. Among the important problems that Christie neglects are modern theories of justice and utility as applied to the evaluation of laws and legal institutions, the interrelations between law and social change, the limits of law's efficacy, "process values," and the "technique element in law."

12. For an extraordinarily suggestive general discussion of the possible relationships between a philosophical discipline and its "historical" literature, see Williams, *Philosophy*, in GENERAL EDUCATION 160 (M. Yudkin ed. 1969).

13. Possible "roots" include the ideas of earlier thinkers, the general intellectual climate of the day, contemporary social events, and a thinker's own education and background.

nal work in the subject. And even if it were, the few capable of it could acquire the sophistication more readily in other ways.

Whatever approach is preferred, Christie's selections and format are subject to question. First, many would agree that jurisprudence really did not come of age in the English speaking world until Bentham and Austin. Not until Bentham did we get a systematic and purportedly comprehensive theory about how laws and legal systems should be qualitatively evaluated.¹⁴ And not until Austin did we get a detailed theory about what law is and how it differs from related social phenomena.¹⁵ Yet Christie devotes half his materials to periods prior to Bentham and Austin when the subject was in its infancy. Moreover, today a great many law students, prior to law school, have already studied most of these materials in courses on political theory and the like.

Second, to omit all works of Bentham in an historically oriented compilation, as Christie has, seems a sin. Bentham was the Aristotle of jurisprudence. He did more original¹⁶ work in the subject than any thinker working in the English language before or since.¹⁷ Christie's failure to include more twentieth-century work is also disappointing, especially when one reflects that half the book is devoted to materials written while jurisprudence was in its embryonic stage. He does, however, include a sprinkling of contemporary writings—nearly all on legal reasoning.¹⁸

Finally, like many before him, Christie implicitly invites students in the first several hundred pages to play the game of pigeonholing thinkers either into the "natural law school" or the "positivist" school. Students who take this seriously will, if they are perceptive, eventually see that these categories are not mutually exclusive and that they hide not one basic issue that supposedly divides all legal philosophers, but many different issues. The good students will see, too, that words such as "positivism" are used in many different senses, and they may well decide that a more particularized approach is preferable. But I fear that the average student may become preoccupied with pigeonholes rather than problems, with schools of

14. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1870).

15. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

16. I use "original" to include "blocking out" relatively new problems as well as providing new "solutions" and developing new methods.

17. Useful and readily accessible selections of Bentham's work may be gleaned from references in D. LYONS, *IN THE INTEREST OF THE GOVERNED* (1972), and from materials included in B. PAREKH, *BENTHAM'S POLITICAL THOUGHT* (1973).

18. And here, Christie would have done well to include selections from the important writings of Dworkin and Hughes, work that is almost certain to last beyond that of Roy L. Stone (from whose work there are extensive selections at pp. 1025-50). See, e.g., Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in *ESSAYS IN LEGAL PHILOSOPHY* 25-60 (R. Summers ed. 1968); Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411 (1968).

thought, rather than thought, with classifications of theories rather than theories and their merits.

My criticisms aside, Professor Christie's compilation is a welcome addition to available course materials. Historically minded instructors will find the book agreeable. My own skepticism might be influenced by my preference for an approach centering on jurisprudential problems, but the book provides a selection of materials that is adaptable, perhaps with appropriate supplements, to this and other approaches. And instructors of any bent will find the compilation a useful reference work.

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