write: "Upon returning after over thirty years to a fresh examination of the literature and sources of the law and practice of evidence, one finds that the most striking impression is one of continuity" (p. 457). This leads him to comment that while it is still true that international law lacks what might be described as an evidence act, it nevertheless possesses "a cumulation of practice, generally applied, [which] may well be invoked by a tribunal as reflecting the existence of a settled principle of law" (p. 458), to be viewed as amounting almost to a customary law of evidence. Despite this, Professor Sandifer would advocate a series of reforms, suggesting, for example, tighter time limits for the submission of evidence; adverse inference from non-production of evidence, with a concomitant obligation of full disclosure; the introduction of an agent whereby in specific cases the tribunal might itself seek out the evidence; a greater use of affidavits particularly with regard to primary evidence should be introduced, associated with a means to compel the attendance of witnesses and punish for perjury, and the like. All these proposals would have the effect of bringing the practice of international tribunals closer to that of municipal courts, while still recognizing the difference in character of the tribunals, the parties appearing before them and the type of issues they are called upon to hear, all of which requires international judges to continue to possess more discretion as to evidence than is perhaps necessary in the case of national judges. The significance of this may be seen in connection with the World Court, in which one finds "the refinement of a lean and pragmatic system of evidence, providing flexibility in application and assuring maximum freedom of action" (p. 465). On the whole, one is inclined to agree with Professor Sandifer that "international tribunals have exercised a free and, in general, intelligent discrimination in the adoption of rules best fitted to the needs of the situation confronting them, without any special regard to the system of law from which they may have come. . . . The record is an encouraging one of evolutionary growth of a generally coherent and harmonious pattern of law and practice" (pp. 470-1).

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JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW. By Edgar Bodenheimer. Cambridge: Harvard University Press. 1974. Pp. xxi and 463. $15.00 U.S.

Rather than attempt a statement of the entire content of Professor Bodenheimer's thinking on a subject so rife with debate as the philosophy and method of the law, this review will endeavour to provide a perspective on this book which was first published in 1940.

The 1940 book, *Jurisprudence*, by Professor Bodenheimer, was hailed as an impressive accomplishment—the work of a young scholar of German origin who had received his American law degree only three years before. Professor Harry Jones, who commented on the 1962 edition, noted that, "... inevitably the 1940 book had some of the characteristics of a tract for the tragic times in which it was written".[1]

[1] Jones, (1962) 8 Utah L. Rev. 281 at 281.

In the Preface to the 1940 book, Professor Bodenheimer characterized the period during which he was writing as one of challenge and attack upon the fundamental values of civilization. He went on to state: "Today, when law as an essential instrument of civilization is in more than 'double jeopardy', we cannot afford the luxury of a positivistic jurisprudence . . . If, as the positivists do, we consider law merely as a command of the state issued in the form of a statute, this [Hitler's] Germany would be a law state *par excellence.*"[2]

In one sence then, the author's first publication of this book reflected his view of the world, a landscape shattered by the breakdown and restructuring of German society, a time during which much more than law was in "double jeopardy".

Unfortunately, the break with tradition and the social remodelling consummated during the empire of National Socialist terror in Germany is not a process that was either then new, nor now a part of yesterday. Just as the rulers of new nations have to break tribal loyalties to established power, so also the National Socialists of Germany had to break the traditional, anti-liberal loyalties for region, religion, family and corporation in order to attain their goals of total power. As Ralph Dahrendorf has put it, "Hitler needed modernity, little as he liked it".[3]

Dahrendorf, in his work *Society and Democracy in Germany*,[4] reminds us of Hitler's speech of February 1, 1933, apparently praising tradition:

> Beginning with the family, by way of all notions of honour and faith, people and fatherland, culture and economy up to the eternal foundation of our morals and our beliefs, nothing is spared by this purely negative, universally destructive idea. Fourteen years of Marxism have ruined Germany . . . [The national government] is going to conserve and defend the foundations on which the strength of our nation is based. It will take Christianity as the basis of our entire morality, and the family as the seed cell of the entire body of our people and state, into its safe protection.[5]

Of course, as we now know only too well, on that very day, Hitler was directing himself to the goal which he attributed to the parties of the Weimar Republic—the destruction of the traditional basis of German society, in every way, in all sphered.

As Dahrendorf has argued, the beginning of this process was the deliberately pursued *Gleichschaltung*, co-ordination.

> The process of co-ordination soon and effectively put the Weimar Constitution *de facto* out of force and abolished the rights of parliament. This was not by itself a process of very great social consequence; but other measures were to follow in the first year of Nazi rule. The restrictions and eventually abolition of the rights of the *Lander*, for example, attacked one of the characteristics traditions—and faultings—or German social structure. The blend of regional loyalty and national unity that characterized Imperial Germany and the Weimar Republic may not have been very effective politically, but it symbolized a mixture of modern requirements and binding traditions that nobody had dared touch before, while it took Hitler only three months to dissolve the mixture at the expense of traditional loyalties.[6]

During the days of the Weimar Republic the mechanisms of public bureaucracy, including the courts, had not been sources of modernity or liberalism. Dahrendorf shares the view that this was due to a considerable

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[2] *Id.*

[3] Dahrendorf, *Society and Democracy in Germany* (1969) at 383.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 384.

extent to the traditional character of these institutions which the Weimar parties again did not have the courage to touch.[7]

But Hitler was not hesitant. In the first months of his rule he enacted the laws and created the institutions necessary to co-ordinate the bureaucracy and the legal system thus subjecting them to his control. The interventions in traditional autonomies, customs and habits were things so profound that they altered these institutions beyond recognition.

Phase one of "The Final Solution" had begun. The subsequent legislation that Hitler's government began to enact endorsed what violence had already accomplished to a considerable extent—the *legalized* elimination of the Jew from Government and public life.[8]

Such were the things that occurred in Nazi Germany, and much more, prior to the first publication of this book. Such were the things which must have been in the catalogue of Professor Bodenheimer's thinking when he first wrote the words, "If, as the positivists do, we consider law merely as a command of the state issued in the form of a statute, this [Hitler's] Germany would be a law state *par excellence*".[9]

Unfortunately, Professor Bodenheimer does not make it clear whether this, in fact, is what he is referring to. But the conclusion is begged by the stated purpose of the 1940 book which was, " . . . to give aid to the student of law and politics who is interested in the general aspects of the law as an instrument of social policy".[10]

It is interesting to note that the author omitted from the Preface to the 1962 edition the anti-positivistic sentiment which previously led him to characterize Hitler's Germany as a law state *par excellence*—particularly when the impression is gained that he shares the natural law philosophy. Apart from thinking that it would be intriguing to believe that theories of and about law and jurisprudence had an impact on Hitler's *Mein Kampf*, it is attractive to speculate whether Professor Bodenheimer's views on the legalized Nazi regime have changed since the publication of *The Concept of Law* by H.L.A. Hart as well as the Hart-Fuller debate, both of which occurred between the 1940 book and the 1962 edition.[11]

The views of Professors Hart and Fuller did receive some attention in the 1962 edition. The articles containing their debate were referred to in footnotes at pages 191, 226, 248 and 328. *The Concept of Law* was referred to in a footnote at page 191.

In this respect, the 1962 edition has been vastly improved upon by the 1974 edition. First, Hart and Fuller appear in many more footnotes. Second, the author acknowledges that although a rule may be said to be a valid rule of law it is not conclusive of the final moral question: "Ought this rule of law to be obeyed?"

Insofar as the actual content of this book is concerned, the format and subject headings have remained essentially the same as the 1962 edition.

Part I titled "Historical Introduction to the Philosophy of Law", contains a chronological account of jurisprudential thought from the early Greeks to modern times and, as Professor Jones stated in 1962, it provides us with a, ".

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[7] *Id.*

[8] For a stunning account of this legislation see, Davidowicz, *The War Against the Jews 1933-1945* (1975) at 48-69.

[9] *Supra*, n. 2.

[10] Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (1962) at vii.

[11] Hart, *The Concept of Law* (1961); Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv. L. Rev. 593; Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart". *Id.* at 630.

. . contour map of the province of jurisprudence".[12] This section has been updated to include the recent developments in analytic jurisprudence and the philosophy of values.

The major part of the book, Part II, titled "The Nature and Functions of the Law", contains the author's philosophical analysis of the tasks, goals and values served by the legal order. This section, which also comprised the central part of the 1962 edition, has been largely rewritten now containing more extensive consideration of the psychological roots of the law, the conceptual scope and substantive components of the notion of justice, and the criteria for validity of the law.

The revision to the third and final part, "The Sources and Techniques of the Law" are less comprehensive than those to Part II. The section which appeared in Chapter 17 concerned with law and logical method has been replaced by two new sections, one on analytical reasoning, the other on dialectical reasoning.

In the Preface to the 1962 edition, the author tells us that the historical introduction is largely descriptive—and indeed, it is very descriptive. However, it should be noted that Professor Bodenheimer felt that in as much as the use of the book for instructional purposes was included within the objectives for which it was published, an evaluation of the contributions of the great legal thinkers was left to be considered in classroom discussion.[13]

The treatment of the substantive problems of legal theory in the second and third parts is based on philosophical and methodological assumptions which are implicit in the author's approach to jurisprudence. The following statements which appeared in the 1962 edition also appear in the 1974 edition; so it may be safely taken that these assumptions remain now as then.

> Perhaps the most basic one among these assumptions is the firm conviction that no jurisprudential treatise should bypass or ignore the burning questions connected with the achievement of justice in human relations, notwithstanding the difficulties encountered in any attempt to apply objective criteria in dealing with this subject. It is submitted that the theory and philosophy of the law must remain sterile and arid if they fail to pay attention to the human values if the function of the law to promote.[14]

Part II of the book, "The Nature and Functions of the Law" contains the author's analysis of what are to him the essential ingredients of the law—order and justice—and is the least sketchy of the three parts. The argument is made that a legal system aimed at justice will attempt to create a workable synthesis and reconciliation of freedom, equality and security.[15]

Professor Bodenheimer reaches the conclusion that every social order faces the task of allocating rights, defining their limits and harmonizing them with other potentially conflicting rights.[16]

> The term 'common good' is a useful conceptual tool for designating the outer limits which must not be transgressed in the allocation and exercise of individual rights lest the commonwealth suffer serious harm. It is one of the chief concerns of justice to create a proper balance between individual rights and the good of the community. In particular reference to freedom, equality, and security, . . . the individual's demands for their realization are rooted in deep-seated needs and inclinations of the human personality, while at the same time there exists a public interest in certain limitations on the scope of

[12] *Supra*, n. 1.

[13] *Supra*, n. 10 at vii-viii.

[14] Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (1974) at vii.

[15] *Id.* at 241.

[16] *Id.* at 242.

these values. *Justice requires, under these circumstances, that freedom, equality, and security be accorded to human beings to the greatest extent consistent with the common good.*[17]

In Chapter 12, the author sets out to provide us with a perspective on law as a synthesis of order and justice which raises the problem of legal statics and dynamics. Insofar as the law strives to promote the social value of order, it is bound by continuity and stability. "Order in social life", he writes, "is concerned with the establishment of patterns for human action and conduct, and such patterns cannot be accomplished without simulating the behaviour of today to that of yesterday. If the law did not act as a break on incessant and indiscriminate change, chaos and confusion would be the result, since nobody could anticipate the tidings and events of the next day."[18]

Professor Bodenheimer's reworking of the views of jurisprudential writers on justice, as well as his own theory (essentially an egalitarian one) is a commendable job of informing us what others have written. Consequently, the reader is abandoned to the effigies of history which parade before him like the images of Piccaso. Maybe what the author has established in these pages is that Edmund Cahn was right, when he said: "Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative, and contemplation bakes no loaves."[19]

Whether that is bad for the country is conjectural for, as Edgar and Jean Cahn have said, we do not know—we never will know, perhaps—what justice is in the sence of some platonic ideal. "Rather," they have argued, "we begin by responding to specific injustices, individual injustices, group injustices, entrenched patterns of injustice. And step by step we move toward progressive approximations of an ideal that we will never reach— and probably never even glimpse its full dimension, except perhaps in the dimmest outline."[20]

Maybe (and what a dreadful thought this is) justice is nothing more or less than the rare good deeds of individuals who, from time to time, are clear in their understanding of what is right and what is wrong. Maybe Georges Clemenceau put it best when summing up his political creed: "I believe in pity, in the generous outburst of the spirit, in the thirst for justice in the hearts of isolated men."[21]

If this is the best we can do, if this is the culmination of all our strivings, then it is clear that we are not free to rest on the seventh day.

—A. CLAYTON RICE*

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[17] *Id.*

[18] *Id.* at 254.

[19] Cahn, *The Sense of Injustice* (1949) at 13.

[20] Cahn and Cahn, "Notes for an Address Before the National Conference on Law and Poverty" (1971) at 21. (unpublished).

[21] Bendiner, *A Time for Angels: The Tragicomic History of the League of Nations* (1975) at 40.

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