

## BOOK REVIEWS

*An Introduction to the Philosophy of Law.* By Roscoe Pound. New Haven, Yale University Press; London, Humphrey Milford, Oxford University Press, 1922. pp. 307.

This volume contains a series of six lectures delivered on the Storrs foundation at the Yale Law School and is a worthy addition to the many series previously delivered on this foundation by leaders of juristic thought. Dean Pound first defines for us the Function of Legal Philosophy; then follow chapters on the End of Law, the Application of Law, "Liability," Property, and Contract.

Perhaps the chief criticism to which philosophers of the past have been subject is that they have presented their very finite wisdom as if it were infinite, that in a world of constant evolutionary adjustment to an ever changing environment they have claimed a universal and eternal validity for their rules and explanations. They have sought to give us an "ultimate solving idea," "a moral and legal and political chart for all time," "a perfect law which should stand fast forever." Dean Pound says that we are not to "scoff at this ambitious aim"; but this means only that criticism should be polite and that the critic should first demolish his own glass house. The following quotation indicates the view of the author: "philosophies of law have been attempts to give a rational account of the law of the time and place, or attempts to formulate a general theory of the legal order to meet the needs of some given period of legal development, or attempts to state the results of the two former attempts universally and to make them all-sufficient for law everywhere and for all time. Historians of the philosophy of law have fixed their eyes chiefly on the third. But this is the least valuable part of legal philosophy."

He proceeds to state for us the contribution to legal philosophy of the Greeks, the Romans, the Middle Ages, the age of colonization, and the 19th century, there being alternation between periods of growth, when theories of "natural law" have prevailed, and periods of consolidation or reaction, when emphasis was put upon authority and the law was regarded as complete and in need of nothing that could not be supplied by history and analysis.

Philosophies, theories of law and its purpose, grow out of the particular needs and activities of men at any given time and place. Thus, primitive theory is that the end of law is the keeping of the peace. The Greeks, Romans, and the Middle Ages regarded it as the maintenance of the social *status quo*. In the age of discovery and expansion it was the maximum of liberty. Since 1900 it has been the maximum satisfaction of wants and the relative valuation of these. We now distinguish between factual wants and legal rights and privileges, arriving at the latter by a conscious compromise. The question now is, how are we to weigh conflicting interests and effect the compromise. There is no definite answer ready to be given.

The lecture on the Application of Law is a discussion of the methods by which the courts have tried to apply rules of law to cases so as to square with the *mores*, the current notions of justice and morality. The author stresses the necessity of rules and the equal necessity of disregarding them on occasion. He argues that the public must be educated up to a proper conception of the function of the judge as that of logical interpreter in the main, but also and in a large degree that of administrator and legislator as well. The dogma of separation of powers cannot control; it results merely in a division of labor. Especially is this true in periods of growth like the present. The judge can no longer merely apply a "rule." In many fields, cases are unique and cannot be decided merely by a rule. They have to be decided by application of a "standard"—as,

for example, that of the reasonably prudent man—and standards change much faster than rules. He is a wise judge who can maintain the proper balance between “rule” and “discretion.” As justice becomes “individualized,” rules become undermined and uncertain, respect for law declines, and a demand begins to be heard for restatement and simplification.

In the lecture on “Liability,” that term is chosen to express the relation of right and duty between two persons, the discussion being limited in the main to the field of torts. The most striking part of this discussion lies in the assertion—surely correct—that to base liability for negligence upon “fault,” “blame-worthiness,” or “culpability” is to base it upon a “dogmatic fiction.” “Is an act blameworthy because the actor has a slow reaction time or was born impulsive or is naturally timid or is easily ‘rattled’ and hence in an emergency does not come up to the standard of what a reasonably prudent man would do in such an emergency, as applied *ex post facto* by twelve average men in the jury box?” “But what the law is really regarding is not his culpable exercise of his will but the danger to the general security if he and his fellows act affirmatively without coming up to the standard imposed to maintain that security.” This is sound and true, but it cuts deeper than may appear; it affords the explanation of morality as well as of negligence. “Fault” ceases to be a “dogmatic fiction” as soon as we realize that it is merely a failure to come up to a standard and that any kind of immorality is the same. Our standards of morality are based upon the experience of the race and are so strongly believed to be necessary to survival that those who cannot live up to them are penalized, regarded with dislike, and gradually edged off the earth.

It would help all of our lawyers, radical and conservative alike, if they would read and could understand Dean Pound’s discussion of property and contract. They, too, are merely evolutionary adjustments through the long centuries. His last word on property is as follows:

“We may believe that the law of property is a wise bit of social engineering in the world as we know it, and that we satisfy more human wants, secure more interests, with a sacrifice of less thereby than by anything we are likely to devise—we may believe this without holding that private property is eternally and absolutely necessary and that human society may not expect in some civilization, which we cannot forecast, to achieve something different and something better.”

The doctrine of consideration is treated with an intelligent insight that is indeed rare if not unequalled. He comes to about the same conclusion as did Professor Lorenzen with respect to the doctrine of *causa* in the Roman law. *Causa and Consideration in the Law of Contracts* (1919) 28 YALE LAW JOURNAL, 621. “Projects for ‘restatement of law’ are in the air. But a restatement of what has never been stated is an impossibility and as yet there is no authoritative statement of what the law of consideration is.” It is true that past definitions and historical explanations and philosophical theories of consideration are inadequate for the law as it is being applied to-day. But no worthy “restatement” will ever merely copy past “statements.” It must, instead, bring the statements up even with the applications. Dean Pound’s lecture will be very helpful in doing this.

Of course, philosophical theories greatly influence the actual decisions; but they do this only because they never precede but are based upon decisions. They are the afterthoughts, frequently lame and halting ones, following upon mass movements of many individuals in their conscious and unconscious adjustment to conditions about them. The courts are reacting to the feelings and opinions of the community and are building a law of consideration. The process is continuous and never ending. A new “philosophical theory of enforcement of promises” will help, if it truly explains what the courts have already done and accurately predicts that which they are going to do.

Dean Pound's lectures are not easy reading; but those who know enough to be able to read with understanding will be rewarded with many new and enlightening ideas. Few other jurists of to-day are so broadly familiar with past tradition as he or so thoroughly emancipated from its shackles.

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*The Supreme Court in United States History.* By Charles Warren. In Three Volumes. Boston, Little, Brown & Company, 1922. Vol. I, pp. xvi, 540; Vol. II, 1-550; Vol. III, 1-532.

An adequate history of the Supreme Court has been long awaited. Biographies of members of the Court have multiplied—some notable biographies. Two attempts have been made to trace the history of the Court through the lives of the Chief Justices. Laborious treatises have been written on the law as expounded by the Court. Monographs without number have analyzed the decisions of the Court. A socialist writer has recorded his impressions of the interests which seem to him to have affected the utterances of the federal judges. But no attempt has been made on the scale of the work before us to treat the Supreme Court as a continuous institution whose history is inseparably intertwined with the general development of American society. In his preface and introductory chapter, however, the author of these three volumes carefully delimits his subject and warns his readers not to demand more than he has to give. And it would be a surly critic indeed who would censure him for not attempting what he has expressly refrained from doing. Surely an author may choose his own task!

The reviewer feels bound, nevertheless, to record his disappointment that only two chapters out of the thirty-eight are devoted to the history of the Court within the last thirty years—in many respects the most important epoch since Chief Justice Marshall laid the foundations of American constitutional law. If the author felt any distrust of his own fitness for writing the history of this highly controversial period, the reviewer would like to demur. In his opinion no one could have entered upon this last phase with surer step and greater poise than the author of these volumes.

Another disappointment is in store for some readers of this work. This is not a history of American constitutional law as expounded by the federal judiciary, but a history of the Supreme Court *in* American history. It is an attempt to correlate the work of the Court at different epochs with the general history of the country—"an attempt to revivify the important cases decided by the Court and to picture the Court itself from year to year in its contemporary setting." It has seemed to the author perhaps just as important—certainly just as interesting—to know what people thought and felt about the decisions of the Court, as to ascertain the legal grounds for those decisions. Unquestionably it is highly desirable to know how the public reacted to the decisions of the Court on controverted questions. The revulsion of public opinion in the North from the *Dred Scott* decision (1856, U. S.) 19 How. 393, is a circumstance of great importance in ante-bellum political history, irrespective of the effect of the decision upon the future of slavery in the territories. Or, to take a more modern instance, the decision of the court in *Lockner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, has more than a legal interest to students of American politics. The protest of labor has had direct political consequences and the animus of labor may quite conceivably have reacted in subtle ways upon the judiciary, as well as upon other organs of the government.