

BOOK REVIEWS

JUSTICE ACCORDING TO LAW. By Roscoe Pound. Yale University Press, 1951. Pp. 98.

In this slim volume, containing 91 pages of text, Dean Pound again summarizes many of his jurisprudential views, which have become so famous and influential throughout the world. The three parts were delivered as lectures at Westminster College in the series which was brought to public attention by Winston Churchill's momentous pronouncement in 1946, after President Truman had introduced him. The book is, therefore, intended primarily for lay readers. It may be doubted whether the lectures were understood by Dean Pound's listeners or whether the book will serve its intended purpose; for the text is loaded with unexplained technical references and allusions to facts of legal history, such as the layman can hardly be expected to comprehend. Its organization, moreover, is complex and not easy to follow. For the lawyer, however, "the impression of the purposes, method, and problems of the administration of justice according to law" which the author has "sought to impart"¹ is significant and worth the effort of close reading; for here are distilled the thoughts, "derived from 60 years of practice and teaching of law, . . . unburdened with . . . accumulated detailed information"—the fruit of a distinguished, scholarly career.

Across these pages march many of the Poundian categories, classifications, insights and attitudes which have become familiar to readers of the author's previous writings. Philosophical jurists, metaphysical jurisprudence, 19th-century historical jurists, neo-Hegelians, Comptian positivism, neo-realists and other categories of individuals and of thought are mentioned. Numerous precise classifications appear. "Right as a noun has five meanings. Law is used in at least five." "Morals has two." (P. 2) "There are four theoretical possibilities" with relation to the place of law in social control. (P. 32) "Three things have operated" to make the question "What is law?" a difficult one. One is the need of balance between rule and discretion. "Another is that there are at least four points of view from which law in the sense of a body of authoritative precepts may be looked at. . . ." "A Third is that three quite different things have gone by the name of law as used by lawyers. . . ." (P. 43) "Rules, principles, precepts defining legal concepts and precepts prescribing standards" (P. 56) make up the total body of authoritative precepts. In the application of standards and choice of competing concepts and principles, "a received picture of a pioneer, rural, agricultural society" has been yielding to "a picture of the urban, industrial society of today." (Pp. 55-56) The "taught tradition of experience developed by reason and reason tested by experience" is the essence of the common law technique. (P. 60) Unnamed individuals "in our law schools today . . . advocate a complete fusion of legislative, executive and judicial power in administrative boards

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and bureaus and agencies," (P. 79) even "administrative absolutism." (Pp. 81-83) Contemporary society is characterized by "new expectations . . . which bring about new conflicts." (P. 17) An example is the claim advanced by "students who belong to racial groups" in "one of the great universities of the land," who "assert what they consider a reasonable expectation of being chosen by socially prominent societies" and have generated "a heated controversy" with those who assert the "claim to choose agreeable associates to live with them." (Pp. 17-18)

Dean Pound's book starts with a discussion of the meaning of justice in the various senses of the word. The principal conflict of meaning with which the text deals is that between "the actual social order and the normal expectations to which it gives rise . . . as the final determinative of rights" and, by contrast, ideals which serve as determinants regardless of previous legal acceptance, such as those of liberty and equality. (P. 5) "On the one hand, justice is thought of as respect for the expectations involved in civilized life as we know it in the time and place. On the other hand, it may be thought of as respect for the expectations involved in life in a society in which every human being may live a full and equal social and economic existence." (P. 6) The former is denominated, in Aristotelian terms, "commutative justice"; the latter is known as "distributive justice." The former should be the guide for the courts, with flexibility provided by the opportunity to use discretion in applying standards; the latter is the business of legislatures. (P. 9) Confusion between them has arisen in recent times, according to Dean Pound; for courts have been urged to distort their function of applying principles of commutative justice so as to bring about distributive justice—*e.g.*, by placing the burden of loss in various situations on persons most able to bear it, rather than on those responsible. To some extent the courts have responded. This process in the example given leads, however, into a morass when business enterprise is involved; for "the bureau organization of the service state today" manipulates price, rate, and other controls in such a manner as to render the actual economic outcome of a particular judicially-devised loss distribution highly doubtful. (Pp. 12-13) In any event there are many situations where no ideal "guide to solution" of particular conflicts is possible because claimants of equal standing advance competing demands. At least in such circumstances, "we must have positive law or go back to private war." (Pp. 15-16)

Dean Pound, however, does not surrender to cynicism because ideals cannot solve all problems. He expresses his dislike for surrender to any "give-it-up philosophy." (P. 23) If it is not possible to rely in the first instance or sweepingly on ideal justice in determining legal rights and duties, it is possible to continue, as law has all along, to "adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste." (P. 29) Such a process does not ignore or reject ideals, but seeks rather to realize existent ideals to the maximum extent. It has "taught

us how to go far toward achieving a practical task of enabling men to live together in politically organized communities in civilized society." (P. 29) Thus the author asserts the pragmatic philosophy which, as respects operations rather than aims, unites men of differing ideals and purposes in a continuing order and, in the process, develops the aim of maximum satisfaction of human wants as a purpose transcending others.

Turning to the meaning of law, as distinguished from justice which is the end of law, Dean Pound deals initially with the "body of authoritative grounds of our guides to decision." (P. 32) Law in this sense may be viewed from the points of view of the lawmaker, of the individual subject to law, of the judge called upon to decide a controversy, and of the counsellor or legal adviser. These four standpoints "can be unified . . . from the standpoint of the judge"; (Pp. 43-45) for judicial decisions serve to define legislative commands, to guide individual conduct, and to afford a basis for the counsellor's predictions. Nevertheless, the law behind judicial decisions "is something actual"; it is not "a pretense cloaking what is done by officials." (P. 39) Here, of course, Dean Pound does battle with those who assert that law is simply actual decisions in particular cases, influenced largely by judicial background and temperament. He points to an example of agreement among judges despite polar differences of experience and personality. (Pp. 37-39) The true conception of law embraces legal precepts, the technique of developing and applying them, and the "received, authoritative ideals" which guide judicial choices when new situations must be dealt with. (Pp. 50-61) To the "self-styled realists" in law who, like those in art, emphasize what is ugly because of fondness for it, (P. 90) Dean Pound concedes only that emphasis upon the "personal, subjective, arbitrary element" in adjudication is "not without some warrant in what has been happening recently in a few courts"² and that "we have always known that the judicial process does not at all times and in all places conform absolutely and in all respects to our ideal of it." (P. 91)

In the concluding part of the book Dean Pound, dealing with judicial justice, pays his respects once more to its antithesis, "administrative absolutism." (P. 73) He rejects as illusory six alleged checks upon the administrative process which, operating with "a complete fusion of legislative, executive and judicial power in administrative boards and bureaus and agencies," is not subject to the "numerous and effective checks" that inhere in "judicial justice." (P. 79) Dean Pound points once more to "certain general and persistent tendencies of administrative agencies" which he has identified as dangerous in previous writings.³ Here they are four, in contrast to larger numbers sometimes specified previously: the "tendency to decide without a hearing"; the "tendency to make determinations on the basis of consultations with witnesses in private or of reports not divulged,

2. P. 36. Dean Pound does not exclude the Supreme Court of the United States from among the courts that might be considered as falling within this stricture.

3. *Report of the Special Committee on Administrative Law*, 63 A.B.A. REP. 331, 346-351 (1938); POUND, *ADMINISTRATIVE LAW* 67-74 (1942); Pound, *For the "Minority Report,"* 27 A.B.A.J. 664 (1941).

giving the party affected no opportunity to refute or explain"; the "tendency to make determinations injuriously affecting individual rights without a basis in evidence of rational probative force"; and the tendency "to set up and give effect to policies beyond or even at variance with the statutes or the general law governing . . . the administrative agency."

Dean Pound does himself no credit by repeating these generalizations which at most reflect occasional abuses in a vast aggregate of administrative proceedings he has never made a detailed effort to appraise.⁴ However the Dean, opposed as he is to "the service state as an omnicompetent agency of perfecting society," (P. 83) recognizes that there was need for the development of administrative agencies and of resort to official discretion as a reaction from the "completeness with which executive action was tied down by legal liability and judicial review" in the nineteenth century and from the tendency "to commit to courts matters of administration which were properly executive." (Pp. 71-72) He is "not preaching against administrative agencies in themselves."⁵ His plea comes down to one for adequate review of administrative action by the judiciary. In pointing out the merits of "judicial justice" he idealizes it. "Mechanical jurisprudence," which once marred the work of the courts, "has disappeared." (P. 85) Judicial justice "provides for certainty" by "logical development and systematic exposition of authoritative materials"; it "provides for growth by permitting a scientific testing" of received materials in new applications. (Pp. 87-88) "Judges will on the whole uphold the law against excitement and clamor." (P. 89) The last word in applying the law should go to them.

What shall we say of this summary of the study and thought of a brilliant and versatile scholar? Not, surely, that it contains the imposing philosophy that might have been based upon a foundation so broad and so filled with enduring substance. Here, for example, is little trace of the results of the Cleveland Crime Survey or of the author's inquiries into judicial administration.⁶ The wisdom and the insights are marred by strong prejudices and inadequately based generalizations. The conception of law which is adopted seems, moreover, to be inadequate for an age in which legislation plays so large a role in legal development; for Dean Pound, while recognizing the importance of legislation, considers it an element in the scheme of social control bearing on law and supplying some of its precepts, but scarcely forming part of the legal system. Hence the forces which work through legislation and the interaction between legislative and judicial development of law are undiscussed. But Dean Pound's

4. See Jaffe, *Investive and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1232-1236 (1939); Davis, *Dean Pound and Administrative Law*, 42 COL. L. REV. 89 (1942). Both Jaffe and Davis have demolished much of the meager evidence adduced in support of the generalizations. See further Bailey, *Dean Pound and Administrative Law—Another View*, 42 COL. L. REV. 781 (1942); Davis, *Dean Pound's Errors about Administrative Agencies*, 42 COL. L. REV. 804 (1942).

5. P. 78. The author's somewhat divergent views concerning administrative agencies reflect an old tendency to self-contradiction which Jerome Frank once tellingly exposed. FRANK, *IF MEN WERE ANGELS* 332-343 (1942).

6. See POUND, *ORGANIZATION OF COURTS* (1940).

contributions are here too. The analyses and classifications he has given are of enduring value. More important, his pragmatic conception of the operation and purpose of law continues to possess major significance. In keeping with the typical American approach to social problems, it needs reassertion in a time when the authoritarian challenge to it, at home and abroad, displays new strength. Finally, there is need in an age of cynicism for Dean Pound's unabated insistence upon the importance of ideals and his assertion that "striving for the ideal . . . goes far to realize the ideal." (P. 91) There is need, too, in a time when harassed officials assert unlimited executive power over the property and lives of individuals, in emergencies determined by the Chief Executive, for reiteration of the philosophy that law is not simply administrative efficiency and convenience. Attention to the fundamentals of a system of law, such as Dean Pound insists upon demanding of the legal profession and of the public, continues to be indispensable.

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BOOKS NOTED

THE SPIRIT OF LIBERTY. Papers and addresses of Learned Hand, collected, and with an Introduction and Notes by Irving Dilliard. New York: Alfred A. Knopf, 1952. Pp. 262. \$3.50.

In truth, this is Learned Hand's book, and Mr. Dilliard, who compiled it, would have no objection to this observation. The very general concession that as a man of letters, wisdom and insight, Learned Hand has few peers, magnifies one's amazement to find that the records of the Library of Congress reveal no book authored by him. Mr. Dilliard's introduction indicates that this fact motivated the publication of the *Spirit of Liberty*, which is a collection of speeches, letters and articles written by Judge Hand over a period of some fifty-eight years. The articles cover a wide range of subjects including democracy, justice, tolerance, liberty, public morals and ultimate values; and some are commentaries on such men as Brandeis, Cardozo, Hughes, Holmes and Stone. The variety of occasions which prompted the writing of these thirty-four articles, and the span of years between the preparation of the first and last article endow the collection with a peculiar quality for reflecting a more or less complete picture of the author. Any part of the picture of the man, Learned Hand, left unmirrored in his own writings, Mr. Dilliard has endeavored to supply in his Introduction and Notes.

The last of the pieces appearing in the book is a speech delivered at the annual dinner of the Harvard Club of New York on January 18, 1952. Of this speech Judge Hand wrote to Mr. Dilliard: "There is only this to say about this speech. It does more completely represent my views on ultimate values than anything else I have written—at least I think so—and it is probably the last time I shall put them out with the same detail." For the reading of this article alone, the book could be highly recommended.

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EQUALITY BY STATUTE—LEGAL CONTROLS OVER GROUP DISCRIMINATION.

By Morroe Berger, with a foreword by Robert M. MacIver. New York: Columbia University Press, 1952. Pp. 238. \$3.25.

Equality by Statute traces the legal status and the welfare of minority groups in this country since 1865. The author's thesis is that the argument, "you can't legislate against prejudice," is met and overcome by the fact that increasing numbers of states are passing laws on the subject, and that the legislation is effecting a curtailment of discriminatory practices. Mr. Berger traces the background and development of these laws, evaluates the Supreme Court's interpretations of them and seeks to set forth their impact by factual data comparing the situations before and after the laws' adoption. The latter is accomplished by a factual demonstration of the efficacy of the New York State Law Against Discrimination, the first law of its kind to be passed in this country.

The author bolsters his thesis that discrimination can be legislated against by this analysis: that although laws cannot directly affect one's thoughts and beliefs, they can affect his acts, and that through a continual course of legally controlled conduct, new beliefs are likely to take shape. The analysis is an interesting one.

GUILTY OR NOT GUILTY. By Francis X. Busch. New York: The Bobbs-Merrill Co., 1952. Pp. 287. \$3.50.

PRISONERS AT THE BAR. By Francis X. Busch. New York: The Bobbs-Merrill Co., 1952. Pp. 288. \$3.50.

FAIR TRIAL. By Richard B. Morris. New York: Alfred A. Knopf, Inc., 1952. Pp. 494. \$5.00.

Here are three books which might well be captioned "Light Reading" for they are designed to entertain. The first two, *Guilty or Not Guilty* and *Prisoners at the Bar*, each relate in condensed form the proceedings in four famous criminal trials. The background and evidence are set forth in text form to enhance their reading quality, with occasional direct quotations from the record where Mr. Busch, who is himself a distinguished trial lawyer, deems it appropriate to capture for his readers the actual force and mood of the proceedings. For instance, in describing the trial of William Haywood for the murder of Governor Steunenberg, Mr. Busch has quoted at length Clarence Darrow's closing address to the jury which resulted in Haywood's acquittal. These two books are designed for the reading enjoyment of laymen and lawyers alike.

In *Fair Trial* Mr. Morris reproduces the drama of fourteen historic American criminal trials, the earliest being that of Anne Hutchinson, the most recent the trial of Alger Hiss. With more emphasis placed on the actual testimony as transcribed at the trials, the author unfolds for his reader the development of the concept of "fair trial" in America with its concomitant procedural and substantive safeguards. This pattern more effectively flavors the work to the professional taste.