

## BOOK REVIEWS

THE TASK OF LAW. By Roscoe Pound. Franklin and Marshall College, Lancaster, Pa., 1944. Pp. 94. Price: \$1.50.

This slender volume, comprising the North Law Lectures delivered at Franklin and Marshall in 1941, epitomizes the contributions of Professor Roscoe Pound to jurisprudence and the philosophy of law. The reader who is even moderately familiar with Dean Pound's books and articles published over a period of some four decades will recognize here all of the major ideas which he has expounded or advocated. To the reader who is unfamiliar with Dean Pound's previous work, this compressed treatment may seem somewhat didactic and abstract. The limitations of time and space imposed upon the author did not permit him to vivify his broad conceptions with numerous concrete illustrations. For these the reader will need to go to his previous writings, to which, unfortunately for that purpose, no references are here given. The present review will endeavor to indicate some of these major contributions, and some additions to them which appear in the present volume.

The urge to probe beneath the surface aspects of a politically organized society has moved two different classes of men to produce writings on jurisprudence, or the philosophy of law. One class consists of those who moved from general theories about the universe, the realm of philosophical speculation, into the realm of law and politics. The other consists of those who, engaged originally and primarily in the study and practical work of law and politics, moved from the concrete to the general. Aristotle, Hobbes, Kant and Hegel are examples of the former; Bentham, Ihering, Holmes and Cardozo, of the latter. Plato exemplifies both classes, since the Plato of *The Laws* seems to have been a different man from the Plato of the *Republic*, because of his intervening political experience.

Pound belongs to the second class. Turning from botany to the study and practice of law, his fertile and active mind sought in history, in philosophy, in comparative law, and especially in the works of continental jurists, clues to the explanation of the concrete phenomena which he encountered in American law. His experiences as a practicing lawyer, as a Supreme Court commissioner and law teacher in Nebraska, supplied ample stimuli for his adventures in ideas. The way in which he became a legal philosopher explains many of the characteristics of his philosophy. It explains, for instance, why his best ideas are those which are derived from, and illuminate, some set of concrete legal phenomena, and are therefore scarcely to be understood apart from those phenomena. "Law in Books and Law in Action"<sup>1</sup> explained and in a way justified the striking disparity between judges' instructions and juries' verdicts in personal injury actions. "Mechanical Jurisprudence,"<sup>2</sup> "The Decadence of Equity,"<sup>3</sup> and "The Limits of Effective Legal Action"<sup>4</sup> were, as of the time when they were written, novel and fresh illuminations of other legal situations, which have in course of time become a part of American legal thought. The most influential of Pound's contributions to American legal theory were those which started from the ground up.

1. (1910) 44 AM. L. REV. 12.

2. (1908) 8 COL. L. REV. 605.

3. (1905) 5 COL. L. REV. 20.

4. (1916) 22 REP. PA. BAR ASS'N 221, (1917) 3 A. B. A. J. 55, (1916) 27 INT. J. ETHICS 150.

A second characteristic of his contributions is to be similarly accounted for. When these generalized insights into concrete phenomena of the law came to be integrated at a higher level of abstraction into a general philosophy of law, they lacked the coherent systematic character which many professional philosophers insist upon as the necessary quality of a major contribution to philosophy. Pound's sociological jurisprudence became an aggregation of valuable insights, a set of classificatory devices, and a program of method, rather than a system of propositions derived from, or logically included under, a few basic propositions. Thus, Pound's "Theory of Social Interests"<sup>5</sup> is a classification of major ends or purposes of the legal order, derived from the author's study of specific legal rules and institutions, shaped, no doubt, by his conception of what ought to be, and yet never articulately integrated into a hierarchy of propositions which would tell us, for example, when to prefer the social interest in security and when to prefer the social interest in the individual human life. Dean Pound's philosophy of law is the work of a botanist rather than a physicist. For my part, better concreteness of reference than systematic coherence.

A third characteristic of Pound's legal philosophy is his frank eclecticism, his continual borrowings from the learning accumulated by omnivorous reading and a remarkable retentive memory. In bringing to American readers the diverse ideas of continental legal writers, he has performed a highly valuable service. The absence of footnotes in the present work limits the range of his allusions; yet most of the important modern legal philosophers—and some unimportant ones—are introduced for the sake of contrasting their diverse offerings. This characteristic of Pound's writings is due, I think, not to mere display of erudition—a pardonable failing of learned men—but rather to an insatiable curiosity to understand a question from all points of view, and to a basic conviction that the best method of guiding thought into action is to present these competing dialectics of the problem rather than the pre-selected dogmatics of the philosopher. In his continual recourse to dialectic or many-sided formulations Pound is something of an Hegelian, and even more a pragmatist.

To attempt a comprehensive appraisal of Pound's contributions to legal philosophy would be premature. The foregoing comments are merely a report of progress. The present volume introduces some new ideas or at least some new aspects of old ideas. In the first chapter his account of the need for law in order to maintain a balance between man's egocentric and his co-operative "instincts"—call them "drives," if you prefer the word—seems to the present writer fresh and valuable. He pays his respects to phenomenology by explaining concisely its general bearing on law, without attempting to expound its obscure metaphysics.<sup>6</sup> His justifiable criticism of Holmes' view that law is a prediction of what officials will do (to be used by the "bad man" in avoiding trouble) is only slightly marred by his ironic fling at "realism": "today we strive at any cost to be realistic."<sup>7</sup> His occasional attacks upon the procedure of administrative agencies<sup>8</sup> contain some needless rhetorical exaggerations. Yet on the whole they do not mar the value of the book as a presentation in concise form, without tiresome footnotes, of the best of Roscoe Pound's philosophy of law.

Edwin W. Patterson.†

5. (1921) 15 PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY 16, revised in Pound, *A Survey of Social Interests* (1943) 57 HARV. L. REV. 1.

6. Page 27.

7. Page 51.

8. *E. g.*, pages 59-60.

† Professor of Law, Columbia University.

WHEATON'S INTERNATIONAL LAW. Vol. 2: War. Seventh English Edition. Edited by A. Berriedale Keith. Stevens & Sons, Ltd., London; Baker, Voorhis & Co., Inc., New York, 1944. Pp. xxvii, 672. Price: \$15.00.

The first edition of Dr. Wheaton's "Elements of International Law" appeared simultaneously in London and Philadelphia in 1836. That its value was widely recognized is shown by the fact that a French edition was published in Paris and Leipzig in 1848, a Chinese edition published by order of the Chinese Government in 1864, and that six other editions, not including the present one, have been published in England since that date, the last in 1929 by the editor of the present revision. To publish a revision of one part of a work without the other is unusual, but in the present instance is fully justified. As the editor says in his preface: "The present war has added to the mass of information, but has not materially altered the treatment [of the laws of war and neutrality since World War I] and hence it has been possible and advisable to re-issue Volume 2 on War, while the contest is still raging." "In time of peace prepare for war" has its counterpart in the equally true saying, "In time of war prepare for peace," and some of the great tragedies of history have taken place because the victors in a war had no well considered plan of how to use and safeguard the results of their victory. For perhaps the first time in history, the allied nations are now planning in advance the details of how to make their victory over the Axis a real and lasting one, and any book which contributes a study and evaluation of the legal and factual elements entering into a solution of this problem is at the present time not only a praiseworthy undertaking, but a definite contribution to world order as well as to legal lore.

A casual comparison of the present book with the corresponding portion of those editions which appeared before or directly after Dr. Wheaton's death shows that the present book contains about double the text of the early editions, and that the portions of Dr. Wheaton's text retained are such a small part of the entire book as to suggest the quip which William Warren, celebrated comedian of the Old Boston Museum Stock Company, made on seeing Joseph Jefferson's revised stage version of "The Rivals," that it was an interesting performance "with Sheridan twenty miles away." Closer examination, however, reveals the fact that Dr. Wheaton's plan has been followed and that, where feasible in the light of subsequent developments in international law, his original text has been faithfully adhered to. When Dr. Wheaton wrote his book, the laws of war were almost entirely customary, like our common law, being based chiefly on historic precedents, judicial decisions, and the opinions of jurists like Grotius and Vattel. Today the laws of war, in theory at any rate, are largely codified in the various Hague, Geneva and other Conventions, at least so far as the ratifying states are concerned. In other words, the task of him who undertakes to revise Wheaton's text to fit present day conditions is similar to that of him who tries to revise Blackstone's or Kent's Commentaries to fit the law of a code state.

Dr. Keith has not only brought to this task a wide knowledge and practical experience in his subject, but has done his task extremely well. With Dr. Wheaton's text and the several conventions as a basis he has set forth carefully and in detail the cases where the rules therein laid down have been applied and also where they have been denied or violated. If the present work had no other value, its abstracts of the precedents occurring

during the last quarter century would make it a valuable addition to any library on international law.

A further point of excellence is that the book does not undertake to idealize. It points out the frequent disregard or violation of the rules established in the conventions, leaving the reader to draw from the facts cited his own inference of what the actual practice is, as well as what in theory it ought to be.

From the mechanical side, the book is excellent. The typography, even in the footnotes, is clear, the citations are copious, and the Table of Cases gives not only references to the source and the pages where the case is cited, but also the date of the decision, thus saving in many instances a reference to the text itself. The index is far more complete than in most English publications, making it easy to find quickly any desired item. Furthermore the dates of treaties and similar documents are given in the index, thus facilitating reference where there are several treaties bearing the same name.

From an American point of view, there are only two matters which seem to me to call for criticism. One is that many early precedents, particularly those from the Napoleonic Wars and our War of 1812 which appeared in earlier editions are omitted, presumably to save space. This is unfortunate because, in spite of later precedents, these older ones still have value, if only for comparison. The other criticism is that the editor appears to feel much of the—shall I say lack of sympathy?—with the United States which characterized the English upper classes during our Civil War, and this feeling to a certain extent colors his attitude toward the position taken by the United States in some controversial questions.

When all is said and done, we must certainly admit the truth of what Grotius says in the Prolegomena to his *De Jure Belli ac Pacis*, "When arms have once been taken up there is no longer any respect for law, divine or human." No general, so far as I know, has ever gone home to his government after a defeat and said, "I was defeated because my hands were tied by the rules of international law. Had I had a free hand, I could have won a victory." Any statement, therefore, of the laws of war must be either a statement of those rules which nations ought to observe, but which few, except the United States, have observed when it suited their interest to violate them, or a statement of the rules of conduct which nations good and bad have actually followed under given circumstances. Dr. Keith has covered both these phases of the subject fully and carefully, without undue emphasis on either. His method is analogous to that of the "case system" of legal instruction. This is particularly commendable in such a subject as the law of war because, as he admits in his preface:

"I have necessarily restated the position as it is shown to be by the available evidence, however unpalatable it may be, for the efforts to improve the law have as a whole failed to achieve that end."

In recognizing the fact that the international law has, both in the present and in the last great war, failed to achieve its purpose and in carefully setting forth the facts showing such to be the case, Dr. Keith has performed a valuable service both for the legal profession, for the student of human affairs, and for the advancement of mankind toward the reign of universal law.

*Frederic Gilbert Bauer.†*

---

† Professor of Law, Boston University.

PRINCIPLES OF PRIVATE INTERNATIONAL LAW. By Arthur Nussbaum. Oxford University Press, New York, 1943. Pp. xvi, 288. Price: \$3.50.

Most American writers on the subject of this book have employed the terms "conflict of laws" and "private international law" synonymously, with a preference for the former. Professor Nussbaum's preference for the latter term, in the title and elsewhere, suggests his civil law background and is, as he tells us, "more in accord with a comparative approach."<sup>1</sup> From the author's comparative approach comes one of his most valuable contributions to our literature of the subject.

As a professor of law at the University of Berlin, Professor Nussbaum was a recognized authority on private international law and the author of a German treatise on the subject. Since coming to this country in 1933 he has been Research Professor of Public Law at Columbia University and has broadened his studies of conflict of laws on the basis of American materials. This experience, he tells us in the Introduction, meant more than an increment in knowledge. "The new atmosphere gave rise to fresh shoots of thought. Many views, previously formed, were re-examined and, I hope, corrected, deepened, and adapted to wider horizons. A new picture of the whole gradually took shape in my mind. This volume tries to reproduce it in terms of American law."<sup>2</sup>

The book does not purport to be an exhaustive treatise. The author discusses in some detail the general principles and theoretical controversies with which the subject abounds, but their particular application to specific topics is largely illustrative. Many important topics have been omitted and others only briefly touched upon. Some of the topics have been more fully presented in the author's law review articles. This emphasis upon the more fundamental aspects, however, does not mean a lack of realism in the book. The author was the leader in the movement toward legal realism in Germany, and has retained that point of view, with "certain reservations," in his American writings.<sup>3</sup> His somewhat cautious realism is suggested by an observation in the Introduction that "There should be a certain balance between the theoretical endeavor undertaken and the value of the problem in terms of reality."<sup>4</sup>

One of the author's reservations would seem to be his retention of the traditional view that conflict of laws does not deal with substantive justice and is not directly concerned with the disposition of cases, but purports merely to solve preliminary questions.<sup>5</sup> Thus, in Part I of the book, in discussing the various theories of the subject, he regards the local-law theories of American realists as no more productive than Professor Beale's vested rights theory and as involving an untenable duplication of rights. According to the author, "Actually the quest should only be for the governing *law*."<sup>6</sup> He refers to Professor Cavers' well known proposal for solving the choice-of-law problem as an "almost desperate proposal."<sup>7</sup> Other passages, however, are more likely to be found congenial to American realism. For example, "Hence the ultimate explanation for the resort to foreign law should be sought in the ends of a sound administration of the law, or in the ends of justice, according to whether one prefers the juridical or the philo-

1. Page 9.
2. Page x.
3. Page 37, n. 11.
4. Page x.
5. Page viii.
6. Page 36. (Italics supplied.)
7. Page 36.

sophical formula." <sup>8</sup> Or, again, "One should not try to conceive of a phenomenon so complex as Private International Law in terms of a single principle, be it international comity, vested right, or what not." <sup>9</sup>

Part II of the book is entitled "The Choice of Law Rule," and it contains excellent analysis of problems such as Qualification, Renvoi, Public Policy, Evasive Submission to Foreign Law, and Domicil and Nationality. It also treats in much more detail than other topics the choice-of-law problem as to contracts. All of this discussion is especially valuable because of the author's comparative law approach and his restrained realism. In dealing with qualification and renvoi, for example, he avoids entanglement in the highly conceptualistic controversy with which legal literature abounds both here and on the Continent. He does not find it either necessary or desirable to choose between total acceptance and total rejection of the renvoi. The choice in a particular situation will depend upon a test of reasonableness, a test which presumably is loose enough to take into account such matters as administrative convenience and the "homeward trend" of the courts which he considers to be a universal phenomenon.<sup>10</sup> The author, furthermore, seems disposed to measure the significance of these problems by their quantitative significance in the courts rather than by their volume of conceptualistic disputation.

In Part III, devoted to Procedural Questions, Professor Nussbaum brings welcome illumination to the subjects of Jurisdiction and Foreign Judgments which are often confused in our law. His criticism of the treatment of those matters found in the Restatement of the Conflict of Laws should help to allay some of the confusion, and at least suggest the need for a more accurate terminology. The present writer's indebtedness to Professor Nussbaum in this matter has been acknowledged elsewhere.<sup>11</sup> Not the least helpful section of the book is the final one devoted to Proof of Foreign Law. It should be grist for the mill to reformers of the common law, for the continental methods described appear to have important advantages of greater simplicity and less expense. It need hardly be added that throughout the book the author's comparative approach is scholarly and dispassionate and reveals no want of sympathetic understanding of the common law.

*Bert Hopkins.†*

REQUISITION IN FRANCE AND ITALY. The Treatment of National Private Property and Services. By Maurice K. Wise. Columbia University Press, New York, 1944. Pp. viii, 207. Price: \$2.75.

The author of this volume has written a scholarly treatise on a chapter of the law of private property and the rights of the individual, a subject which has had particularly disappointing manifestations in its development.

Dr. Wise's book describes in detail, with appropriate documentation, the development of the institution of "requisition" in the legislation of France and Italy, up to 1940, including compulsory services required of individuals. It deals with military and civil requisitions, with the power of requisition and the occasions for its exercise, its exercise and its objects, as well as the question of indemnity. The author does not treat of the requisitory institution developed in international law with regard to occupied territory and combat zones.

8. Page 34.

9. Page 35.

10. Page 41.

11. Hopkins, *The Extraterritorial Effect of Probate Decrees* (1944) 53 YALE L. J. 221, 224.

† Professor of Law, University of Idaho.

Requisition is defined as "the institution whereby the modern state, through the exercise of its sovereignty, secures property and services for the satisfaction of urgent needs."<sup>1</sup> It differs from taxation because it is not generally applicable. It is not in the nature of conscriptions because it meets neither recurrent nor easily foreseeable public needs. It differs, in theory, from outright civil law expropriation in that it requires more than public utility for its justification. However, the author is not blind to the fact that the line of demarcation between civil law expropriation and requisition is often unrecognizable in practice. In most cases title to the requisitioned property does not pass to the State, but instead the risk remains with the owner.<sup>2</sup> The latter continues to assume the burdens connected with the property, without having the enjoyments thereof.<sup>3</sup>

The scope of requisition<sup>4</sup> has varied with the nature of the State (liberal or authoritative) and, therefore, with the changing degree and extent of its recognition of rights of the individual and the assumption of certain functions to itself. Requisition basically calls for the recognition of private property and of individual rights.<sup>5</sup> As more of the rights of the individual are impaired by the State there will be less need and possibility for the exercise of requisition. This automatic reduction in the social functions of private property and its effect upon the institution of requisition is noted by the author throughout the book and brought home to the reader in unmistakable language.

That Fascism in Italy,<sup>6</sup> when it assumed power, did not need to make many changes in the framework of the Italian law relating to requisition shows in my opinion two things: (1) the low level of respect towards private property which already had been reached, and (2) the fact that the situation under Italian Fascism never became quite so bad as under German National-Socialism.

The author points out what could be achieved and was achieved with pure laws on requisition. The French Government<sup>7</sup> in 1938 broke the general strike, and earlier, in 1920, broke a transportation strike by requisitioning plants, means of transportation, and personnel. Railways and the merchant fleet could have been commandeered; foodstuffs could have been distributed in case of scarcity. Price ceilings could have been established for any necessary commodity. Because of the scarcity of agricultural commodities, uncultivated land was requisitioned and recultivated.<sup>8</sup> In this reviewer's opinion, the law was motivated by the appalling decrease in the French population resulting from the decline in the birth rate. The author states that "the principal cause of the scarcity was the lack of labor."<sup>9</sup>

As late as 1924, France was not psychologically prepared to adopt in peacetime a body of legislation providing for full regimentation.<sup>10</sup> It required German and Italian war preparations to make the French people conscious of the threatening danger. The laws of 1936 and following years, in making some preparation for the war that was approaching, resulted in inevitable repercussions upon private property.

The author shows how the *Front Populaire* sponsored the nationalization of war industries, in the hope of extending this policy in the future.

1. Page 3.

2. Page 70.

3. Page 53.

4. Page 3.

5. Pages 188 *et seq.*

6. Pages 100 *et seq.*, 187 *et seq.*

7. Pages 13 *et seq.*, 19.

8. Pages 18, 41.

9. Page 41.

10. Pages 47 *et seq.*

Important parts of the French automotive, maritime, arms and munition industries came, therefore, by outright expropriation, not only under the absolute control of the French Government, but title to them passed to the French State.<sup>11</sup> France did not make an exception of the old experience that war and war preparations are closely allied with a disregard for private rights, particularly private property.

A French law of 1938<sup>12</sup> gave power to the Government to plan and to execute, in peace time, total mobilization of all national forces, in case of open aggression or even of simple external tension. This involved not only property, such as industrial plants, but also the requisition of all male adult residents. Labor could be apportioned among public services or in private establishments functioning in the public interest.

Although indemnity<sup>13</sup> is granted by French law to the owner and although he enjoys procedural remedies,<sup>14</sup> it seems to this reviewer that requisition is to him, generally, a "source of loss"<sup>15</sup> even in France. However, it must be recognized that the *Conseil d'Etat*, the highest French administrative court, did its best for the protection of the owner, within the scope of the law.

The development in Italy is described by Dr. Wise as parallel to that in France,<sup>16</sup> inasmuch as the influence of Fascism in this field was not very great.<sup>17</sup> The author sees, correctly, the main reason for this parallelism in the fact that both legislatures had to meet the same emergencies. He, therefore, attributes particular weight to the evidence contained in the legislation of both countries.

While these lines are going to the printer, a continuation of the history of requisition in France is being written by General Charles de Gaulle and his provisional government. France is, right now, adopting an *économie dirigée* (planned economy). Certain mines and plants are being taken over by the Government. The owners are to get some compensation, though not in proportion to the value of the property. The *New York Times* describes a whole system of national economy, a kind of state-socialism, as planned by the present French leadership.<sup>18</sup>

Other countries may take the same course. New Zealand may retain her State control over foreign trade and exchange. On the other hand, the United States Chamber of Commerce warned against the "socialism" which may result in case of a continuation of Federal operation of Government-owned plants beyond the time when they are needed for the war program.<sup>19</sup>

Pope Pius XII, in his broadcast of September 1, 1944, defended the institution of private ownership as one of the elements of social order, but required harmonization of the labor contract with the social contract. The Pope also held it to be a function of the State to adjust, by expropriation with suitable indemnity, any distribution of property which may impede the future social and economic aims of the State and of its organizations.

Indeed, private property has been regarded as being in the nature of a public trust granted to the owner.<sup>20</sup> It may be revoked for reasons of public

11. Pages 48 *et seq.*

12. Pages 49 *et seq.*, 63.

13. Pages 76 *et seq.*

14. *E. g.*, pages 20 *et seq.*

15. Page 81.

16. Pages 187 *et seq.*

17. Pages 100 *et seq.*

18. *N. Y. Times*, Oct. 2, 1944, p. 1, col. 6.

19. *Id.*, Sept. 24, 1944, p. 25, col. 2.

20. See this reviewer's address on "Certain Trust Concepts under German Law," in Proceedings of the American Foreign Law Association, No. 16 (1937) 2.

interest. This should, however, in this reviewer's opinion, be done only for compelling reasons, and only upon full compensation.

*George M. Wunderlich.†*

**MILITARY LAW FOR THE COMPANY COMMANDER.** By Julian J. Appleton. National Law Book Company, Washington, D. C., 1944. Pp. 141. Price: \$2.50.

The lawyer who enters the military service as a company officer—and this reviewer speaks from experience—finds himself confronted by a terminology and a procedure which is just enough unlike that with which he is familiar in his civil practice to irritate and annoy him. I recall being advised, on appointment as a trial judge advocate, to conduct my first case “just as would a district attorney.” The advice was decidedly misleading. No matter what one's knowledge of civil law and procedure may be, he enters a new field when for the first time he comes in contact with the military code. True, there will be the old common-law offenses and the old common-law definitions in such matters as assault and battery, larceny, burglary, etc., but who in civil practice ever heard of conduct to the prejudice of good order and military discipline, wilful disobedience of the orders of a superior, the offense of consorting with enlisted men, and the like? Then too the procedure differs: the preliminary investigations (which are unlike a grand jury proceeding because both sides are heard), the so-called “charges and specifications,” the finding of guilty (with “exceptions and substitutions”), the insistence on details such as warning the recalled witness he is still under oath, the peculiar division of functions between the president, the law member and the entire personnel of a general court-martial, the automatic exception which makes “I except” superfluous, and divers other peculiarities of our military system of justice.

No matter how experienced the lawyer, he still, when asked if he understands what he reads, must, in the language of Holy Writ, answer “How can I, except some man should guide me?”

In this little book the author has done a valuable service for the new officer (and for the old one, too, for that matter), in that he has gathered together in one place the questions which are certain to arise in every company, battery, and troop.

How to handle the wilful absentee, the soldier who will not obey, the prisoner who breaks arrest, and similar questions, are answered clearly and concisely. A number of similar books are merely paraphrases of the official “Manual for Courts-Martial, 1928.” This book is not. It contains apt references to reported cases in which the Judge Advocate General has construed the punitive articles of war and relevant comments by such authorities as Winthrop, “Military Law and Precedents.”

The reviewer appreciates the generous reference in the preface to the somewhat similar book by Lt. Col. W. H. E. Jaeger and himself, but I think my co-author would agree with me that if a company commander had to choose between this book and ours, he would find the book under review more useful. As we appear to have the same publisher, this is not an admission against his interest but only against our royalties.

*F. Granville Munson.†*

---

† Office of the General Counsel, Foreign Economic Administration.

† Colonel, General Staff Corps.