

Essays in Jurisprudence in Honor of Roscoe Pound

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BOOK REVIEWS

ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND

Edited by *Ralph A. Newman*

The Bobbs-Merrill Company, New York, Pp. 670. \$12.00

Reviewed by

WILLIAM F. CAHILL*

A reader, and more especially a reviewer, looks for a unity in the writing contained between his book's two covers. The unity in this book comes from outside the book itself. It derives from a few interrelated generalizations which are implicit in all that Dean Pound has said and written on the law. Man does not live in society because he needs to have law. Rather, it is because man does live in society that he needs law. Society, therefore, is the end of the law, and law is a means which social man uses to organize his society. When Pound began to write, most of those who had influence in legal education and practice viewed law either as an end in itself which society existed to serve, or as a fixed price which men, both the ministers of the law and its subjects, must pay in order to enjoy society and its benefits. Pound, of course, did not discover the general principles he espoused. Nor did any of his writing directly and explicitly elucidate them in a theoretical way. The measure of Pound's greatness is

that, for most of a century and throughout the civilized world, he has inspired and taught men to implement the principles. His work and theirs have had enormously good practical effect. By and large, society is better served by law in our time because of the work of Pound and his disciples. More, there is hope, and good ground for it appears in some of the essays here examined, that the practical success of these great ideas may open men's minds to the cognates of those ideas, and persuade men that there is nothing so practical as an idea thoroughly understood.

A good summary of Pound's most important developments in sociological jurisprudence is offered by Professor Sethna (p. 99). In the same paper, the most significant relations and reactions between Pound's thought and that of other modern jurisprudential writers are traced out. Professor Del Vecchio's contribution (p. 142) makes a point often missed by the sociological jurists. Human society is not a monolith—its members confront the "law-state" not only in their individual persons, but as

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members of the "inferior" societal entities of which the family is the most important example. Law serves, and must serve, not only the general society, but also these entities which, though less general than the state or nation, are historically and ontologically prior to either. Del Vecchio also indicates that the human society which is more general than the national one has a valid claim upon the service of the law of the national states.

Many who will read this review are familiar with Dr. John Wu's writings in which the humanism of the ancient Chinese law appears so clearly. The contribution of Wen-Yen Tsao to the present volume (p. 21) shows that ethical considerations are a most important factor in calculating the reasonable expectations of men in civilized society, the expectations which law must satisfy if it is guided by Pound's jural postulates. The genius of the Talmudic lawyers for applying general ethical principles to adapt law to the here and now circumstances of man in society is illustrated in Justice Cohn's essay (p. 44). Social justice as the common basis of ethics and law is adverted to by Professor Sethna (at p. 132), quoting Professor Ralph Newman's beautiful statement of the theme. Justice Cardozo observed that the judge's perception of the right decision is prior to his selection of a legal method for framing it. This perception, described in *The Nature of the Judicial Process*, seems to be one of the chief guides followed by Professor Recaséns-Siches in developing his excellent discussion of the logic of the reasonable as the true lawyer's logic (p. 192).

Comparative law, the device which served Dean Pound best, both in elaborating his theory of law and in demonstrating how the law best serves society, makes several ex-

cellent contributions to the present anthology. Professor Kahn-Freund compares the law of England with the law of the States in reference to matters which touch intimately the family mores of the two peoples (p. 362). His discussion of the laws on dissolution of the marriage relation brings to light one problem that has confronted and confounded many sociological jurists. The mores and social expectations of a people are often ambiguous because men give their allegiance to contradictory standards simultaneously. Many who will say that divorce should be readily available to those who "need" it will at the same time maintain that society must suffer if the law undermines the general expectation of men that marriage is for life. Professor Szpunar's study, "Concurrent Fault in Comparative Law" (p. 497), illustrates the struggle between the reasonable and the rational in law. The study has special importance because it makes one realize that the sin of confusing the law that is with the law that should be is an evil, not imaginary or even rare, but both real and common.

These two studies suggest questions which they neither formulate nor resolve. May not a law, in seeking to meet the social expectations of a people, create new and contradictory expectations in them? Have the divorce laws and tort laws led people to expect that the device of law can solve all the problems arising out of moral failure without condoning, not to say rewarding, such failure? That this kind of question should arise suggests the need for study of the actual social effects of enacted law, a need Pound saw clearly. Little has been done to meet this need, for the kind of work required is extremely difficult, its hazards and hardships are little understood and less appreciated, and few have patience to test

its results by employing them. Sheldon Glueck's essay in the present anthology (p. 410) deserves to be read and meditated carefully and sympathetically, as a competent statement of one of the most extensive and successful efforts to correct the law by studying its actual effect.

The reviewer has already suggested that this book suffers seriously from a lack of internal unity. Notoriously, such unity is often hard to find in a book put together out of the work of many writers as a tribute to a great scholar. Sometimes the unity emerges out of a plan which assigns to each writer a distinct phase of the thought or work of the man they honor. Sometimes the

synthesis is suggested in a foreword. Nothing of the kind has been done here.

The only unifying device attempted in this book is that of dividing the collected essays into groups labelled with three Part titles. This gives little aid to the reader, for many of the essays assigned to any one Part could as well be placed in either of the others. The book is very difficult to use because it lacks an analytical index and because the essay titles are not carried on any but the initial pages. Only by using the Table of Contents can one find his way around the text, and this sole guide is well concealed at page xxi, behind the Preface, Introduction and List of Contributors.



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