

Justice According to Law (Book Review)

Miriam Theresa Rooney

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BOOK REVIEWS

JUSTICE ACCORDING TO LAW. By Roscoe Pound. New Haven: Yale University Press, 1951. Pp. vii, 98. \$2.50.

The latest title to appear under the authorship of Dean-Emeritus Roscoe Pound is a slender little book, made up of three lectures delivered a year ago under the John Findley Green Foundation at Westminster College. In it he undertakes to explain to laymen three of the most difficult subjects in the history of thought: (1) what is justice; (2) what is law; and (3) judicial justice.

In discussing justice, he notes the changes that have occurred in prevailing notions about the basis of legal liability, and he touches again upon that great stumbling block, the relation between morals and law. The five theories of liability he mentions, involve (1) the necessity of preserving the general security, or peace, by requiring the injured person to buy off his desire for vengeance, which would otherwise lead to private war; (2) the substitution of general morals for general security, by requiring the person who is at fault to pay damages; (3) the reinforcement of general security by the idea of public policy, whereby those to whom certain wrongs are attributable are required to pay whether culpable or not; (4) the contemporary idea of substituting insurance for personal liability, thereby shifting the burden of the damage to those who can collect from the public; and (5) the new trend toward collecting for damage from those best able to bear it. Without citing authorities for any of his points in these lectures, the author nevertheless notes that the issue of morality with respect to the third point was raised in 1908 by Dean Ames, and he is as critical of the modern trend toward strict liability regardless of fault in tort, as Jerome Hall is in criminal law. It is a subject not yet touched upon by moralists but one which demands serious attention. Dean Pound speaks of it as the morals of Robin Hood.¹

Another important sequence of ideas indicated in the chapter on the nature of justice concerns the nature or end of law. The trend here, he says, has been from (1) keeping the peace, (2) through maintaining the social status quo, (3) to the idea of individual equality, (4) by the substitution of contract for status, (5) toward liberty. The latter notion has found two types of exponents—those who substitute for law voluntary cooperation, free from coercion by state-imposed rules, upon the theory that the realization of liberty is inevitable, and those who propose to utilize the power and force of politically organized society to deliver men from want and fear and frustration. Dean Pound himself has not adopted any of these goals to the exclusion of the

¹ P. 14.

others, but rather continues to think of law as a science of social engineering whereby the maximum satisfaction of human expectations may be realized through an administration of authoritative guides toward judicial or administrative decision.

He points out the fallacy of confusing an aggregate of laws with law. He rejects the subjective foundation of the "neo-realists" who deny the reality of the "authoritative precepts" in shifting the question of the nature of law to that of the nature of the judicial process. He does not recognize the existence of any legal right to disrupt the legal order by exercising private judgment to the extent of disobedience of any particular legislative or administrative regulation or precept. If there is any place for the exercise of private judgment in disrespecting a particular law, he holds that this can at most be allowed in the moral sphere and cannot amount to ". . . a guaranteed expectation of immunity from the legally appointed consequences of disobedience. . . ." ² This latter argument, it may be suggested in passing, seems to be based on the very confusion of law with laws, and the assumption that law is a simple, unequivocal notion, which he himself recognizes as fallacious.

There are many wise and valuable insights in this little book, often inserted interstitially. He defends Holmes against the criticism of the latter's prediction theory of law by observing that it was set forth in a law school lecture explaining the counsellor's function. He notes, in discussing administrative law, that some European countries who have had experience with absolute administrative government, composed of officials ". . . who ex officio know what is good for us better than we know ourselves," ³ are now setting up independent judicial tribunals to give effect to the Declaration of Rights. And he says that Radbruch, whom he considers "the foremost philosopher of law" in the present generation, has become convinced that he must modify his Neo-Kantian attitude that since one cannot make assured decisions he should remain serene and let things work themselves out—experience with totalitarian governments having caused the change.

Dean Pound himself observes that pessimism over the impossibility of attaining justice develops side by side with absolute government, so he rejects the give-it-up philosophies in favor of a legal order based upon ". . . a taught tradition of experience developed by reason and reason tested by experience." ⁴ Furthermore, in turning his back upon the complete relativism which is founded on subjective criteria of values, he reinstates principles as authoritative starting points for legal reasoning, since principles, he says, are the work of lawyers, organizing judicial experience by differentiating cases and putting a reason behind the difference. Indeed the primary function of legislation lies in its capacity for declaring and systematizing the results of judicial experience. Law, being neither identifiable with power nor with force in Dean Pound's view, is rather a guide to decision in the adjudication of disputes and these decisions are subjected to continual professional criticism according to

² P. 48.

³ P. 84.

⁴ P. 60.

the principles of the taught tradition. Nothing more than this should be expected of law, in order to maintain its supremacy and hold our respect.

This book will undoubtedly be widely read, not only because of the great influence of its author in the judicial field but also because it packs into a brief and easily read space a great many of the controversial issues over law which are uppermost at the present time. It is distressing therefore to find the highly misleading statements which Dean Pound has to say about natural law generally, and about Neo-Scholastic and Neo-Thomistic theories of law in particular. The principal misapprehension occurs in the discussion of the relation of morals to law, where the author relies on the authority of Maritain, only to reject not only Maritain's view but also the whole notion of natural law as basic to our legal system. It is not unlike Holmes' repudiation of natural law because he could not accept Gény's interpretation. Dean Pound's shrewd observation that "[i]t is significant that some outstanding recent French jurists have shifted from Comtian positivism to Neo-Scholasticism without, however, it must be confessed, much change in the substance of their doctrine . . .,"⁵ cannot fail to win support. It is his correlative statement about the current revival of natural law that calls for criticism where he says:

At present there is a revival of natural law, especially in the form of Neo-Scholasticism or Neo-Thomism, which would give us a theory of the end of law by logical deduction from what is given us by revelation and by intelligence, by a technique of choice guided by "the predetermined ends of the legal order which suggest the means of their own realization."⁶

In the decadent days of scholasticism when rules of thumb were transmitted to neophytes by means of brief manuals of philosophy which copied from one another, undoubtedly some justification for such a generalization could be found, but in this era of careful resort to what Thomas Aquinas said himself, no one who has glimpsed the purpose of the Thomistic revival as expounded by Pope Leo XIII or Desirée Cardinal Mercier or Edward Aloysius Pace could fail to distinguish Aquinas' philosophy from that of other scholastics nor accuse Aquinas of relying entirely on deductions from *a priori* principles to the exclusion of inferences based upon observed experience. It is precisely because Thomas Aquinas took scientific observation and the data of experience into account in reconciling the teachings of his predecessors that his mental processes are invaluable to us in this scientific age and it is because he used exactly the same method of distinguishing fact situations in endeavoring to reconcile the apparently contradictory, that Bracton and the other common law judges did, that Aquinas is such a source of intellectual as well as spiritual strength to modern philosophers concerned with the problems of jurisprudence. To confuse the moderate realism of Thomas Aquinas with the exaggerated realism or pseudo-idealism of the other antimaterialists in the history of thought not only savors of libel but it is dangerous in dismissing the strongest foundation for the validity of judicial reasoning that the human mind has yet produced.

⁵ P. 28.

⁶ *Ibid.*

Instances of Dean Pound's misapprehension of the substance of Aquinas' thought may be found unfortunately in more than one place in this book, as well as in his earlier writings. Recalling that Lord Acton referred to Saint Thomas as the first Whig, Dean Pound says of Aquinas that, "[h]e took the first step toward secularizing the idea of justice which in the patristic theory had been a purely theological idea. In developing Aristotle's analysis he took commutative justice to be the justice of contracts and exchange where an idea of equivalents answered to Aristotle's characteristic of equality."⁷ Specific citations are necessary to warrant such statements. This reviewer, having read and studied the *Opera Omnia* of Saint Thomas Aquinas over a period of several years, wishes to be placed on record as denying, in the absence of proof to the contrary, that he did any such thing.

Another series of statements about the "Spanish jurist-theologians" requires either documented support or correction. According to Dean Pound:

At first men took it that the end of law was to keep the peace. Later, as we have seen, Greek philosophers held it was peaceable maintaining of the social status quo, and this idea was accepted in the Middle Ages. [sic]

A change begins with the Spanish jurist-theologians of the sixteenth and beginning of the seventeenth century. Recognizing the facts of the political world of their time, with which the medieval juristic theory of Christendom as an empire [sic] was wholly out of accord, they conceived of individual states, and thence [sic] ultimately of individual men as equal, since states [sic] and men were able to direct themselves to conscious ends and thus [sic] their equality was a principle of justice.⁸

First of all, equality between men was not first taught by the Spanish jurist-theologians, but by Christ Who died that all men might be saved. The Spanish theologians who expanded this doctrine were making no new discovery about equality. Further statements about the Spanish jurist-theologians could be quoted for criticism, but it is sufficient for the purposes of this review to note merely that it is no more correct to lump the Spanish jurist-theologians together in generalizing upon the foundations of international law than it is to include Aquinas' doctrine about natural law with those of the so-called "scholastic" writers from Augustine to Blackstone. Francis De Vitoria was professor of philosophy at Salamanca at the end of the fifteenth century, teaching the subject according to the principles of Saint Thomas Aquinas as recognized by that time as authoritative throughout the Dominican Order. A careful reading of his books side by side with those of Aquinas will disclose that in applying Thomistic principles to the juridical problems arising from the discovery of the New World, Vitoria differed in no substantial way from the doctrine of Aquinas himself. Francis Suarez, on the other hand, put greater emphasis on will than on intellect in determining the course of events and developed his conclusions more directly from *a priori* principles than from

⁷ Pp. 18-19.

⁸ Pp. 19-20.

the empirical methods characteristic of Aquinas. (The new book by T. E. Davitt, S.J., on *The Nature of Law* is helpful here.)⁹

It is unfortunate that the late James Brown Scott, who did so much to make known the work of both Vitoria and Suarez in international law, apparently had himself no more first-hand acquaintance nor training in Thomistic philosophy than Dean Pound, and so has confused many students on these points by his interpretations of excerpts of their writings taken out of context.

Apparently the chief source of Dean Pound's misunderstanding of the Thomistic doctrine of natural law is due to his own view of natural law as an ideal. Although adopting the Hegelian dialectic of synthesis—following thesis and antithesis—he appears to have veered away from the absolutism implicit in Hegel's thought in the realization of the ideal and back toward Kant, with the latter's distinction between will and idea, which has been transmitted to us by Schopenhauer as well as by Radbruch. However, he is beginning to indicate in his later books a dissatisfaction with these German philosophies as explanatory of the taught tradition he serves and venerates in the common law. His renewed attention to Aristotle, instead of to Plato's idealism, may help him to see his way out of the fallacy implicit in his oft-repeated phrase about "received ideals." But it is submitted that not until he glimpses the reality that natural law is nothing more nor less than a term used to describe the existent relationship between the Creator and the universe He created, which creatures must discover at their peril, will the author find a satisfactory key to his great loyalty to the law. Law is not a means of realizing the ideal which is never quite attainable, as pessimism teaches, any more than the Creator is nothing but a postulate from which conclusions can be derived. God defined Himself in terms of Being, as "I am Who am," and in accordance with that revealed definition, the identity of essence and existence in God was recognized in the Thomistic system. Not the ideal but the real is what matters, and the natural law is a term descriptive of this fact. No legal rules which ignore or deny it can endure. Until the Pragmatists, Neo-Idealists, and the "Thomists" Dean Pound is conversant with, agree on existence, in which man participates, there is bound to be confusion with respect to the nature of law and the law of nature which the distinguished teacher has not yet been able to clear up.

MIRIAM THERESA ROONEY.*



THE NATURE OF LAW. By Thomas E. Davitt, S.J. St. Louis: B. Herder Book Co., 1951. Pp. v, 274. \$4.00.

Father Davitt, who is Assistant Professor of Jurisprudence, Philosophy and Ethics at the Law School of St. Louis University, maintains that law is

⁹ See Brown, Book Review, 26 ST. JOHN'S L. REV. 399 (1952). [Ed. note.]

* Dean of Studies, Seton Hall University School of Law.