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Book Reviews

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BOOK REVIEWS

AN INTRODUCTION TO THE PHILOSOPHY OF LAW. *Revised Edition*. By Roscoe Pound.¹ New Haven: Yale Univ. Press, 1954. Pp. ix, 201. \$3.50. This book is a revision and expansion of the original Storrs Lectures which Dean Pound delivered at the Yale Law School in 1921-22. Since that time a number of new legal problems have arisen which made necessary some rewriting changes and additions to the original version.

By way of an introductory remark Dean Pound observes that the legal philosophies of the past have become a potent force in the administration of justice of the present: they have been instrumental in abolishing outworn traditions, banishing caprice, carrying new ideas into the law, systematizing existing legal materials, and strengthening established rules of law. But more than that; they have tried to provide man with a complete and final picture of what constitutes proper social control by laying down a moral, legal and political chart for all time. Believing that they could uncover the everlasting, unchangeable legal reality, they have attempted to establish a perfect law by which human relations might forever be ordered without uncertainty and without further need for change. The ideal of such a perfect law has been envisioned by the ancient Greek philosophers or sophists, the Roman juriconsults, the Mediaeval scholastics and the modern jurists, no matter what their particular philosophical persuasion or method might have been.

Dean Pound then goes on (in chapter two) to discuss the end of law which, in his opinion, originally was a political rather than a legal question. Legal philosophy, he maintains, was, and still is, primarily concerned with the nature of law and the basis of its authority, rather than with the end of law. Throughout recorded history it was held, at one time or another, that law is (1) a divinely ordained rule for human action; (2) a tradition of the old customs which have proved acceptable to the gods and, hence, are safe guides for human conduct; (3) the recorded wisdom of the wise men who had learned the divinely approved and, therefore, safe course for human conduct; (4) a philosophically discovered system of principles expressing the nature of things, to which man ought to conform in his conduct; (5) a body of ascertainments and declarations of an eternal and immutable basic moral code; (6) a body of agreements of men in politically organized society as to their mutual relations; (7)

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the reflection of the divine reason governing the universe; (8) a body of commands of the sovereign authority in a politically organized society as to how men should conduct themselves; (9) a system of precepts, discovered by human experience, whereby the individual may achieve a maximum of freedom consonant with the like freedom of others; (10) a system of principles, discovered by philosophy, whereby the actions of man are evaluated either by reason or by the manner in which they can be harmonized with the actions of his fellow men; (11) a body or system of rules imposed on man by a dominant class in furtherance of its own interests; and (12) a body of dictates of economic or social laws, discovered by experience and applied through the principle of expediency.

All these philosophical definitions of law, no matter how different and even irreconcilable they may be with one another, have one fundamental idea in common: the quest for some ultimate single basis for ordering human conduct and for adjusting human relations beyond the reach of human caprice as well as above the constant flux of historical existence. Dean Pound, however, concedes that the faith in such a perfect law (which in the opinion of the present reviewer would be anything but "perfect") together with the belief in limitless opportunity which men only need freedom to realize, has all but faded. Instead of the perfect law man now clamors for a new humanitarian ideal, for a sort of greater equality in the satisfaction of human wants and demands which liberty alone apparently can no longer afford him. Returning to the theories about the end of law which have been developed by legal philosophers, Dean Pound recognizes five basic ends: (1) to keep the peace at all events and at any price; (2) to preserve the social *status quo*; (3) to bring about a maximum of individual free self-assertion; (4) to protect and give effect to human rights; and (5) to guarantee a maximum of satisfaction of human wants through a minimum of social friction and economic loss.

The application of law, that is, the adjudication of a controversy according to law, Dean Pound insists in chapter three, is more than mere mechanical fitting of the "case" into a legal "strait jacket." Application requires three important steps: (1) finding the law to be applied (or, if none is applicable, devising a rule on the basis of given materials which the legal system points out); (2) interpreting the rule so chosen by determining its meaning; and (3) applying to the facts the rule so found and interpreted. Contrary to the separation of powers theory, which insists that courts take the law as they find it; what actually goes on in the name of interpretation is often an outright "law

making process" which frequently supplies a new law. In other words, the doctrine that law may only be "found," but never made, at least not by the courts, is in Dean Pound's opinion a pious fiction which, if it were true, would deprive the courts of all power to exercise creative reason. Interpretation, therefore, implies law making and even "administration." The problem of application constantly touches upon questions of intelligent selection and discretion, so necessary for the operation of a mature and efficient system of law where the individualization of the application of law is of paramount importance.

Present-day jurisprudence, in the main, advances three distinct theories of application of law which, in some way, are antagonistic to one another, namely, (1) the analytical theory which proceeds from the erroneous assumption that the law is something complete and without gaps or contradictions and, hence, can without fail be applied to any fact situation that may possibly arise; (2) the historical theory which insists that all law is growth and development along certain lines and, as such, merely declaratory of certain basic principles or ideas which gradually evolve through history; and (3) what Dean Pound calls the "equitable theory" which is primarily concerned with a reasonable and just determination of each individual controversy rather than with a mechanical adjudication. This equitable theory endows the courts with much (and in the opinion of its opponents, too much) free play and leeway in dealing with a concrete case so as to meet the demands of justice between the parties and accord with the dictates of reason and morality. Dean Pound believes, however, that these conflicting three theories of application and interpretation could somewhat be reconciled if we were to ask ourselves the following question: may we not find the proper domain of each of these three theories by examining the means through which in fact we are able to achieve the desired concrete individualization that does not exist in theory? For pure theory denies individualization, while any just and workable application abhors generalization and mechanization. In the United States today, there are no less than seven possible agencies for individualizing the application of law: (1) the discretion of the courts in the application of equitable remedies; (2) the application of legal standards of conduct; (3) the power of juries to render general verdicts; (4) the latitude of judicial application involved in finding the appropriate law; (5) devices for adjusting penal treatment to the individual offender (Dean Pound rightly holds that the punishment should fit the criminal rather than the crime); (6) informal methods of judicial administration in petty courts; and (7) administrative tribunals.

By liability, which he discusses in chapter four, Dean Pound means a situation whereby one may exact legally and the other is legally subjected to the exaction. Liability started as a duty to compound for "injury" to man or gods or people, lest they be moved to vengeance (composition); and developed into liability to answer either for injuries caused or promises made (compensation). Thus liability came to mean either a duty to repair or a duty to carry out some formal undertaking. Consideration back of this duty "to carry out something," however, came much later; it came with equity where "intention" and "good faith" were afforded a foremost place. During the nineteenth century, which believed in the greatest possible individual liberty, it was held that law should give the widest effect to the declared will of the individual. Consequently, liability could flow only from freely assumed duties (contract) or from culpable conduct (tort). Contractual or relational liability may be reduced to the following "postulate" or formula: In civilized society man must be able to assume that those with whom he deals in the general intercourse of society will act in good faith. From this it follows that he may surmise that his fellow men will make good reasonable expectations created by their reasonable promises or other conduct; that his fellow men will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto; that his fellow men will conduct themselves with zeal and fidelity in relations, offices and callings; and that his fellow men will restore in specie or by equivalent what comes to them by mistake or unanticipated situations whereby they receive what they could not have expected reasonably to receive under such circumstances.

The notion of culpable conduct (tort) soon led to the common law theory that tort liability was a corollary of fault and, hence, that there could be no liability where there was no fault. This view of "liability for fault" has its ultimate roots in the essential identification of law and morals. But soon it was felt that, as a matter of policy, liability could not always be restricted to fault. This led to a thorough revision of tort liability, to the doctrine of liability without fault which, however, was not universally accepted by all jurisdictions. Dean Pound believes that this new doctrine is fully in keeping with the basic postulates of civilization formulated by him, namely, first, that in civilized society man may assume that no one will attack him; secondly, that in civilized society man must be able to assume that his fellow men, when they are in a course of conduct, will act with due care; and, thirdly, that in civilized society man must be able to assume that others, who keep things or maintain conditions or employ agencies that are likely to get out of hand or escape or do dam-

age, will restrain them or keep them within proper bounds. In other words, general security is threatened (and, hence, liability arises) by willful aggression, by affirmative action without due regard for others in the mode of conducting it, or by harboring or maintaining or failing to restrain things or employing agencies likely to escape or go out of bounds and do damage. The ultimate basis of tort liability, therefore, is the social interest in general security. Hence law no longer looks at the culpable exercise of the will, but rather at the effect — the danger — the actor has upon general security. This new theory of "absolute liability" seems to maintain that negligence is established by liability, not liability by negligence. In the case of workmen's compensation, for example, the liability is based on the legal responsibility to the public flowing from the control of property, a theory which was advanced by Professor Friedmann. Dean Pound also believes that more recent developments of this liability notion are connected with the new idea of the "service state" which supposedly is to fulfill the general human expectation that in civilized society everyone may expect a full economic and social life. Liability, he deplores, has extended the concept of general security to include security against one's own fault, improvidence or ill luck, or even to one's own defects of character. This new concept of security (and liability), which Dean Pound discusses also in his *New Paths of the Law*, seems to require reparation at someone's expense of all loss to everyone, no matter how caused or incurred, thereby shifting the burden from the luckless victim of injury to the public, without fault of anyone. In this fashion man is no longer his brother's keeper, but actually his insurer. Dean Pound insists that this new "policy of liability" is indicative of a new and, in his opinion, pernicious postulate, namely, that in civilized society man is entitled to assume that he will be secured by the service state against all loss or injury, even though the result of his own fault or own improvidence, and that liability to repair all loss or injury will be cast by the law on someone deemed better able to bear it.

When discussing the problem of property in chapter five, Dean Pound starts out with the postulate, devised by him, that in civilized society as we know it, man must be able to assume that he may control, for purposes beneficial to himself, what he has discovered and appropriated to his own use, what he has created by his own labor, and what he has acquired under the existing social and economic order. This control also includes the security of transactions. As of late, he observes, acquisition by discovery or occupation, however, tends to become somewhat restricted. The appropriation or use of important social or natural resources, for example, has become the subject of much

statutory restriction and regulation so as to eliminate possible friction and economic waste. Thus it appears that some of these resources are now considered "property of the state" or, perhaps more correctly, are "owned by the state in trust for the people," where this "state ownership" is really a sort of guardianship for social purposes.

After having discussed the various legal and philosophical theories about property and its justification, Dean Pound distinguishes three "grades" or stages in man's power or capacity for influencing the acts of others with respect to corporeal objects. One stage is a mere condition of fact, a mere physical holding of or control over the thing (custody). The other stage, which is called the "juristic possession," signifies a possession protected and maintained by law as well as by a claim, supported by law, to have a thing restored should it have been improperly alienated. In the final stage the law secures to man the exclusive enjoyment of control over objects far beyond his capacity either to hold the thing in custody or to possess it. This is called the "interest in substance" of which the law must take account, the more so, since property, as a medium that secures a maximum of human interests as well as satisfies a maximum of human wants, is a social institution based upon an economic need in society and upon a natural instinct of acquisitiveness. Dean Pound concludes his observations about property with the remark that the present law of property is a wise bit of social engineering in our particular world in that it satisfies effectively more human wants and secures efficiently more human needs or interests than anything we are likely to devise in its place.

The contract, which Dean Pound discusses in the last chapter, is concerned with promises — with the satisfaction of reasonable expectations created by reasonable promises and agreements. In any civilized society, Dean Pound insists, man must be able to assume that reasonable promises are carried out according to reasonable expectations created by the promises. The keeping of such promises as well as the stability of promises in general is of prime social importance to any commercial society. After having compared the different ways in which the civil law and the common law enforce a valid promise, Dean Pound points out that the Anglo-American law of contracts, at least during the seventeenth century, made four types of promises legally enforceable, namely, (1) a formal acknowledgment of indebtedness by bond under seal, often conditional upon performance of a promise for which it was a bond, acknowledging thereby an "equivalent"; (2) a covenant or undertaking under seal, where the seal implied or presupposed an "equivalent"; (3) a real contract of debt, where the obligation arose from the detention of something by

him to whom it had been delivered; and (4) a simple promise upon consideration, that is, in exchange for an act or for another promise, where the other act or counter-promise was the motive or "consideration" for the promise, and the cause or reason for making it was the equivalent for which the promisor chose to assume the undertaking. Until the common law was finally settled during the nineteenth century, equity frequently used consideration to mean not an equivalent but any reason whatever for making the promise. Later during the nineteenth century, when the principle of freedom of contract became all-important, it was reasoned that in contract the idea of human freedom could attain its fullest realization, and that contract was the ideal means of promoting a maximum of human happiness through the promotion of the greatest possible free self-assertion of the individual. Conversely, a maximum enforcement of contractual obligation was demanded: men of full age and competent understanding were to have the utmost liberty of contracting and such contracts were to be fully enforced.

Dean Pound points out that none of the four theories concerned with the enforcement of contractual promises, which are current today (the will theory, the bargain theory, the equivalent theory and the injurious-reliance theory), is really adequate. Among these four theories the bargain theory, which in essence is a development of the equivalent theory, is the most accepted in modern common law thinking. But courts seem to be trying to get away from the bargain theory and enforce promises which are neither bargains nor can be stated as such. We have but to remember gratuitous promises afterwards acted on, promises based on moral obligations, certain cases of "waiver," etc. As a matter of fact, Lord Mansfield's proposition that no promise made as a business transaction can be *nudum pactum*, has been nearly realized today. Dean Pound is of the opinion that philosophical jurisprudence has its first and perhaps its greatest opportunity in the Anglo-American law of contracts. Given an attractive philosophical theory of enforcing promises, American courts might reform the law of contract and thereby develop a truly workable system along new lines. A great service would be rendered by a philosophy which could formulate the idea of good faith as regards promises in a manner that might be acceptable to the courts in that it furnishes them with a rational critique, a workable measure of decision and an ideal of what the law seeks to do, whereby to carry forward the process of enlarging the domain of legally enforceable promises. Unfortunately, neither Dean Pound nor any other philosopher has come up with such a theory.

Dean Pound also notices the gradual disappearance of free

contract and a development in the direction of "contractual dirigism," to use a term coined by the French jurist, Josserand. Standard contracts, statutory obligatory clauses in contracts, insurance contracts, etc., would be instances of this "dirigism" which prescribes rather than enforces contracts. Another feature of modern contract law which Dean Pound notices, is the growing tendency to insist that the creditor, too, must take risks, either along with or in some instances instead of the debtor. Statutes, for example, provide a number of restrictions upon the power of the creditor to exact satisfaction. But this was done, Dean Pound maintains, primarily in order to secure the social interest in individual life. But this trend has gone further: it is held in some quarters that man has a claim against society to relieve him of a burden which he has freely and fairly assumed. This trend has been greatly aided by the new "prediction theory of contract" which insists that a contract is nothing more than a prediction of the ability and willingness to do something at some future time. Legislation, too, often for the alleged purpose of extending the "police power" into the economic life of a nation, has done much to impair contractual obligations, thus undermining the feeling of a moral duty to perform. It could be said that the nineteenth century carried to an extreme the principle of letting people of full age and sound mind contract most freely and holding them rigidly to the contract they had made. The twentieth century, on the other hand, seems to carry to an undesirable extreme the policy of restricting the freedom of contract, of making contracts over for the policy of restricting the freedom of contract, of making contracts over for the parties by judicial action, and of relaxing obligations arising under a valid contract.

The *Introduction to the Philosophy of Law* is a truly remarkable work which fully bears out Holmes' famous remark to Pollock: "The number of things that chap [meaning Pound] knows drives me silly."² Its particular value consists in the fact that it reflects the revolutionary transition from the legal thinking of the nineteenth century to that of the twentieth century. Probably more than anyone else, Dean Pound is responsible for this transition, beginning with his famous address, *Causes of Popular Dissatisfaction with the Administration of Justice*,³ which he delivered before the American Bar Association on August 29, 1906, certainly a noteworthy date in the annals of American jurisprudence. This address, as Dean Wigmore has pointed out, became "the spark that kindled the white flame of progress" in the field of American law and American jurisprudence. The

² HOLMES-POLLOCK LETTERS 115 (Howe ed. 1942).

³ 29A.B.A. REP. 395 (1906).

Introduction, written fifteen years later, added fuel to this spark.
Anton-Hermann Chroust*

LAW AND MORALITY. By Leon Petrazycki.¹ Cambridge: Harvard University Press, 1955. Pp. VIII, 335. \$7.50. Leon Petrazycki was born in 1867 into a family of old Polish nobility.² Although in the introduction to the above mentioned work, Professor Timasheff writes that Petrazycki was a leading Russian philosopher, we would like to point out that he was Polish. The fact that he had published some of his excellent monographs on Roman Law in German and his theories on law and morality in Russian does not make him either a German or a Russian legal philosopher.

Petrazycki's origin had a great bearing on the development of his mind and character. His mind was that of a Westerner. He was a realist, devoted to observation, experiment and to establishing principles of scientific classification of the phenomena under observation. His mind was averse to both: German metaphysics of Kant and Hegel, and the German apotheosis of the state, as well as the soul searching meditations a la Dostoyevsky. While his works are imbued with a spirit of idealism and a certain influence of Russian philosophy may be traced in his works, idealism in legal philosophy is not a specific Russian characteristic. It is also a typical feature of the Polish mind—that when faced with a purely theoretical doctrine it fathoms always the pragmatic and idealistic question: whether and how does this doctrine aid the community, the nation and mankind?

Petrazycki looked askance at the emergence of powerful militaristic states in the second half to the nineteenth century, and fought against the theory that the state and its machinery of physical enforcement are the sources of law. Montesquieu made a remark that the old Polish constitution was made up in such a way that each individual endowed with civil and political rights is to be considered as a sovereign. (*Esprit des lois, passim*). The echo of this idea is reflected also in Petrazycki's theory of law. He states namely: ". . . the number of the spheres where legal phenomena are is the same as the number of living creatures capable of experiencing — and in fact experiencing — the corresponding

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¹ (1867-1937). Famous philosopher of law of the nineteenth and twentieth centuries. Former Professor at the Universities of Petersburg and Warsaw. Author of many works in Polish, Russian and German.

² Text, Introduction at xxi.

mental states . . ."³ Petrazycki reduced the nature of the state to the idea of an independent social organization, and taught that the power of the state is created for the purpose of serving the welfare of the members of the state community.

When Petrazycki started his writing career, the following materialistic and egoistic views were very popular: (1) The purpose of law is the protection of individualistic interests. (2) Might goes before right.

In his monographs: *Die Fruchtverteilung beim Wechsel des Nutzungsberechtigten* (Berlin, 1892), and *Die Lehre von Einkommen* (Berlin, 1893-1896), Petrazycki analyzed the ethical and economic consequences of different institutions of Roman Law. The conclusions he arrived at from the study of the development of Roman Law and from its comparison with the law of the Bible were very startling and contrary to the then prevailing views of jurisprudence. According to these conclusions there are certain leitmotives which clearly manifest themselves in the history of Roman Law as well as in the Law of the Bible, to wit: the Law protects the poor, the orphans, widows, minors, insane, the absent whose whereabouts are not known, and the unborn (*nascitur pro nato habetur quamquam de commodis eius agitur*). In short Petrazycki demonstrated with great craftsmanship and mental acumen that the law protects the most handicapped, the economically weak, and those who are not able to protect themselves or their own interests.

Petrazycki's *Introduction to the Study of Law and Morality* (in Russian), appeared in 1905. In 1907 Petrazycki published in two volumes (in Russian) *The Theory of Law and State in Connection with a Theory of Morality*. These books, with certain omissions and condensations are now published as *Law and Morality*. The purpose of Petrazycki's theory is to explain the nature, the attributes and the effects of the legal phenomenon.

There may be different and equally important approaches towards jurisprudence. One of them is the purely abstract, theoretical. This approach is made under the auspices of the motto: *scientia gratia scientiae*. The theoretician of law states the specific characteristic of the legal phenomenon, pointing out that which distinguishes the legal from the non-legal phenomenon and analyzes the causal connections as well as the effects of that phenomenon.

Petrazycki is thoroughly original in his methodology, in the search and selection of the material for his theory, and in its exposition. Not satisfied with the theories of logical concepts and reasoning as they were presented by Aristotle and John Stuart

³ Text at 12.

Mill, Petrazycki sets forth his own methodology, comprising both his theory of logical concepts and of adequate theories.

One of the great obstacles to the formation of a scientific theory of law is that in jurisprudence (as in the social sciences and the humanities), there does not exist any correct doctrine on the formation of general concepts. Petrazycki wrote:

It is commonly assumed that, in order to form the concept "law," one should make a survey of legal phenomena, compare them with one another and then with kindred phenomena, and finally select the attributes which are common to the law and distinguish law from other phenomena. That is, however, impossible: such surveys and comparisons presuppose knowledge of what are — and what are not — legal phenomena.⁴

In short, this method of creation of concepts, recommended already by Aristotle, is based on a vicious circle: one decides in his own mind the *differentia specifica* of the phenomenon to be defined, one selects according to that specific difference those phenomena, and finally points out triumphantly that thus selected phenomena belong to the same class, because they have certain characteristic attributes.

Petrazycki gives another definition of general or class concepts:

A general or class concept is the *idea* of objects which possess certain attributes or traits. A class consists of all the objects having these traits. Thus the *idea* of white things is a *class concept*, and the *things themselves* comprise the corresponding *class*. Class concepts are by no means limited to things which actually exist: there are class concepts of things entirely imaginary, such as those in geometry, and even class concepts meant to cover real things are not limited to those actually existent but include as well things of the past and of the future possessing the relevant attributes.⁵

Thus a typical idea of a class concept is: all phenomena with the specific mark *a* or *b*, or *ab*, or *abc* etc. One does not, therefore, need to survey all things or phenomena of a certain class; it is enough to examine one single thing or phenomenon and through its analysis arrive at a truth which refers to all other phenomena or things of that same class.

By an adequate theory Petrazycki understood such theoretical propositions where the predicates and the subjects are precisely commensurate. That is, the subjects of the theoretical proposition are specifically referred to the predicates; and vice versa, that is, that the predicates are specifically bound to the subjects. When the subjects and predicates are adequate and the specific mark of the class phenomena under observation can be connected

⁴ *Id.* at 17.

⁵ *Id.* at 18.

either causally or logically with other attributes — such adequate theories are also scientific theories.

Petrazycki found that the proper sphere where legal phenomena exist is the human mind and, especially, the ethical consciousness of the individual.

Copernicus fought the optical illusion that the sun evolves around the earth; Petrazycki fought the psychological illusion that the Law exists somewhere outside of our mind, somewhere above, or somewhere among human individuals, or is an expression of a fantastically construed "will" of an organism, such as the "will" of the community, of the Nation, State, etc. When we deal with the legal proposition: A, the lessor, has the right to obtain from B, the lessee, \$5,000 in rent. There is a legal relationship between A and B. Where is it? Where can it be found for the purpose of study? If A and B live in different states, could we say that the legal relationship exists somewhere in the middle way, or is it attached somehow to B, as the lessee, because he is bound to pay the rent, or to A, as the obligee, who has the right to demand the rent? The scientific and critical answer to these questions is that the legal phenomenon exists in the mind of the third person C, who supposes that A has a right to receive — and that B is bound to pay \$5,000.⁶

Legal phenomena consist of unique psychic processes . . . expressed, incidentally, in the unique form of ascribing to different beings . . . or to certain classes of such beings, "duties" and "rights"; so that these beings, so conceived of, are seemingly found in certain peculiar conditions of being bound or of possessing special objects ("rights"), and the like.⁷

For thousands of years a distinction was being made between law and morality. According to Petrazycki the legal and moral phenomena belong to a common, higher class of ethical phenomena. The characteristic feature of ethical phenomena is that they impose upon the person experiencing them a feeling of being bound, and that this feeling of boundness is imbued by some mystical authority. Some of the ethical experiences are purely imperative, which means that we feel that our duty depends on our free will and is not something which is secured to another as due to him. Petrazycki classifies these experiences as moral ones. On the other hand, there are ethical experiences of such a nature, that while we are bound to do or to abstain from something, we feel that the object of our duty is not dependent on our free will, but has a corresponding right. This class of ethical phenomena Petrazycki classifies as legal pheno-

⁶ *Id.* at 7.

⁷ *Id.* at 8.

mena. The *differentia specifica* of legal phenomena is that while moral phenomena are *purely imperative*, legal phenomena are not only *imperative* but also *attributive*.

It should be pointed out that Petrazycki's theories on the psychology of ethical phenomena specifically, as well as in the other domains of human behavior, are absolutely up to date, and that nobody has surpassed him in his classification of psychic phenomena. Moreover, his theories in the field of the motivation of human behavior are not only of great theoretical but of great practical value as well.

All the above discussion concerned jurisprudence as a theoretical science. However, besides the theoretical approach to jurisprudence, there may be different practical approaches: the normative and dogmatic approach which has as a purpose to establish with precision the scope and content of the legal norm.

On the other hand, jurisprudence can also be considered from the viewpoint of legal policy. This viewpoint has two aspects: the critical one which evaluates the already existing law and also the creative one, which refers to the law to be formed in the future. Both aspects are being evaluated from the viewpoint of socially desirable goals.

Applying his theory to the phenomena of practical legal life with great craftsmanship, Petrazycki has explained the functions of practical jurisprudence. According to his opinion, its most important task is to discover ways to protect the weak and the poor.⁸

Petrazycki has set forth the following propositions as the foundations of a scientific policy of law. The law is a motivational factor. Its motivational effect upon the human mind is constant, thus creating habits and propensities of that type which make people more adaptable to life in community. It eradicates anti-social propensities which would make life in community either miserable or impossible. Through its constant and perpetual effect, it molds the human mind and character of each individual and of the mass of the people, effectuating in this way a change in the character of the individual, as well as in the character of the mass. Thus, besides being a motivational factor, the law becomes an educational factor too. "Rational law," wrote Petrazycki,

represents a complex and mighty school which aims at socializing the national character and adjusting it to rational coexistence. Unsuccessful law may spread demoralization and poison the national spirit—or at least counteract the healthy psychic process and retard the development . . . of individual and mass character.⁹

Petrazycki has analyzed further the consequences of the mo-

⁸ *Id.* at 144-145.

⁹ *Id.* at 301.

tivational and educational function of the so-called law of free — enterprise economy, consisting of the combination of a few legal principles to wit: (1) Every adult citizen has a right, in general terms to organize his life as he pleases. (2) The tools of production and the land is divided among individuals or corporations on the basis of the law of property — given with the exclusive right of *utendi* and *abutendi* to the owners. (3) According to the law of inheritance, the free enjoyment, with no obligations to render an accounting, is granted to one and his heirs forever. (4) According to the principles of modern family law, the upbringing of children is a function of the parents, and chiefly that of “the father of the family.” (5) The members of the contemporary society not being obliged to work for the welfare of others and having no claim to obtain from others the necessities, obtain by barter what is necessary for themselves in exchange for the objects being at their disposal. They enter into mutual agreements, contracts, in order to get money or food for labor, or sell their goods in order to obtain money. The guiding principle of the contract-law is the principle: *pacta sunt servanda* under the sanction of damages for non-fulfillment of the contract.

The combination of these few legal principles works as a

. . . powerful psychic pressure in favor of zealous concern that the elements of national wealth entrusted to the uncontrolled disposition of individuals be utilized in the best way for the production of new economic goods (corresponding to the social needs of the nation) so that these may be furnished where they are the most useful and the most needed.¹⁰

Summing up his propositions on the motivational and educative functions of law, Petrazycki thought that the guiding ideal to which unconsciously the development of law proceeds is the ideal of brotherly, active love. And at the same time these propositions give the criteria for the distinction of good law and bad law. According to Petrazycki, the final test and distinction in evaluating the law as positive and negative would depend on whether or not such law would aid or hinder the fulfillment of the supreme idea of brotherly love.

Petrazycki's *Law and Morality* has explained from the point of view of the psychological theory of law the basic concepts of legal theory: legal subjects, legal objects, norms and legal relationships.

The most illuminating sections are devoted to the differentiation of various species of law. Petrazycki has given a penetrating analysis of the mutual relationship of what he calls intuitive law

¹⁰ *Id.* at 305-306.

and positive law. His observations shed a new light on mutual relation of law and equity and the final merger of both in Anglo-American jurisprudence (as for instance in mortgage law). He discussed justice as an expression of intuitive law and found the latter to be the basis of the legal order. Then came a fine analysis of different species of positive law, such as the statutory law, customary law, the law of court practice, book law, *i.e.*, law based on books and treatises of learned jurists, and other species of positive law.

In each of the enumerated subject-matters Petrazycki has always had something original to say, something that was never heard hitherto. He tried especially to establish some tendencies in the development of the law: such as the tendency towards the decrease of motivational pressure through the ages of the history of law; the tendency towards the increasing loftiness in the quality of motivation which induces the members of the community to an active and socially useful life. Let us compare, for instance, the methods in which the needs of the community were provided: in ancient times through the means of slave work, later, in the Middle Ages with the Feudal System through serfdom and corvee, then with the free enterprise—through a free labor contract.

Petrazycki's deep understanding of the mutual relationship and interdependence of the intuitive and positive law has created a vivid picture showing how the intuitive law is sometimes a guiding light in positive law, and how progressive positive law has the effect of evoking into life progressive intuitive law.

Though Petrazycki was a believer in social progress, and especially a believer in the greater educational social power of law than of morality, he was by no means naive. He stressed the vindictiveness of legal emotions in case of non-fulfillment of the attributive, exacting side of the legal psyche. Out of the discrepancies between intuitive law and positive law, of customary law and progressive positive or intuitive law, arise the great social convulsions and clashes—revolutions and civil wars. Petrazycki's theory serves as an excellent basis to explain in the terms of these discrepancies the American and the French Revolution, the Civil War between the States, etc.

The scope and content of Petrazycki's work, the depth of its analytical reasoning, the original views on the development of the law and on the sources of revolutions and civil wars—endow it with such significance, that it should be read not only by the members of the legal profession, but also by psychologists, sociologists, theologians, historians and philosophers. It presents law as the phenomenon of culture. It comprises the wisdom of

theory, the knowledge of facts, and corresponds to the most urgent needs of our time: the need for a guiding light in the domain of legal policy.

Summing up, we can say that the work of Petrazycki has the stamp of a genius which makes it comparable to the *Nicomachean Ethics* of Aristotle. He presents a full, rich and scientifically explained picture of human ethical consciousness and gives an excellent exposition of the problems and nature of law and morality.

Professor Babb, author and co-author of important works in the domain of law merchant, is an excellent translator. The text to be translated was difficult even for a translator of such capacity as Professor Babb. It is his great merit that he undertook this very arduous task and completed it successfully. The translation is simply brilliant, and in the English translation Petrazycki's work is much clearer and more intelligible than in the original.

*Zygmunt Epstein**

LEGISLATIVE DRAFTING. By F. Reed Dickerson.¹ Boston: Little, Brown, & Co., 1954. Pp. ix, 149. \$4.95. Mr. Dickerson has put together a compact, interesting, and informative manual on the technique or art, as the author undoubtedly would refer to it, of drafting legislation. A copy of his book should be in the possession of all lawyers in the service of the federal or state governments who are called upon to draft, or advise in the drafting, of statute or administrative rules and regulations. Moreover, the book should be of considerable benefit for the attorney in private practice whose skills in the drafting of legal instruments may need sharpening. While necessarily manualistic in form, Mr. Dickerson's little book is delightfully readable. This happy relief from the tedium from which most legal manuals congenitally seem to suffer is due to the light, almost sprightly style with which the author is blessed. Those who recoil at the boring pursuit of the uninspiring pages of legal manuals of various kinds should find the cover to cover reading of *Legislative Drafting* a surprisingly easy feat.

Nor does the book sacrifice instruction and coverage of the subject to interest and readability. Indeed, one of the few criticisms that might be made of the book is that the author sometimes wastes space on mechanical minutiae, such as his reminder to the putative draftsman that he should have well sharpened

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¹ Chief, Codification Section, Office of General Counsel, Department of Defense.

pencils handy before he begins his job. Having shifted to a more critical vein, mention might here be made that the book suffers in one respect from the author's parochialism in presenting examples or experiences to illustrate some of his points. Practically all Mr. Dickerson's examples, though often apt illustrations for the purpose cited, are drawn from his experiences in drafting legislation for the Department of Defense, or even more unfortunately from the point of view of being less than typical, are those abstracted from some of the unbelievable aberrations of legal language that were not the infrequent characteristics of regulations issued by the Office of Price Administration. Of course, any work of this kind would be expected to reflect in good measure the writer's own experiences in drafting legislation. Nevertheless, it is regrettable that Mr. Dickerson did not rely more for his examples or illustrations on bills and statutes which he must have come across while serving with the Legislative Reference Service of the House of Representatives. If this had been done, in the reviewer's opinion, there would have been added to the book a balance that it does not now enjoy.

Despite the defects mentioned, however, the book has undeniable merit as a valuable reference work and working tool for the attorney who must face the problem of drafting bills or regulations. While elemental in nature, it is precisely that quality which makes it worth while as a working tool for those who need one in this field. Combined with its readability, the detailed check list of the "do's and don'ts" of sound legislative drafting which the book provides entitles it to be ranked as a significant contribution to the few helpful source materials that now exist on the general subject of legislative drafting.

The reviewer has one final criticism, directed not so much at the book as to a point of view of the author's which from time to time he imparts throughout his work. Mr. Dickerson seems taken with the somewhat dandified notion that legislative draftsmen are a class of experts quite apart from lawyers generally and that access to the cult is, or should be, a difficult thing by which to come. We will concede that the drafting of legislative or administrative administration is indeed a specialty. However, unless the law schools of the country are neglecting completely one of their basic functions, *i.e.*, adequate training in the use of law and language to articulate ideas, it strikes the reviewer as a mistaken emphasis to suggest that well educated lawyers cannot master the skill necessary to accomplish, when called upon, the task of writing an understandable, cohesive statute or regulation designed to carry out a particular purpose of the client. Actually,

there may be a substantial disadvantage should Mr. Dickerson's view gain acceptance with legislative or administrative bodies and a priesthood of legislative draftsmanship be created. This would result in isolation or at least separation from those lawyers who operate in the substantive field with which the proposed legislation to be drafted would be concerned. Apart from the hazard that draftsmen thus compartmentalized will be less well informed on the subject with which they must deal, once having placed the draftsman in the strategic and elevated position of writing the law, the temptation would arise to accept them as authorities who are not only most qualified as to what should be put in or kept out of the statute or regulation, but also, after its passage, to rely on them as its most conversant interpreters and best administrators. Such a position is not without logic in its support. Having drafted a technical piece of legislation, it can be persuasively contended that the technicians who created it are those best qualified to have custody of operations under it. While it is true that early in the book Mr. Dickerson does warn of this tendency toward self or group aggrandizement among draftsmen, his admonition is subsequently obfuscated by his excessive emphasis on the special skills and attributes that are those of the legislative draftsman and to which few attorneys can aspire.

Part of the standard equipment of a trained lawyer should be the ability to cast language not only in argumentative or analytical form, as in brief writing but also to put it together as the text of statutes or regulations. Mr. Dickerson's book should help attorneys who have occasion to refer to it to achieve that latter ability. If so, we should hope that the author would not regret too much the fact that his own work helped to dispute his thesis that accomplished legislative drafting must remain a talent reserved for the few rather than become the common possession of the trained advocate both within and outside of the public service.

*Alfred L. Scanlan**

THE PUBLIC PHILOSOPHY. By Walter Lippmann.¹ Boston: Little, Brown & Co. 1955. Pp. XIII, 189. \$3.50. Of the two great fears driving men to a reconsideration of the natural law position, only one has been fully articulated in this country. This is, of course,

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¹ Noted Publicist: Author of A PREFACE TO MORALS (1929); PUBLIC OPINION (1922) and many others.

the fear that our individual liberties will be swept away by authoritarian social orders unless they are anchored in a firmer ground than the positivist doctrines of law as effective command, accepted sanction, or cultural consensus. Many thinkers and institutions, not least the Natural Law Institute at Notre Dame, have sounded the warning and pointed to the cure.

The other drive, however, has not found as forceful expression as the first. This is the converse fear that democracy will be lost not by reason of the imposition of order by the self-justified power of a dominant group — but by reason of excessive liberty leading to reaction. Many have recognized but few have stated that human rights which are not kept within the limits of human duties become irresponsible and self-destructive. Yet it is a common-place irony that collectivist theories — Communist, Fascist, Nazi, and others — have succeeded in large measure because democratic theory has given too much attention to individual freedom and too little to social responsibilities and the common good.

This is a delicate subject in our present climate of opinion because of its susceptibility of misinterpretation. Yet the point needs to be made and developed — and by a person of unquestioned integrity, acknowledged detachment, and broad sympathy with democracy.

It is a happy event, then, when a journalist-philosopher of the stature of Mr. Lippmann brings out these truths. As Mr. Lippmann says:

. . . we must adopt the habit of thinking as plainly about the sovereign people as we do about the politicians they elect. It will not do to think poorly of the politicians and to talk with bated breath about the voters. No more than the kings before them should the people be hedged with divinity. . . . [T]hey are betrayed by the servile hypocrisy which tells them that what is true and what is false, what is right and what is wrong, can be determined by their votes.²

Basically his book is a protest against the popularity test of right and wrong and an affirmation of the existence of an objective, qualitative standard of right and wrong. This emerges gradually from a discussion of many subordinate points, related ideas and historical vistas. It does not emerge at once and clearly. It is only after a progressive widening out of his original diagnosis of the democratic malady and the cure, that we can see the underlying thesis.

Because of this progressive deepening of his thought, the

² Text at 14.

unsympathetic reader could easily find fault with apparent incoherencies and non-sequiturs. The only fair way to read it is as one listens to one who is thinking aloud. Indeed Mr. Lippmann expressly notes that he wrote it:

. . . in an effort to come to terms in my own mind and heart with the mounting disorder in our Western society. . . I began writing, impelled by the need to make more intelligible to myself the alarming failure of the Western liberal democracies to cope with the realities of this century.³

Mr. Lippmann begins with the failure of the democracies to cope with the problem of war. Mass opinion has acquired the decisive power; and

. . . the prevailing public opinion has been destructively wrong at the critical junctures . . . too pacifist in peace and too bellicose in war, too neutralist or appeasing in negotiation or too intransigent.⁴

Not only in preventing war or preserving peace, but in the issues of security and insolvency, and of order and revolution, the democracies have shown alarming irresponsibility and weakness. As a consequence anti-democratic revolutionary movements have manifested alarming strength, for the people “. . . will choose authority, which promises to be paternal, in preference to freedom which threatens to be fratricidal.”⁵

The trouble is, in Mr. Lippmann's opinion, the masses as such, or public pluralities as such, are simply not equal to the task of governing. They lack adequate knowledge; they cannot be kept fully informed and up to date; much information is necessarily withheld or distorted. Furthermore they can only say “yes” or “no”, and usually this is “yes” to the proper end but “no” to the necessary means since they inevitably choose the softer, easier decision over the harder but proper one. Moreover, a mere momentary plurality of voters is by no means competent to speak as the representative of the “people” or the “public interest”: the “people” are a changing group, constituting the whole community, young and old, and including even unborn generations.

According to Mr. Lippmann the masses are not meant to govern; they are meant to choose the governors and to criticize, assent or veto what the governors do. The executive power alone should have initiative. The legislative branch should function as the advocate of the people.

³ *Id.* at 3 and 4.

⁴ *Id.* at 20.

⁵ *Id.* at 61.

A basic derangement of function began in about the year 1917. From that time onward the masses have become increasingly dominant and the executive powers have become progressively enfeebled, such that political leaders are basically intimidated servants of majority opinion who occasionally in the public interest circumvent this opinion. The causes of the derangement have been twofold. First, the enormous monetary requirements of governments have necessitated popular consent and led to popular control. Second, the superficiality of popular judgment, believing only in the tangible universe of the senses, has stripped the executive leadership of "the imponderable powers," *i.e.*, the aura of majesty which surrounds and strengthens a morally correct leadership.

To be sure there are many devices by which reliance on decision by mere numbers is sought to be limited.

. . . [M]uch invention and reforming energy have been applied to finding other ways to insulate the judicial, the executive and the administrative functions from the heavy pressures of "politics" and "politicians." The object has been to separate them from the electoral process. . . . The civil service, the military services, the foreign service, the scientific and technical services, the quasi-judicial administrative tribunals, the investigating commissions, the public schools and institutions of learning, should be substantially independent of the elections.

Yet implicit in them there is a principle which, if it can be applied deeply enough, gets at the root of the disorder of modern democracy. It is that though public officials are elected by the voters, or are appointed by men who are elected, they owe their primary allegiance not to the opinions of the voters but to the law, to the criteria of their professions, to the integrity of the arts and sciences in which they work, to their own conscientious and responsible convictions of their duty within the rules and the frame of reference they have sworn to respect.⁶

Traced to its source, the basic cause of the derangement is what Mr. Lippmann calls the prevailing "Jacobin Spirit" which teaches that there will be an earthly paradise when our natural impulses are liberated from artificial authority and restraint—a doctrine that sprang from the French exasperation with their closed, incompetent aristocracy. This spirit led naturally from the French Revolution against ruling classes to the Communist Revolution against the capitalist bourgeois class and ultimately to the Leninist doctrine of continuous revolution to overcome all opposition. Unlike the responsible and stable governments arising where there is an open aristocracy or a constitutional monarchy, the Jacobin governments are revolutionary and utopian.

⁶ *Id.* at 51.

There is involved the idea of a collective redemption of mankind and a building of a heaven on earth.

The hidden lair of the trouble consists in the great sin of pride. Man arrogates to himself the role of God, and confuses the realm of essence (ideals, perfection) with the realm of existence (practical prudence and possibility). He forgets that the old Adam must be educated into a self-disciplined new Adam, that an unrestrained allowance of all natural inclinations cannot be permitted.

The cure which Mr. Lippmann suggests for all this is a return to the public philosophy. "The public philosophy is known as *natural law*, a name which, alas, causes great semantic confusion."⁷ This philosophy was present with our Founding Fathers and is what makes democracy work. It gives a common direction which fills the vacuum and anarchy of pure freedom and tolerance and makes society cohere. It is a substratum of right and justice that we share and it supplies the qualitative, self-mastering, principle necessary to limit and guide decisions by sheer plurality. In other words, Mr. Lippmann argues for the introduction of an aristocratic principle into the democratic framework. And in fact, he makes this explicit in a later part of the book.⁸

What is the natural law?

They are the laws of rational order of human society—in the sense that all men, when they are sincerely and lucidly rational, will regard them as self-evident. The rational order consists of the terms which must be met in order to fulfill men's capacity for the good life in this world. They are the terms of the widest consensus of rational men in a plural society. They are the propositions to which all men concerned, if they are sincerely and lucidly rational, can be expected to converge.⁹

The author discusses in detail the application of the rational order in only two areas—property rights and freedom of speech—showing the natural limits on both. (Incidentally he justifies freedom from censorship by the necessity of public debate to get at the truth, so that if there is no true debate, censorship is necessary.)

Rational procedure is the ark of the covenant of the public philosophy.¹⁰

We find, then, that the principle of freedom of speech, like that of private property, falls within the bounds of the public philosophy. It can be justified, applied, regulated in a plural society only by adhering to the postulate that there is a rational order of things

⁷ *Id.* at 101.

⁸ *Id.* at 140.

⁹ *Id.* at 123.

¹⁰ *Id.* at 133.

in which it is possible, by sincere inquiry and rational debate, to distinguish the true and the false, the right and the wrong, the good which leads to the realizations of human ends and the evil which leads to destruction and to the death of civility.

The free political institutions of the Western world were conceived and established by men who believed that honest reflection on the common experience of mankind would always cause men to come to the same ultimate conclusions. Within the Golden Rule of the same philosophy for elucidating their ultimate ends, they could engage with confident hope in the progressive discovery of truth. All issues could be settled by scientific investigation and by free debate if—but only if—all the investigators and the debaters adhered to the public philosophy; if, that is to say, they used the same criteria and rules of reason for arriving at the truth and for distinguishing good and evil.¹¹

. . . the highest laws are those upon which all rational men of good will, when fully informed, will tend to agree.¹²

History will be society's mirror to build and preserve from generation to generation a "tradition of civility." Yet Mr. Lippmann is quite clear that natural law theory must be reworked in modern idiom and addressed to modern problems. Mr. Lippmann thinks that the

. . . public philosophy cannot be popular. For it aims to resist and to regulate those very desires and opinions which are most popular.¹³

Nor is it easy to teach, being intangible. The basic problem is to accommodate its profound spiritual and philosophic truths to the senses—by parable, symbol and analogy—making them concrete. The idea of a public contract (the Constitution) is an example of "concretization." The starting point is to teach the teachers. Our philosophers and theologians have a key role in clearing the atmosphere for a new acceptance of a transcendental, rational order of things. The principles of the public philosophy

. . . cannot be made to prevail if they are discredited,—if they are dismissed as superstition, as obscurantism, as meaningless metaphysics, as reactionary, as self-seeking rationalizations.¹⁴

In short, the democracies must recapture the sense of the "mandate of heaven" if they are to succeed in rescuing themselves.

How shall we appraise this book? To begin with it is evident that it has the weaknesses of its strength; that is to say, it has the faults of any eloquent exploratory thinking: the parts do not

¹¹ *Id.* at 134.

¹² *Id.* at 160.

¹³ *Id.* at 162.

¹⁴ *Id.* at 179.

always seem to hang together because the writer is penetrating deeper and deeper into his subject, leaving his starting point far behind in the excitement of the various vistas that he opens up.

For example, Mr. Lippmann's proposed cure does not clearly match the original evil. He begins with a lament over the popular errors arising chiefly in the field of international order whereas he ends with the medicine of natural law applied in detail by him only to the fields of free speech and property rights. Again, at first he finds the evil in the over-extension of the power of the mass opinion at the expense of executive power; then he sees it in the prevalence of the Jacobin spirit (which cannot be allocated to the masses over the executive); and finally he places the evil in the sin of pride (to which all men are prone).

One would desire that in thinking his way through to the basic evil, positivism and pride, and the basic cure, the acknowledgment of a knowable, objective, rational, moral order, he would not rely so much upon certain questionable points not necessary to his thesis. Thus the idea of an historical turning point in 1917 seems dubious. The mistakes of the rulers before 1917 were as gross as the people's afterwards. And the errors of the people after 1917 were in a large measure shared by their leaders, whether Lloyd George, Clemenceau and Wilson, or Churchill, Roosevelt and Stalin. Actually history would seem to indicate as many great errors by a government uninhibited by pluralities as the opposite, and conversely as many correct decisions by the majority as by uninhibited leaders. Mr. Lippmann appears not to do justice to the many correct decisions of the majority. As a result the presentation tends to give the impression that the executive department of the government if freed from popular pressure would rule wisely and well. This is not Mr. Lippmann's meaning.

Also the suggestion that the executive department should *initiate* and the legislative department *advocate* is to pitch the antithesis of quality vs. quantity on too low a plane. Surely the makers of the laws should initiate and share in the leadership. The evil is not the cession of powers to the legislative, but the loss by both legislative and executive of a sense of justice transcending subjective and quantitative tests.

Again one feels that, insofar as the United States is concerned, Mr. Lippmann has overstated the prevalence of the revolutionary, radical spirit of Jacobinism.

One would wish a clearer distinction between the failures of the people flowing from inadequate information (which might possibly be corrected) and those flowing from the inherent in-

capacity of the people to administer their affairs in any detailed sense.

Finally, it seems to this reviewer that Mr. Lippmann has overdrawn the gulf between spiritual ideals and practical applications; between the Apostles, as it were, and the practitioners. The theme of existence vs. essence has not the same philosophic meaning as Mr. Lippmann gives it in his book. Ideals are not necessarily unattainable or irreducible to the concrete. The Ten Commandments are not so vague. After all it is a quite definite directive to say, "don't lie", "don't murder", "don't steal" — and quite attainable and attained in the vast majority of actions. Kindness and brotherhood are quite general ideals and yet quite simple to explain in concrete terms.

On balance, however, the virtues of Mr. Lippmann's book far outweigh the apparent defects. The central thesis seems unassailable: the democracies, to survive, must build upon an objective rational order transcending majority opinions and giving moral legitimacy to a non-servile leadership. The message is timely: there is a need to redress a one-sided view of the natural law ideas of freedom and to prevent a false deification of popular pluralities. The publication is courageous: — one must admire the taking up of a potentially unpopular position that has and will subject the author to accusations of being distrustful of the people. The style is eloquent and direct: a well-known Lippmann characteristic. Finally the presentation is highly stimulating: an effect given by the manifestations of wide reading, large experience and far ranging vision.

In short, one must congratulate Mr. Lippmann on the trend of his thought, the timeliness of his message, the courage of his undertaking, and the eloquence and suggestiveness of his presentation.

*George Constable**

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* Reviewed in this issue.