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Book Reviews

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BOOK REVIEWS

JUBILEE LAW LECTURES: 1889-1939. By Roscoe Pound and others. The Catholic University of America Press, Washington, D. C. 1939.

These eight lectures were arranged by the School of Law of the Catholic University of America "as a contribution to the celebration of the Golden Jubilee Year" of that university, as Dean Robert J. White tells us in the preface. The first series comprises four lectures by Roscoe Pound on the general subject, "The Church in Legal History." They are rich in legal lore and juristic erudition as all readers of the scholarly papers of the former Harvard dean would be prepared to expect. Here we encounter, not only Bartolus, Ulpian, Gratian, Isidore, Gregory, Bracton, Justinian, Coke and Blackstone—to say notohing of Pollock, Maitland, Story, Savigny, Holmes and other recent Bartolists and worthies of bench and bar, of tribunal and wool-sack — but also Aristotle and Aquinas.

In these days when the layman all too frequently, and most of the time unjustly, refers to lawyers, attorneys, counsels, barristers and advocates as shysters, ambulance chasers and "mouthpieces," it is meet and just as well as wholesome to renew acquaintance with the noble historical background of a profession which had its glories and played a pivotal part in the course of civilization. For the man of law in the past was never a mere "business adviser" although our businessman's civilization has done much to reduce him to that condition.

Moreover, in these same days, when nominalism, behaviorism and pragmatism have been transferred from the field of pure or speculative philosophy to the more practical domain of law and jurisprudence by such legal thinkers as Thurman Arnold and Jerome Frank, it is highly desirable that there be a return to those philosophical principles which historically supplied so many data and premises (sometimes, but not always, as unconscious presuppositions) for the structure of legal doctrine. The ideas of these modern skeptics are not entirely new, of course. In 1345, Judge Hilary said, "the law is the will of the judges," while Chief Justice Stonore replied, "No, law is that which is right." Today, the self-styled "realists" insist that law is the totality of official behavior instead of a collection of abstract rules and that "what the judge and jury do" is more important than what the judge says. But besides confusing morals (mores, folkways, customs, conventions, etc.) with ethics, or, in other words, "ought" with "is", they forget the solution of the moderate realism of Aristotle and Aquinas for whom the abstract universals exist, *ut sic*, in the mind but have an objective counterpart or a basis in reality. Thus, to a Thomist, it is not difficult to reconcile the statement in the *First Institute* of Sir Edward Coke (1628) to the effect that "reason is the life of the law" with the assertion of O. W. Holmes that "the life of the law has not been logic but experience." One may also allow for the human equation and agree with Lord Halsbury that "the law is not always logical" or with J. Bailhache when he avers that "our law is not a science," even if this last declaration requires some qualification. The law may be an experiment and a weapon or means but it is also something more, something deeper. Even Holmes[1] who was impatient of axioms and dogmas and who seemed to favor the definition of law as "what is decided by the courts," denied that he was a cynic and wrote: "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."

In the present work, the four lectures by Roscoe Pound deal with four ideas, *viz.*, universality, authority, good faith and law, which were contributed to the

1 COLLECTED LEGAL PAPERS, Harcourt Brace, 1920, p. 170.

law by the Church. In the first lecture (which might be read along with the Harvard Tercentary address by Etienne Gilson on "Medieval Universalism"), he enumerates three phases of the universal idea in its relation to law, namely, the conceptions of a universal church, of a universal empire, and of law as an expression of justice and truth and the eternal reason of the Creator.[2] He illustrates his thesis with examples from the church-state controversy, the laws of marriage and the "great subject of Conflict of Laws". He then shows how nationalist theories of law and the 19th century analytical school rejected this universalism which, however, is enjoying a revival of late. This resuscitation is in large part due to the increasing interest in comparative law.[3]

The second lecture treats of the idea of authority and the author, after contrasting medieval with modern values, points out that "the lawyers learned from the church and have since assumed, that what lay behind law in all of its senses was authority."[4] Then after discussing different kinds of control, the need of both stability and change, and the psychologic and economic bases of the quest for authority, he declares that the "unchallengeable bases universally recognized" in the Middle Ages were the Bible, the Patristic writings, the logical method of Aristotle and the legislation of Justinian.[5] Then follows an account of the technique of the glossators and, later, the commentators. Here one might object[6] to the statements regarding: "Scholastic philosophy, with its reliance upon dialectical development of authoritatively given premises" and "Reason was appealed to, to sustain authority. But the reason appealed to was a reason itself resting on authority." This is true, and rightly so, in theology but not in philosophy and the distinction is made by St. Thomas Aquinas in a classic text, *Summa Theologica,* P. 1, q. 1, a. 8.

Pound's third lecture shows how the idea of good faith was absent from the ancient codes and that "the performance of promises" as a legal conception was furnished by the Church. We cannot enter here into his account of contracts in the Roman law and at Common law but he shows that the Romans turned duty which was originally a moral idea into a legal conception,[7] but the Roman law did not grow and the Roman law of contracts did not "shake off the ideas of the strict law." Showing the importance of *nuda pacta,* of promises which are not bargains, in the economic order, in international relations and, generally, in any developed social order where uniformity, reliability and predictability in human conduct are indispensable and that by secular means alone the idea of good faith has little support. With reference to the doctrine of consideration and the idea of specific performance he blames the attitude and tradition of "strict law" for the "feeling amounting to a conviction that promises simply as such ought not to be enforced." The church was the force behind this fundamental ethical and legal conception of good faith which belongs in the field where the moral and the legal orders overlap. Modern extreme secularization has transferred to the law and to public education what the home and the Church formerly performed as tasks of social control[8] and Pound is pessimistic about their prospects as substitutes for the latter. He is not wrong.

The fourth and final lecture deals with the idea of law by which the author means not laws or special rules or detailed provisions or an aggregate of these but rather general ideas, rules, principles and received ideals. He shows that

2 JUBILEE LAW LECTURES, 1889-1939, p. 8.
3 *Id.* at p. 24.
4 *Id.* at p. 30.
5 *Id.* at p. 34.
6 *Id.* at pp. 35, 41.
7 *Id.* at p. 53.
8 *Id.* at p. 71.

Greek philosophers and Roman jurists sought something behind special rules and particular laws of the primitive legal order. He tells us that "the lawyers of the church and the theologian philosophers of the church took over from Roman law the idea of natural law and made of it the chief instrument of creative law-making and the great liberalizing agency in law for the modern world." [9] Gratian expounded "the ideal foundation on which all laws were to rest." St. Thomas's account of the natural law with the eternal law behind it, is assigned major credit for the fact that "laws were made subordinate to law" and that "the law of nature prevailed over custom and over the ordinances of princes. Suarez, Ockham and John of Salisbury are also quoted.

By implication, I believe one may fairly say that Roscoe Pound has little regard for such modern theories of law as skeptical realism, psychological realism, phenomenalism, Marxism, psycho-analysis, positivism.[10] His conclusion, after many tributes, is: "I do not say, as some are doing, back to Aristotle and St. Thomas Aquinas. But I do say we need philosophers of their organizing genius to make what has come after them fruitful for mankind."

The second half of this little volume consists of a series of four lectures on "the Function of Law in Society Today." Contributors to this part two are Daniel J. Lyne of the Boston Bar, Grenville Clark of the New York Bar, Hector David Castro of El Salvador and John J. Burns of Boston. The first of these lecturers spoke of "The Future of the Common Law." He showed how "the two important characteristics of the Common Law of yesterday" were "its devotion to liberty and its protection of individual rights." [11] He then traces the changes in the direction of increasing social emphasis and attention to the common good. Among his illustrations special attention is given to the growth of administrative boards and to "the extension of the power of the Federal Government" because "only a power that is national can serve the interests of all." He urges the need of vigilance lest organized minorities impose their ideologies upon our democracy. His conclusion sounds somewhat like Republican propaganda in behalf of business.

The second lecture in this second series is by Grenville Clark on the subject of "Law and Civil Liberty." This consists of a courageous plea for "safeguarding freedom of expression." The lecturer is a bold champion of tolerance and goes rather far in his opposition to censorship in any form. He bases his thesis upon the proposition that "our institutions rest upon the conception of a government based on the consent of the people—a consent that can only be real if neither coerced nor uninformed." [12] He insists that there be true consent with discussion of implications, not a nominal or supposed consent. He stresses the prime importance of education and the advantages in a deeper knowledge of history. The law "must foster free debate in public matters" if our "basic philosophy is to live and grow."

The third lecture in this second series is by Hector D. Castro and deals with "Natural Law and Positive Law." He begins by contrasting the materialistic and positivistic conception of law and society with the spiritualistic school of thought. He defends with the latter the notion of natural rights and enumerates some of these. He rejects the view of nature held by Hobbes as well as the social contract theory. He attributes to positive law three functions and insists that it be subject to the natural law and that it recognize and regulate natural rights. As he develops his thesis, euthanasia, slavery, Communism and the usurpation by the State of the role of parents in education, etc., are repudiated.

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9 *Id.* at p. 74.

10 *Id.* at pp. 6; 29; 90-97.

11 *Id.* at p. 102.

12 *Id.* at p. 129.

The final lecture by John J. Burns is entitled "Law and Ethics." It begins with a resume of the other seven papers and is otherwise somewhat rambling and diffuse. In rather desultory fashion, the contributions of ethics, philosophy, virtue and morality to positive law, are illustrated by a variety of instances. The discrepancy between legal policy and moral obligation, the lag between the "ought" and the "is" and the difference between Oswald Spengler and Jacques Maritain, are demonstrated.

Daniel C. O'Grady.[13]

LAW AND THE PROFITS, by Charles Francis Coe; The Harrison Co., Atlanta, Georgia. $3.00. pp. 240.

Although the title of this book does prove to be slightly facetious, the work itself is delightfully entertaining and amusing for both the professional and non-professional person. In addition to its enjoyable attributes, its friendly and informal style, the book affords immeasurable help to the practicing lawyer because of the interesting presentation of the practical legal problems of the author as they confronted him together with the intelligent manner in which he solved them.

The purpose of the book is to examine into the relationship of client and attorney, jury and attorney, witness and attorney, and judge and attorney. Technicality is left strictly at home. Form is discarded in favor of chronology in order to give the desired force and effect to each problem as it actually faced the author in real life. To effectuate the first named purpose, the author vitalizes the various states of mind of some of his clients to prove the premise that when a client has no use for a lawyer, he is a person to be avoided, as one possessing mysterious ways and magical formulas; but as soon as a client has need for a lawyer, everything is different. He desires to be friendly with the lawyer and wants his mysterious ways and magical formulas applied to his particular needs.

In discussing the relationship between jury and attorney, and witness and attorney, the author makes some suggestions which, if given some degree of thought, will prove of unending value to the young lawyer. In the case of a juror, for instance, you should not test for his mere honesty but for particular knowledge of the juror, his likes and dislikes. The type of case will also determine the type of juror to be selected. The author also points out that if the art of cross-examination is to be effective, the lawyer must have the ability to properly appraise the instinctive reactions of witnesses. The law student and young lawyer will gain a wealth of knowledge on the subjects of cross-examination and examinations of jurors because of the remarkable ability of the author in those fields.

Some of the subjects which are given particular attention are wills, real property, the doctrine of *stare decisis*, the future of administrative law, and the activity of judges. The great necessity for each person to have a will is pointed out very strongly, as is the necessity for careful and accurate work on the part of the lawyer in drafting the will in order to cover all possibilities and avoid all disputes. Legal language must never lend itself to a varied interpretation. The law of real property is dismissed with a shower of adjectives denoting the author's utter contempt for the practice of that branch of the law. His reasoning seems to be quite logical.

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[13] Professor of Philosophy, University of Notre Dame.

The author's discussion of the doctrine of *stare decisis* and administrative law is highly illuminating and provides the reader with a great deal of food for thought. I am sure that every lawyer is cognizant of the fact that the doctrine has shackled the progress of the law to a certain degree in order to maintain and establish precedents. Mr. Coe sets forth what I consider to be a very persuasive criticism of the doctrine in the following words: "But I think it becomes a false doctrine when it closes its eyes to progress and embitters hope and retards striving by the fetters of implacable adherence to truths which have been consumed in the march of the centuries; truths which have been unbalanced by greater truths in other fields." Due to the strict adherence to the doctrine of *stare decisis* by the judges, "the administration of Law in our Courts remains an oxcart while the body of Law itself shifts to the motor-driven vehicle of Boards and Commissions." How perfectly true that is. The remedy for this situation lies in the lawyers, says Mr. Coe. They must decide "whether our people shall trade the sanctuary of the law for the facility of the tribunal."

Having written many books on divers subjects and innumerable articles for national magazines, Mr. Coe has proved his literary ability, which, coupled with an extensive knowledge of fundamental legal principles and the practical application of such principles, has given to the legal profession a book containing a wealth of thought, idea, and suggestive material in the author's own fanciful style of expression. The book is heartily recommended as providing a delightfully entertaining expose of the practical problems facing every lawyer.

John Wilson.

PRACTICING LAW. By Silvester E. Quindry.[1] Washington Law Book Co. 1938. Pp. 567. $3.75.

It is interesting in these days when popular diatribes are published and widely read to read a book with the refreshing attitude of PRACTICING LAW. The author is obviously a man who has enjoyed a successful life, but above all a happy life in the practice of his profession. It is a silent indictment of those who would have us believe that the practice of law is mummery, sham, or worse. Written in the fashion of a series of personal essays, it admirably portrays through the medium of narrative and good advice the enthusiasm of the author for his work. Nothing could be more of an antidote to the work of modern day hyper-intellectuals who seem to know all about a profession they boast they have never practiced.

Aside from the prophylactic effect of the book, however, it is one containing a wealth of information about its subject-matter. It should be read by anyone contemplating the practice of law because it undoubtedly covers the field in a manner at once interesting and informative. The experiences of a lifetime are condensed within a few pages. The style is easy and familiar. The information is practical. The only criticism that could be made of the presentation is that at times the author's preoccupation with his topic leads him to cram experiences and facts on his pages, one after another, in a way characteristic more of a reference work than a book to be read as easily as this one is.

Although the material compiled will be of more practical value to the student contemplating the continuance of his studies in law, or the lawyer just beginning practice, it will be of more pleasure to the lawyer enjoying a practice all ready, because it is, to some extent at least, autobiographical of the lawyer, and of all lawyers.

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[1] Member of the Bar of Illinois and New York.

For the law student, it gives an interesting course in the practical phases of the profession that most young lawyers learn only through experience, or not at all. The book treats of preparation for the study of the law, choosing a location, the office and library, whether to practice alone, with a firm, or a partner, handling clients, — in brief — it covers the practice of law, its when, where, and how.

Francis E. Bright.

STUDIES IN THE ADEQUACY OF THE CONSTITUTION. By James Barclay Smith.[1] Parker & Baird Company. 1939. pp. xv, 366.

Professor Smith has published here a series of essays primarily concerned with the problems of our present industrial order as related to constitutional questions. In rapid succession he treats the constitutional aspects of such problems as government competition and ownership, child labor, public utility regulation, regulation of labor and employment relations, price control with special reference to rate-making, the regulation of commerce in relation to due process, the functions of non-judicial bodies, and the federalization of law under the full faith and credit clause. Possible overlapping is explained by the fact that all but one of the articles, in substance, at least, was previously published in one or another of the various law reviews.

In the first chapter, the author gives special consideration to the theory of American government. Historically the approach to this problem is adequate; but the author should have defined his concepts a little more carefully. Evidently, his idea of natural law is essentially rationalistic, advancing the theory that it means that it is right to do what ever we are impelled to do by our natures; in other words, he rejects or, at least ignores objective standards of natural law. Thus, he arrives at the conclusion, that natural law leads to anarchy. He seems to confuse natural law with Rousseauistic naturalism.

In the field of constitutional law, the author is profound and scholarly. His analysis is searching and accurate. The various problems considered, although the first chapter dealing with government competition is far below the standard of the rest of the book, are treated both with an eye to what has been done and what can and should be done in the logical development of our constitutional law.

The author's style is unusual enough to be note-worthy. In spots, the construction is a little too labored to be entirely lucid or fluent; the vocabulary used seems a little too Thesaurian to be true. Altogether, the book is penetrating enough to be of definite value to the student of constitutional law. For a book on controversial questions, it is logical, analytical and completely sound.

Francis E. Bright.

THE CONSTITUTION OF THE UNITED STATES AT THE END OF ONE HUNDRED FIFTY YEARS. Indiana University Publications, Social Science Series No. 1. 1939. Introduction by Hugh Evander Willis.[1] Pp. 72. $.75.

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[1] Professor of Law, University of Kansas.

[1] Professor of Law, Indiana University.

This book is an attempt to set forth very briefly the Constitution of the United States — both the Constitution as it was written and amended in its first one hundred fifty years of existence and the Constitution as it exists today by virtue of the interpretation put on its various clauses by the Supreme Court of the United States. The book is the practical result of the doctrine that the Constitution is "what the Supreme Court says it is." The monograph contains a brief introduction tracing the history of the Constitution against the background of the men who have sat on that court and have "said what it is." The rest of the pages are devoted to setting out the Constitution in a novel frame — the frame of its interpretation.

The Constitution is printed in a form emphasizing the "seven great constitutional doctrines" which Professor Willis states to be the foundation of our system, as well as that part of the work of interpretation which is permanently woven into our governmental structure. The monograph illustrates the progressive nature of the original document, pointing out that the Constitution is not a static control. It is rather a constantly changing thing in the hands of the Supreme Court

In the explanatory note to the book, it is stated that the purpose of the project is to inform the general public of the true nature of the Constitution in the light of judicial interpretation. This then is the criterion one must use to evaluate the work of the editors. It is true that the introduction and the form of the work should impress on the mind of an average layman that the Constitution as ordinarily presented is not complete. However, it is safe to doubt whether the book will be of great aid in educating the public to a realization and understanding of the whole Constitution. It is to be questioned whether any layman will understand this version better as a whole than he will the original. The reason why people are not familiar with the Constitution is that they do not understand what it means. Though parts of the edition here are excellently clarified, much of it will be as unintelligible as it ever was.

On the other hand, the book is undoubtedly a step in the right direction. The limitation of space and the limitation produced by the paucity of interpretation of some clauses are valid excuses for the book's inability to do the whole job. In any case the product of such an original idea should be of interest to anyone who is devoting either part of his time or all of it to a study of constitutional law.

Francis E. Bright.

WOE UNTO YOU LAWYERS! By Fred Rodell.[1] Reynal & Hitchcock, 1939. Pp. 274. $2.50.

This is a vicious tirade against a highly respected and indispensable profession; it is a scathing rebuke of the Constitution, the laws under it and the lawyers who plead it. The author, in his unwarranted attack on the field of law and its constituents, spares no bitter words of insult in constantly criticizing this modern group of "medicine men . . . this pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day."

The author, incidentally a law professor in one of the country's law schools, continually pours forth his outlandish and absurd statements, which, if true, would convince the laymen of this country that there is no real need for lawyers and courts; that they are merely being "used" by the lawyers and judges for a

[1] Professor of Law, Yale University.

source of income; that such a thing as rule-making is entirely too simple to call for a judge to apply it, or for a three-year education to learn it. The author would have us believe that the profession of law, in contrast to other professions, is merely a sham, being something quite simple and readily comprehensible by any person with average intelligence, whether he chances to study the intricacies of the law or not. This simplicity, the author contends, is, of course, camouflaged by complex legal jargon, invented and maintained by the lawyers to "completely baffle and befoozle the ordinary literate man who has no legal training to serve him as a trot."

The author further bombards the profession with: "The legal trade is nothing but a high class racket . . . the lawyers are not even aware that they are indulging in a racket. And the general public, scared, befuddled, impressed and ignorant, they take what is fed them, or rather take what is sold them."

The doctrine of separation of powers is even denied when the author states that the President or Congress have as much right to decide whether a Statute violates the Constitution or not as the Supreme Court does.

The writer searched long, but unsuccessfully, in his groping through a mass of ridiculous analogies, absurd and outlandish statements, and unwarranted, insulting remarks, to find something to compliment. At the most it is destructive criticism. This warning, "Woe Unto You Lawyers," will be neither heard nor heeded—by either layman or lawyer.

John C. O'Connor