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Reuschlein: JURISPRUDENCE-ITS AMERICAN PROPHETS.

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RECENT BOOKS

This department undertakes to note or review briefly current books on law and materials closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publishers' literature, and the ordinary library sources.

BRIEF REVIEWS

JURISPRUDENCE—ITS AMERICAN PROPHETS. A Survey of Taught Jurisprudence. By *Harold Gill Reuschlein.* Indianapolis: Bobbs-Merrill. 1951. Pp. xvii, 527.

This is essentially a textbook *about* jurisprudence in America; it is a textbook *in* jurisprudence only incidentally as the reader discerns the author's evaluation of the view being presented.

As has been frequently pointed out, there is a dearth of textbooks indigenous to America dealing with approaches to jurisprudence other than the analytical.[1] The present volume does not purport to fill this gap, but it is most useful in helping to compensate for the deficiency. By reference to Professor Reuschlein's work the reader may obtain information about particular juristic views which might otherwise require extensive bibliographical research followed by the reading of a large number of relatively independent articles and monographs. This is so since, despite the lack of treatises about a particular view of jurisprudence, there is a considerable body of literature having these problems for subject matter. Appended to the volume is "A list—biographical and selectively bibliographical—for purposes of identification and for the stimulation to further reading,"[2] which further aids the reader in finding his way into the maze of available literature.

Reuschlein first sketches the influences which plied upon the earliest developments in American Law; then by examining the "taught law" of Wilson, Kent, Story, and some later teachers, he seeks "to note how the fundamental problems of Jurisprudence have been formulated in this country."[3] The works of Wilson, Kent, Cooley, and to a lesser extent, Story, reveal the influence of the then still firmly entrenched concern with religion, as well as the influence of the rising conviction as to the supremacy of reason. Natural law doctrines were dominant despite the first stirrings of science with its consequent effect upon legal thinking, as well as upon thinking in general.

In the subsequent taught law there appeared different theories of jurisprudence. Langdell's awareness of the achievements of science and his resulting efforts to apply a somewhat Baconian conception of science to the problems of law are responsible for the American system of case study. Also to be taken account of is the work of Ames, who supplied the still firm foundation for much

[1] See e.g. STONE, THE PROVINCE AND FUNCTION OF LAW 13-14 (1950).
[2] P. 465.
[3] P. 29.

historical jurisprudence, the work of Carter upon law as custom, and the championing of the economic interpretation of law by Brooks Adams. During this time the trenchant influence of analytical jurisprudence did not wane for lack of exponents, among whom may be mentioned Gray and Hohfeld.

It is interesting to note that these predecessors of contemporary jurisprudence, did, in a sense, formulate the fundamental legal problems in this country. Nearly all who were to follow could claim an honorable ancestry; if a new school could not trace a respectable lineage, at least it did not have to look far to find something against which to react. Then, of course, there was always Holmes, in whose shadows all sought to locate their legal mansions. Reuschlein points out: "Much of the work of Oliver Wendell Holmes chronologically belongs to the period we have just considered but in point of content, it has close connection — indeed it fathered — the thought of Pound, Frank, Llewellyn, Rodell and scores of other socio-economic legal thinkers, realists and iconoclasts."[4]

It is with the survey of contemporary jurisprudence that the author commences his chief task, and in approximately three hundred and sixty pages the work of some fifty individuals is discussed. Limitations of space hardly allow for any detailed treatment here of the extensive information presented. Some individuals are grouped into schools of thought and so treated when convenient, some are discussed separately when their work does not seem to fall into one of the proposed categories. Reuschlein uses categories of thought designated by a one or two word name and, as is usual with such classifications, individuals are included in a particular category who lie far out in the periphery. For example, considered under the heading "The Realists," one finds J. W. Bingham, T. Arnold, K. Llewellyn, L. Green, J. Frank, M. Radin, H. E. Yntema, W. O. Douglas, F. Cohen, M. Lerner, W. Nelles, T. R. Powell, F. Rodell, H. J. Laski, and E. N. Garlin.

In one of the book's most valuable sections is found a discussion of the sources and the nature of the views so well known to us as sociological jurisprudence. This summary of Dean Pound's work adds to the growing literature serving as a substitute for the full analysis long promised by Pound which was to appear in a volume to be entitled *Sociological Jurisprudence*.[5]

Stone, Vanderbilt, Wigmore, Kocourek, and pragmatism in general are discussed upon concluding the presentation of Dean Pound's position. Naturally enough, pragmatism leads to the realists, of whom Reuschlein says: "It may be that the neo-realists suffer from a strange color blindness. When they look at a rule or principle it appears to them as a red flag to incite them to rage. A rule or principle is not necessarily a red thing, although at times it may be. Usually it is many-colored. In other words, the neo-realist is quite as guilty as the legal fundamentalist of looking at rules, principles and concepts as finalities,

[4] P. 95.

[5] Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 HARV. L. REV. 591, note (1911).

albeit the non-realists look at them in contempt while the fundamentalist gazes with an air of adulation."[6]

Reuschlein is surely successful in including in his survey of contemporary American jurisprudence the most notorious aspect of legal realism. It may well be that there has been a plethora of literature in the past fifteen years to support the suggested evaluation, but one may wonder if there is not something more that should be said about realism in such a survey. Perhaps the empirical orientation of the so-called "realists," although less frequently the subject of a book or article, is of equally great lasting significance. In general, the realism exhibited by "the realist" has been the result of an effort to treat the law as something other than the subject for ethereal speculation. The realists have not been aestheticians demanding realism for its own sake; rather, the realism has been a result of a method of analysis, a method which found repugnant the fireside contemplation of the "great ideal" of law as the application of Aristotelian Logic to a sanctified major premise. What is here urged is that a frequently underestimated aspect of the significance of the "realist school" lies in their effort to apply the empiricism of Hume, motivated by the pragmatism of Dewey and James, to the problems of law.[7]

After considering the relation between law and scientific method, sociology, psychology, and logic via Kelsen,[8] the doctrines of the neo-scholastics are examined. In this section is found a discussion of the works of the men largely responsible for the current revival of interest in natural law. Although much heated argument has been, and may be, expended in advocating the supremacy of natural law doctrines, the author has not fallen victim to temptation, despite his own conviction as to the desirability of this approach. As Dean Pound observes in the introduction, "the author is to be commended for consistent exhibition of what Mr. Dooley would have called juristic gentlemanly restraint."[9]

The concluding section of the chapter deals with "integrative jurisprudence,"[10] the salient feature of which is the emphasis upon what may be called critical synthesis. It is an effort to avoid the pitfalls of the particularism of any one juristic attitude, an effort to avoid the "separation of value, fact and idea (form)."[11] Among the initiates of this "school" are found Cardozo, Patterson, Cairns, M. Cohen, Fuller, Hall, and Cahn. One may question whether the *distinguishing* characteristic of each of these men is the avoidance of the particularistic fallacy. Nevertheless, it is true, that to a greater or lesser degree they do

[6] P. 192.

[7] Cf. as to role of pragmatism in American law, Cowan, "A Report on the Status of Philosophy of Law in the United States," 50 COL. L. REV. 1086, esp. pp. 1092 ff. (1950).

[8] Here, as throughout the volume, Reuschlein by recourse to individual exponents, explicates the position under discussion.

[9] P. xii.

[10] Reuschlein indicates his debt to Professor Hall for the term (p. 404) and offers an extended explanation of it in the subsequent presentation of Hall's views, pp. 445-458.

[11] Quoted by Reuschlein, p. 404, from Jerome Hall, Integrative Jurisprudence in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHY 313 (Edited by Sayre, 1947).

share a concern as to method. Cardozo's concern with the method for the growth of the law, Patterson's investigation of the role of science and logic in law, Cohen's polarity, all bespeak an interest in methodology. But, on the other hand, each of these jurisprudents has also expressed convictions as to the end toward which these views should lead. Are the convictions of Cardozo, Fuller, and Hall any less vigorous that those of Pound, Frank, and Holmes?

Dean Pound points out in the introduction that the purpose of a survey is not only to reveal what has happened, but also, "to show how far [juristic thought] has moved or is moving toward what is taken to be the ideal form and content."[12] In regard to the latter objective Reuschlein concludes: "If a survey . . . teaches us anything at all, it must teach us that there is not likely to be a complete monopoly of truth in the legal philosophy of any particular school or of any particular thinker. The thoughtful student of jurisprudence—no matter what his age—still wants to make his own integration of the legal philosophies he studies. . . . He will sincerely attempt to harmonize and reconcile various judgments. That means he ought not to be afraid to identify law with morals."[13]

It need hardly be suggested that if one were to "attempt to harmonize and reconcile various judgments," and if one were to understand all that Professor Reuschlein has so well surveyed, it does not entail as a necessary implication the identification of law and morals.

In conclusion, it may well be suggested that Professor Reuschlein's generally objective presentation of the "schools" warrants a reading of the volume by the student and lawyer who would gain insight into the broader aspects of American juristic thinking. Although perhaps pedagogically unsuited for a mature course in jurisprudence, the book can be as useful to the student of jurisprudence as a sound dictionary is to the student of writing.

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[12] P. x.
[13] P. 463.
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