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CONTEMPORARY JURISTIC THEORY, by  
Roscoe Pound. Claremont Colleges, Claremont,  
1940. Pp. viii, 83. \$1.50.

Frank Hanft

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dition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.”<sup>2</sup> Mr. Pound has chosen to write the present book along the line of historical development; he emphasizes the method of evolution. From that standpoint he has done an important piece of work and done it well though often in pedestrian fashion. But if I am right in believing that he intended his book to be a tract, he would have done better to use what Cardozo calls “the method of sociology.” An analytical table presenting graphically the forms of court organization in half a dozen fairly typical states, preceded by a very brief condensation of historical background, and followed by factual and statistical analyses of the unhappy results would be far more effective as argument.

This is not to say that Mr. Pound has written an unimportant book. Probably no one is so well qualified to make a historical study of this nature; certainly anyone who attempts to follow it up by the method of sociology will draw heavily upon Mr. Pound’s learning and research as here recorded. The book will stand as a monument to his industry and perseverance in the pursuit of an ideal. Perhaps its greatest value will prove to be that it will inspire another student and publicist with a characteristically different method of approach to publish a more effective argument upholding Mr. Pound’s original thesis.

JOSEPH N. ULMAN\*

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CONTEMPORARY JURISTIC THEORY, by Roscoe Pound. Claremont Colleges, Claremont, 1940. Pp. viii, 83. \$1.50.

In this book Pound points to the rise of administrative tribunals with far reaching powers over the affairs of others, which powers are little restrained and controlled by law; points also to the modern juristic theory advanced by the realists that legal rules and principles are a sort of judicial superstition, and that judges really decide each case as they want to decide it without much regard to rules and principles, except as a means of making plausible what they have done; and then Pound holds that this growth of law-free administrative tribunals plus the growth of law-scoring juristic theory tend toward a new absolutism, in

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2. Cardozo, *The Nature of the Judicial Process* (1921) 31, 32.

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the sense of government by men and not by law. It is not difficult for the author to make such a danger vivid by reference to the state of affairs in many countries of the world.

Of course, the use of the word "danger" in the preceding sentence jumps to a conclusion. If law and its restraints are indeed myths and superstitions, impotent in producing the conduct of men and the decrees of judges, then the shedding of a belief in legal rules and principles could hardly be referred to as a "danger." "Enlightenment" or "emancipation" would be better words. Pound himself expressly discards the word "danger"<sup>1</sup> because he believes that the present fashion in juristic thought is not likely to dislodge "sound Anglo-Saxon sense." Although he withholds the magnifying epithet "danger," Pound does consider the present trend of enough importance to warrant a devastating attack.

Pound's tremendous learning in the juristic thought of past ages enables him to assault any assumption that the present trend toward absolutism necessarily represents progress. For ages human kind slowly struggled away from absolutism, away from the subjection of men to the arbitrary wills of other men. Government of laws and not of men was the achievement of centuries. Pound having recalled attention to this fact, the reader is impelled to ask himself whether this hard won accomplishment was progress. If so, is the present stampede in the opposite direction progress too? The question whether we are advancing or retreating depends of course on where we think it is most desirable in the end to be. That in turn depends on what we consider good, and what we consider bad. The ultimate issue, then, is that of a standard of values. To this issue Pound gives much attention. On it hinges not only the case of law versus absolutism, but also the question of what the laws shall be if we are to have a regime of law. To answer this latter question Pound reasserts and reinforces a position he took long ago. He shows that there are a great number of individual, public, and social interests to be secured by law; that they can not all be secured; and that what the law should be depends on a balancing of interests so as to secure a maximum of those interests. The difficulty lies in determining which interests are the weightier. Further, decisions are not final; there is a constant struggle to obtain a higher valuing of particular interests. Pound illustrates<sup>2</sup> by pointing out that labor unions are not complaining because they are *not* treated on a basis of

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1. P. 11.

2. P. 67.

equality with other litigants, but because they *are* so treated, whereas they claim a higher value for their interests, which will take their cases out of the usual rules regarding trespass, contract, and the like. Ever present is the question of how to value each conflicting interest. It seems to the reviewer that Pound here passes the buck. He apparently thinks that the civilization of the time and place will formulate its own objectives, and it then becomes the task of the law to accomplish them with a minimum of friction and waste by securing a maximum of interests weighed according to these objectives.

Although the balancing of interests theory is an old one with Pound, he has considerably sharpened his discussion of it in this re-presentation. For example, he hits briskly at the current tendency to give interests much or little weight depending on whether they are individual or social, when in fact both interests involved could be classified either way.<sup>3</sup> This point of Pound's can be utilized against self-classified liberals who set social interests (usually labelled "human" interests) against individual interests (usually labelled "property" interests) and then give the greater weight to the social interests simply because they are social interests. Such liberals need to be reminded that the social interest in the individual's right to an individual life is one of the greatest social interests.

There can be, and probably will be, a good deal of criticism of this book. The answer of many realists to Pound's criticism of their views is likely to be that they never had any such views. This may be true of individual realists. But Pound has an often demonstrated genius for seeing movements in human thought in their entirety. His panoramic pictures of the legal thought of past ages are familiar to students of jurisprudence. In them we see the great mountain ranges of thought, we do not see each stick, stone, and tree on each mountain. It is probable that Pound sees the realist movement as a whole more clearly than do most realists. At least the reviewer is of the opinion that the movement as a whole goes in the direction Pound describes.

More serious is the charge that although Pound admits the necessity for a measure of values, the measure he discovers and elaborates is illusory. His measure<sup>4</sup> is to secure as much as possible of the whole inventory of interests with the least impairment of the entire inventory. But when two or more interests are

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3. P. 75.

4. *Ibid.*

in conflict, how are we to tell which are to be secured because of more importance in the whole inventory? The question of values still remains. Pound, rather vaguely, seems to leave it to the civilization of the time and place to generate its own values, ideals, and objectives. Thus Pound recognizes the importance of a measure of values, but does not carry us far in the direction of any acceptable philosophy of values. This criticism the reviewer believes to be true of Pound, but also true of his critics, and likely to remain true of juristic writers generally until human thought gets away from the idea that right and wrong, good and bad, are products of man's manufacture.

One favorite point of his own the reviewer insists upon. Pound's theory of balancing interests describes much that is true and valuable, but his theory, like many another in the course of juristic history, falls short of describing the whole truth. Law is the product of life, and is almost as complex. It is describable from many points of view. Light may be cast upon it by one theory, but it can not all be comprehended in terms of one theory. Nor is it likely to be squeezed within the bounds of one statement. The idea that law operates through a weighing of conflicting interests is *one* way, and a useful way, of looking at the great complexity. But when a stepfather murders a child to collect insurance on it, if we say that law condemns this because upon a weighing of interests it is concluded that the interests to be served by permitting such conduct are not as heavy as those to be served by condemning it, we are fitting the facts to our theory, not our theory to the facts. The stepfather is hanged, and most people are "glad" of it, because he did "wrong." The conclusion, "wrong," springs from our nature, just as does the feeling "glad." Here natural law, in the sense of a belief that some things are inherently right and some wrong is more real than a balancing of interests.

A book along the lines described could be very good or very bad, depending on how well it is written; the question remains how well Pound has done his task. Any one anxious to demonstrate his own erudition might well temper his praise of the book in order to show that he is not too easily pleased.<sup>5</sup> Having no

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5. Considerable carping about detail could be done. For example, the reviewer believes that the ills of administrative action listed by Pound (pp. 22, 24) are already in process of remedy by recent Supreme Court decisions. The brilliance of Pound's appraisal of the modern scene and the sharpness of his comments are in no wise impaired by such errors, even if they could be proved to be errors.

aspirations in that direction, the reviewer hereby declares without any qualification whatever that this little book of less than a hundred pages contains some of the most astute and penetrating comments on modern juristic thought which have come to his notice. Perhaps because it was first presented in the form of lectures to an audience of lawyers and laymen as well as students, the book is, for a book in this field, uncommonly readable. The style is vivid, the comments shrewd, barbed. As a former student of Pound's, familiar with his vast but heavy learning, the reviewer was startled to find this book stimulating in the same fashion as a lithe buggy whip. Occasionally the reader strikes such a snag as the description, "an absolutist theory of law on a basis of philosophical relativism."<sup>6</sup> This sort of verbiage comes of reading too much jurisprudence. But if the reader will slide over such exceptional rough spots as these, he will have no difficulty picking up the thread of the discussion. Pound even departs from more abstract reasoning to do a little tanning of a few realist hides,<sup>7</sup> thus providing entertainment for the lay reader. He proves over and over that he has been keeping a searching, inquisitive eye on the doings of his fellows in the field of jurisprudence. Those erudite gossips in academic cloak rooms who have for years been hopefully announcing the decline and fall of the great Pound will discover, on reading this book, that their announcements were premature. The book weighs a few ounces. But if anyone were to swap for it a hundredweight of the mine run of books in this field he would still have made a good trade.

FRANK HANFT\*

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TRADE AGREEMENTS: A STUDY IN DEMOCRATIC METHODS, by John Day Larkin. Foreword by Eugene Staley. Columbia University Press, New York, 1940. Pp. ix, 135. \$1.00.

The author of *Trade Agreements*, which is number one of the International Economic Handbooks edited by Eugene Staley for the Carnegie Endowment for International Peace, presented his book in February, 1940, when international trade was quickly becoming primarily a battle for war materials. There is irony in

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6. P. 1.

7. P. 52.

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