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Justice According to Law, by Roscoe Pound

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JUSTICE ACCORDING TO LAW. By Roscoe Pound.* New Haven: Yale University Press. 1951. Pp. 91. $2.50.

This trilogy of essays is a printing of the lectures delivered by Dean Pound under the auspices of the John Findley Green Foundation at Westminster College in 1950. They are entitled, "What Is Justice?" "What Is Law?" and "Judicial Justice."

The condensation of subjects of this moment into 91 pages of text presages the interpretation and interpolation the reader must make for himself. From the early Greeks to the present, man has struggled, without too much success, to define "law" and "justice" and to evolve fixed formulae for both. The author traces the history of this struggle through the centuries and concludes that Anglo-American jurisprudence, though not perfect, is superior in all respects to the others which have been tried or suggested.

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33. Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80 (1943), 332 U.S. 194 (1947).

34. See p. 428, for an example.

35. See pp. 736, 1124, 1133.

36. Preface, vi.

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In the first essay, Dean Pound, in the best tradition of legal scholarship, re-tells the story of this struggle by the philosophers and jurists from the days of the early Greek conception of justice as an individual virtue to the modern theory, and one which the author approves, that justice is the effort of law to "adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilized society with a minimum of friction and waste."[1]

Dean Pound highlights the conflict between justice as a system to preserve the individual's "reasonable expectations"—such as a maximum allowance of liberty—and the necessary limitations imposed upon such expectations by the like rights of all others. He views with alarm the current trend toward imposition of liability without fault, or the "insurance" idea of imposing the loss upon those who can best bear it. The author's illustration of the suicide's calculating selection of an approaching vehicle as a means of self-destruction vividly illustrates the sophistry and danger of this trend.

In discussing the current inclination for more and more control by government, the author makes it clear that he has no more patience with the view that individual liberty can best be attained through the maximum exercise of government control than he has with the substitution of social responsibility for the time-tested doctrine of negligence or moral fault as the basis of liability.

In his second essay, "What Is Law?", lawyers would expect Dean Pound to champion the cause of the common law—and he does. He deals at some length with the excellence of "lawyers' law"; and he compares it with social control through the administrative process, which he condemns unless subject to limitations and judicial review. The training, experience and tradition of the judges, says Dean Pound, enable them to "do a great deal at least of what the law expects of them, and by striving for objective decision as an ideal, [judges] can come close enough to objective decision for practical purposes even if theoretically they cannot attain it 100 per cent."[2] Thus, he disposes of the argument of the neo-realists that "lawyers' law" is "gastronomic"[3] and not objective. He argues, as one would expect, for control by rule rather than control by discretion.

It might well be that he is speaking of the Supreme Court of the United States, among others, when, after conceding that the uniformity and objectivity of judicial decision may have been exaggerated in the

1. P. 29.
2. P. 36.
3. See Frank, *A Plea For Lawyer Schools*, 56 YALE, L.J. 1303 (1947).

past, he says: ". . . many jurists of today, not without some warrant in what has been happening recently in a few courts, greatly exaggerate the personal, subjective, arbitrary element therein."[4] Dean Pound believes that much of the confusion which exists concerning "law" is due to the various meanings ascribed to the term, *i.e.,* (1) the legal order—or regime of social control; (2) the authoritative guides, or patterns of decision (what the lawyer thinks is "law"); and (3) the process of determining causes by common-law courts or administrative agencies. After again emphasizing that the question is whether the stress is placed upon rule or discretion, the author concludes that the common law has proved adequate and is competent to adjust itself to quickly changing conditions (e.g., the airplane) and that this law of "taught traditions" has "proved resistant to forces that destroy political institutions."[5]

Judicial justice, says Dean Pound in his third essay, is the administration of law by judicial specialists, those who by training, experience and tradition are fitted for the task of dealing objectively (or as objectively as is humanly possible) with causes. He would have no truck with realists who preach that the separation of powers of our government is outmoded and must be superseded by the discretionary action of administrative officers and agencies. The history of legislative justice (e.g. bills to divorce, bills of attainder, etc.) was largely found, according to the author, to be without justice in the sense that we know the term today. Fortunately, decision of causes by legislative fiat is now a practice of the past. (Justice administered by the executive or ruler was peremptorily dispatched by the author in the second essay.) The argument that legislative justice is more responsive to the will of the people and, therefore, superior to judicial justice is, to Dean Pound, one of its greatest faults: "In a large body not so trained and without judicial habits, we should expect, and experience shows we must expect, many of the characteristic phenomena of what psychologists have called the mob mind."[6] This essay deals with the growth of our law courts as a reaction to the administrative regimes in Tudor and Stuart England, with a concomitant overcrowding of the courts which has in turn produced a glut of administrative agencies with policy-making and adjudicating powers. Dean Pound thinks this second reaction has gone too far ". . . if not beyond the limits of our constitutional polity. . . ."[7] He cites the lack of effective checks on administrative action and, in many cases, the lack of opportunity for any judicial review.

4. P. 36.
5. P. 61.
6. P. 70.
7. P. 73.

It is ironical and astounding to recall that a large number of neo-realists in federal service during the late 1930's were products of the law school of which the author was then dean. It was then that the doctrine that a good end justifies the use of any means had its inception in our law. Dean Pound describes this movement as "a hierarchy of superman administrative officials who ex-officio know what is good for us better than we know ourselves."[8] The author has no quarrel with administrative agencies as such and concedes they are essential to the tasks at hand. He does, however, decry the frequently successful attempts to free their determinations from judicial review. Such review, he believes, is essential to ascertain whether the agencies have conducted their proceedings in accordance with legislative standards and due process of law.

In making a strong and logical case for the preservation and, indeed, the strengthening of our system of judicial justice, the author deals with the objections to that system, *e.g.* its slowness and rigidity. However, he neglects what many consider to be one of the real faults of judicial justice today—the lack of an efficient method of selecting competent lawyers for service on the bench.

The prospective reader must be warned that this small book is hard reading.[9] Dean Pound is so much the scholar, on such good speaking terms with the philosophers from Thales to Dewey, so much the historian and the legal philosopher that some of his arguments and erudite references require several readings. This reviewer wishes the author had given more heed to the admonition of Socrates, as reported by Plato in "Phaedrus" that the orator must adapt his speech to the comprehension of his audience. Nevertheless, the book is timely. Unfortunately, it will not have popular appeal nor appreciation. If reduced to layman's language and given wide circulation, it might prove a great force in the preservation and reinvigoration of the judicial justice which in large part nurtured the extrordinary development of this country.

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8. P. 84.

9. Coudert, Book Review, 38 A.B.A.J. 222, 223 (1952).

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