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Book Review. Readings in American Legal History by M. D. Howe

John P. Frank

Indiana University School of Law

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escape the parties and which, when skillfully applied, make for a more workable solution. In a word, the successful arbitrator must be constructively imaginative. And his ideas are no less "creative" simply because they stem from the hard facts of reality instead of being conceived in the ivory tower of academic insulation.

JOSEPH SHISTER†

READINGS IN AMERICAN LEGAL HISTORY. By Mark DeWolfe Howe. Cambridge: The Harvard University Press, 1949. Pp. x, 529. \$7.50.

HOWE'S book will be the first tangible evidence to many that a new subject matter, American legal history, is finding its way into law school curricula. There had been scattered work before in other fields of legal history. Radin at California, Woodbine and Thorne at Yale, Haskins at Pennsylvania, Goebel at Columbia, to name only some of the outstanding, have worked in Roman, or continental, or English, or colonial legal history. But the law schools are barely beginning analysis of a new subject, 19th and 20th century *American* legal history. Indiana, Yale, and Harvard have recently offered courses. Professor Hurst at Wisconsin, aided by a Rockefeller foundation fellowship program, is just beginning the training of teachers who will spread a new gospel of history training in law schools.

An appraisal of a course book for existing and potential legal history courses necessarily involves a judgment as to the function those courses should perform. But the whole field is still in so formative a state that no two programs even remotely resemble each other; and a credo for a course must therefore be intensely personal.

The study of American legal history is, in the bread and butter sense, twice useful. First, it is systematic training in a method of analysis and presentation of legal materials. The historical method is one way of putting precedents where they belong, in the perspective of the reasons for their being. Legal history has a utility apart from the substantive courses which explore reasons as well as rubrics; no matter how well taught, these courses have a primary purpose of exploring substance. The historical method, as used in law, is sufficiently complex to require status as more than a by-product of a study of something else. Second, though this is subsidiary, the study of history provides at least some substantive information which can help the student to integrate or illuminate other parts of his legal training.

An independent value, quite apart from bread and butter utility, is the aesthetic virtue of historical studies. We lawyers have, many of us, chosen a profession not only as a source of income but also as an object of our liveliest intellectual interest. We want to know about the role of the profession in national life, about the beginnings of equity practice in America, about the relation of property law to the growth of our state, or about whatever else it

† School of Business Administration, University of Buffalo.

is that stirs our individual interests. We want to know for the most impelling, if the simplest, of reasons—simply because we enjoy knowing.

In this view, a coursebook in legal history is to be appraised in terms of its utility for the teaching of method, the incidental acquisition of practically useful substantive information, and the exploration of the interesting. Yet because a coursebook in an untried field is for the most part a projection of the interests of its editor, the utility of the book depends peculiarly on the background and enthusiasms of the individual who uses it.

Hence the Howe book will doubtless have its maximum utility exactly where it should, in Howe's hands. These materials are sufficiently tailored to Howe's own interests to make it improbable that another teacher would find them useful in the classroom. They are properly described by the title as "readings," rather than text materials, and are a collection of excerpts centering around the migration and modification of the English common law, first in the colonies, then in the inland states, and finally in codes. The colonial materials, approximately a third of the book, are drawn from Massachusetts exclusively.

In so far as he may desire to train his students in putting the rules of law into their social perspective, Howe must rely on lectures or outside readings not included here. For example, a sixty page section on the troubles with France in 1798 and the Alien and Sedition Acts are edited to present the neat question of whether the federal government can punish common law offenses. The student presumably learns from other sources what made these disputes the life and death stuff of politics, as well as how that political significance affected the legal dispute. Liberal assignments in collateral texts may perhaps permit more significant analysis than the materials themselves suggest.

Viewed from the standpoint of substantive information afforded—whether for purposes of practical use or of aesthetic appreciation—the Howe experiment demonstrates that the source book device will not by itself provide a satisfactory solution to the materials problem in American legal history. The case method, with its variants, is too wasteful of time to fit with historical survey work. If a standard introductory American history course in the colleges were taught from original sources in the detail which Howe uses here, the student who began at Plymouth Rock would probably end his first year's studies somewhere between Valley Forge and Yorktown. So long as American legal history is fighting for two or three credits worth of the whole time of the law student's education, this extreme slowness of pace is undesirable.

This is not to suggest that law school history courses ought to be slick surveys aimed at giving the student a nodding acquaintance with a few judges, putting a veneer of "culture" on the graduate. The point is that the choice between overly intensive and overly extensive history courses can be resolved by modifying the reliance on original source material. The pinpoint aspect of source book legal history is illustrated in the Howe book, where the entire volume studies one small, narrowly construed problem with primary reference to the experience of one colony. One answer for other teachers may be the reliance, partial at least, on text materials. But assuming that source materials

should be used as the primary reference, they ought to be selected over a far wider range of topics and then linked together by the lecture method. The solution may be in a combination of the source material, the lecture, and the textual devices to broaden the range of study.

Yet these criticisms cannot be made with assurance. Because American legal history is still so experimental, the most important aspect of Howe's book is its evidence that he, a skilled historian, has found for the moment at least a method satisfactory to himself of teaching in the field. Howe concedes in his preface that "some readers" may think his concentration on Massachusetts material "bespeaks the arid enthusiasm of an antiquarian." I confess to being such a reader, though doubtless Howe makes vivid in his classroom such items as his eight excerpts from the journals and papers of John Winthrop. If old Governor Winthrop could launch not only justice in Massachusetts in the 17th century, but also American legal history at Harvard in the 20th, he is perhaps worth dusting off.

JOHN P. FRANK†

THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE AND SOCIAL CONTROL. By Julius Stone. Sydney: Associated General Publications Pty. Ltd., 1946. Pp. lxiv, 918. \$15.00.

IN the maze of currents and cross-currents that characterize contemporary writing on jurisprudence and legal philosophy there are not many points on which common agreement can be found. But one point on which representatives of the most widely disparate views might agree is that Julius Stone has provided us with the best general introduction to jurisprudence that has yet appeared in the English language. This is not to say that Stone has a keener mind or a more fertile imagination or a more felicitous style or a broader scholarship than Austin, Maine, Holmes or Pound. But jurisprudence, despite all the battle-cries and advertisements of the conflicting schools, is a cumulative enterprise like science or music. It is possible for a rational being to grasp the varied insights that Austin, Maine, Holmes, Pound, and many other original thinkers during the past two or three thousand years have contributed to our understanding of law. In science, it is not necessary to reject Euclidean geometry in order to make use of the non-Euclidean geometries of Riemann or Lobachewsky; we can, and do, use all three in different contexts. Just so, one may enjoy Bach and Wagner, or Homer and Swinburne, on the same evening. It is Stone's great merit that he has not accepted the popular picture of legal philosophy as a bad play wherein each actor kills off all his predecessors on the stage. Nor has Stone followed the practice made standard by his revered teacher and one time colleague, Roscoe Pound, of pigeon-holing each legal thinker within a particular century, country, and school, explaining how he got into that particular pigeon-hole, and passing on quickly to the next pigeon-hole. Rather, he has had the insight to appreciate the character of legal philosophy (and of philosophy generally) as a great cooperative human enter-

† Associate Professor, Yale Law School.