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Criminal Justice in America, Roscoe Pound

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Criminal Justice in America. By Roscoe Pound. Henry Holt & Company, New York, 1930. Pp. xiv, 226.

Lawyers and judges find a special interest in what Dean Pound says in this book about criminal law in the United States. One reason for this interest is the fact that Dean Pound speaks from an extensive experience as a practicing lawyer and as a commissioner of appeals of the Supreme Court of Nebraska. His place in legal education, moreover, is well known; and his work in crime surveys and as a member of the National Commission on Law Observance and Enforcement has attracted nation-wide attention. Another source of professional interest is the fact that the author is dealing authoritatively with a problem which is of primary concern to the American judge and lawyer. Furthermore, he centers his discussion of this problem around the participation by judges and lawyers both in the historical development of the problem and also in meeting its present-day demands.

The author neither understates nor overstates the problem. He recognizes fully its actual importance and difficulty. "Criminal law," he declares, "involves the most insistent and most fundamental of social interests." (P. 57.) "Perhaps the most difficult problem of the science of law" (P. 38) is the problem of the criminal law in its "quest for a workable balance between the

general security and the individual life" (P. 214); for a "balance between rules of law and magisterial discretion, which will give effect both to the general security and the individual life, with the least impairment of either." (P. 38.)

The author refuses, however, to overstate the problem or to borrow trouble for it. Some common allegations which seek to magnify the problem are shown to be in fact imaginary and false. For instance, the author points out the fallacies in the contentions that disrespect for criminal law is a new or unusual feature in American life, or that modern lawlessness is caused by the existence of too many criminal laws. American politics and social traditions and independence of spirit are shown always to have offered strong opposition to the effectiveness of the criminal law. The multiplication of the provisions of the criminal law is shown to have been largely the inescapable result of the growing complexity of American life. In fact, the greatest difficulty in the whole problem is declared to be the failure of Americans to amend and to expand their criminal law system to keep pace with the economic and intellectual progress of the nation.

The author attributes to historical circumstances in England and in America the emphasis of the common law in protecting the individual citizen at the expense of the general security. These historical reasons—such as the colonial fear of the tyranny of kings and royal judges, and the pioneer conditions of local and individual self-sufficiency and self-government—are shown to have been largely displaced by the changed situations and requirements of modern American life. The author concludes, therefore, that "our whole apparatus of juristic thinking on this subject must be overhauled." (P. 215.) "We need the same creative spirit and inventive activity which Americans and American lawyers displayed so abundantly in the formative period of our institutions." (P. 214.)

But no lawyer would expect to do effective, or even safe, work in this continuous "quest" without having a sound grounding in the history of the judicial institutions and of the administrative machinery which he is trying to displace or to improve. Dean Pound continually presents illuminating details of the historical origin and development of criminal law and procedure. One chapter is entitled "Our Inheritance from England." In it, as elsewhere in the book, he shows how the legal doctrines of Coke dominated the legal thinking of the 17th century colonists who came to America; how the doctrines of Blackstone became the legal principles of the 18th century colonists who won independence from England and who then proceeded to establish the constitutions and laws of their new states; and how the ideas of the frontiersmen and farmers dominated 19th century American criminal law.

"Our polity had its roots in the era of the Puritan Revolution. It was established as an independent polity in the era of the American Revolution. It was formulated in a written Con-

stitution in the era of the French Revolution. Thus the whole emphasis is on liberty as contrasted with order, on rights as contrasted with duties, on checks upon government as contrasted with efficient government, on the dangers of governmental oppression as contrasted with the menace of anti-social individual action." (P. 132.)

In each century, therefore, the dominant influence was individualistic and decentralizing. Authority was taken from the judge and powers were heaped upon the juror. Politics became of increasingly dominant importance in the administration of criminal law by short-term, elective officers. In constitutions, statutes, and administrative practice the people established rigid checks on criminal investigation, on criminal procedure, and on penal treatment. While many of these checks are seen to be necessary and proper today for securing individual rights, it is made equally clear that there are many others which have outlived their time and which now are only costly and harmful obstructions.

In evaluating the services, present and prospective, of the judge and of the lawyer, Dean Pound says: "It cannot be said too often or too emphatically that the judiciary has, on the whole, the best record of any of our institutions." (P. 191.) But he adds, "This is due largely to a tradition [chiefly the common-law tradition of an independent bench] which has shown signs of disappearing under the untoward conditions of our urban centers." A common type of judicial weakness is found in the excessive subjection of judges to politics. One result of this condition has been some self-advertising, publicity-hunting judges whom Dean Pound calls "judicial Barnums." The author refers also to the similar tendency among some police officers and district attorneys who "go out for glory or publicity," each endeavoring to be spectacular or to "play politics" in his own independent, irresponsible way.

"If the regime of judges appointed for life, which gave us the great judges who made our law, cannot be restored, we must learn to use our nominating and electing machinery to ratify a choice made on non-political lines by those who are competent to select, and must make tenure secure. Indeed, there are signs that pressure of the economic order has begun to lead toward something of this sort in more than one state." (P. 192.) "Maintenance of the general security in the close-knit economic order of today, with the new conditions of rapid transportation and easy movement across political lines, demands organization of administrative agencies, coordination of responsibility with power, and reliance upon personality rather than upon a system of checks and balances. Such things are called for in the twentieth century as emphatically as the conditions of a pioneer, rural community demanded decentralization, division of power, independent magistracies, and elaborate checks upon administration. We have become unified economically, and there must be a

corresponding development in our legal institutions. If we fear centralization, we must learn to bring about cooperation." (P. 178.)

In regard to the lawyer, the author points out the responsibility of lawyers both for the evils in the administration of criminal law and also for the improvement of the situation. "A movement for organization of the profession as a whole has just begun. . . . Centralized admission under the auspices of the highest court of the state, is a step in the right direction, taken in most jurisdictions during the present century. This, however, is only a small beginning." (P. 194.)

The effect of prohibition legislation upon the administration of criminal law is not directly discussed. The author refers, however, to the political theories of popular sovereignty and of individual liberty which have always been wide-spread among American citizens as difficult factors in law observance and enforcement.

"Without going into controversial matters of the present, one need but read the discussions of the era of Rooseveltian progressivism to see that business men have been known to regard as entirely legitimate evasion of statutes which interfered with their carrying on business as they chose. We must not overlook these phenomena when we are considering disrespect for law at the bottom of the social scale, where it takes cruder, more direct, and less subtle forms." (P. 64.) "It is significant that openly expressed contempt for prohibitory laws is most acute among educated, intelligent persons at the top of the social scale, among whom the conditions which make for conscious show of self-assertion are most pressing." (P. 172.)

The aim of the program of improvement is stated to be, not perfect law enforcement, but a reasonably high average of observance and enforcement.

"Our ultimate aim must be a body of laws adequate to securing social interests and capable of that high average. But three special ends should be kept in view in the endeavor to reach this ultimate aim under the conditions of the time, namely, preventive justice, a system of individualized treatment of offenders, and a readjustment of our legally received ideals as to the balance between the general security and the individual life." (P. 213.)

The author frequently indicates his conviction that lawyers will continue to have a large part in securing this just balance. The following passage therefore requires the attention of some lawyers and of their bar associations:

"As one reads the discussions in the reports of bar associations he can but feel that a chief obstacle to improvement is in the democratic tradition; in what we must pronounce false ideas of democracy. Throwing of even the least details of all things into politics and subjection of every one and everything to political pressure are traditional American ideals. But are they not

pioneer ideals rather than necessarily democratic ideals? . . . Distrust of judges, lay magistrates, free rein to counsel in the forum, extravagant powers of juries, an uneducated, unorganized, deprofessionalized bar are urged as democratic, and their supposed democratic character is expected to make up for their manifest inadaptation to the demands of justice today. Every proposal to make our administration of justice more effective is resisted eloquently in the name of the common people, or of justice to the poor and oppressed. But these are pioneer institutions, not necessarily democratic institutions. There is no intrinsic reason why democratic institutions should be inefficient. . . . Moreover, the people at large suffer most from a condition of ineffective justice. Great enterprises, with highly organized legal staff, are much better able to secure their interests under such a system than is the average man. The poor and oppressed are not better off by being left to the risk of ignorant or unscrupulous practitioners. . . . Demos must learn to govern urban America by means adapted to its problems. He cannot expect to go on governing by means suited only to the pioneer America which has disappeared." (Pp. 198-200.)

The improvement of criminal justice in the United States in the past has frequently been blocked by oratory parading as facts and by fictions, traditions and prejudices masquerading as legal history. In this book the lawyer and the judge and others find a compact and forceful marshalling both of facts as established by crime surveys and by personal observation, and also of principles and rules of law as interpreted and set in their proper places by authentic legal history. The book therefore deserves recognition as a sound, useful and stimulating contribution to the progress of criminal law in twentieth century America.

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