

REVIEWS

ENGLISH CONTRIBUTIONS TO THE PHILOSOPHY OF LAW. By Arthur L. Goodhart. New York: Oxford University Press, 1949. Pp. 44.

IN this slender volume the American lawyer will find an urbane, interesting and scholarly summation of the principal philosophical ideas which the legal profession of this country has received from the English writers on legal and political philosophy. The author, an American by birth, was formerly a practitioner in New York and still retains his American citizenship. He is now Professor of Jurisprudence at the University of Oxford. For these and other reasons he is exceptionally qualified to interpret English jurisprudential ideas to American lawyers. The essay here published was delivered in May, 1948, as the seventh annual Benjamin N. Cardozo lecture, before the Association of the Bar of the City of New York. It is published with a graceful introduction by Cloyd Laporte of the New York Bar.

Professor Goodhart takes as his text a sentence from Cardozo's *The Growth of the Law*:

"A philosophy of law will tell us how law comes into being, how it grows and whither it tends." ¹

The essay is thus divided into three parts: How Law Comes Into Being, The Growth of the Law, and the Purpose of Law. Under the first of these topics Professor Goodhart's main thesis is that the ordinary officials of government in a political society are bound by the laws that they participate in creating, and that this English conception, which he traces to Bracton, has led to the American doctrine of the unconstitutionality of legislation. Under the second heading he traces, also from Bracton, the development of the common law doctrine of judicial precedents, and concludes that at the present time the exaggeration of the creative power of the judiciary may seriously weaken the stability of the law.² In the third part he defends Austin's separation between law and morals, and adds that the making of such a distinction does not mean that law and morals do not influence each other.³ His own view of this relation is expressed in the conclusion that law is, properly and perhaps inevitably, "a compromise between conflicting interests."⁴

This bare summary of a summation does not reveal the originality and prudence with which Professor Goodhart has drawn upon the writings that are the sources of his thesis, nor his skill in fitting them smoothly together. For example, from John Locke he takes the conception that "government

1. CARDOZO, *THE GROWTH OF THE LAW* 24 (1924), quoted p. 15.

2. P. 34.

3. P. 39.

4. P. 44.

is a form of trust"⁵ and tries to show how this peculiar English concept of the trust provided a compromise between executive tyranny and the irresponsible tyranny of popular emotion. From Edmund Burke, whose writings on legal philosophy are seldom referred to by American jurists, he brings out the conception of law as a compromise of conflicting interests,⁶ a position more fully developed in Pound's sociological jurisprudence. The preference of Sir Francis Bacon, another neglected English legal philosopher, for "reason" over "custom" in the decision of novel cases is compared to Cardozo's division between "logic" and "history" as methods of the judicial process.⁷ However, I believe that Bacon's "reason" was much broader than Cardozo's "logic," and came closer to what Cardozo called "the philosophy of pragmatism."⁸ The author pertinently observes that what is frequently ascribed to bad logic in the law is lack of uniformity in, or the "unreasonableness" of, the premises with which logic has to begin.⁹ Again, in Austin's monumental work on jurisprudence he finds the view, more recently emphasized by Kelsen, that there is no distinction between public and private law.¹⁰ Professor Goodhart regards the controversy over this point "as merely a verbal one."¹¹

One practical result of the English doctrine of the "rule of law," that the government rules under the law, is, the author says, "a strengthening of the respect for law" among the English people;¹² the ordinary man will more readily obey the law if he regards it as the expression of his own will and that of his fellow citizens. I do not question the reliability of Professor Goodhart's observation of English political society, but I believe that in the United States the same or a similar idea has had an opposite consequence. The principle that government derives its just powers from the consent of the governed is often here taken to mean, I believe, that whatever does not seem just to the ordinary citizen is not law for him but merely a trick of pressure groups and politicians. The greater respect for law among Englishmen than among Americans is more likely due to another factor which Professor Goodhart emphasizes, the unbroken continuity of English legal and political history over a period of at least seven centuries.¹³ Doubtless there are other explanations, for social causation is a baffling inquiry.

To the busy lawyer who has even a little time for such "useless" subjects as legal and political philosophy Professor Goodhart's lecture can be recommended as a concise and enjoyable discussion of some basic presuppositions of American law.

EDWIN W. PATTERSON†

5. P. 23.

6. P. 26.

7. P. 29.

8. P. 43.

9. P. 33.

10. P. 40.

11. P. 40 n.74.

12. P. 19.

13. P. 15.

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NEW YORK UNIVERSITY SCHOOL OF LAW, SOCIAL MEANING OF LEGAL CONCEPTS: NO. 1. INHERITANCE OF PROPERTY AND THE POWER OF TESTAMENTARY DISPOSITION. New York, 1948. Pp. vi, 90.

It is a truism of contemporary legal education that the field of decedents' estates presents an unparalleled opportunity for the teaching of lawyers' techniques. The opportunity arises, however, not so much from the multiplicity and complexity of problems in drafting instruments and construing statutes, as from the apparent absence of substantive problems involving issues outside the lawyer's technical competence. But the suspicion that substantive problems exist unnoticed is rapidly growing into a conviction, forcing itself upon scholars and practitioners alike, that traditional devices for the transmission of wealth from generation to generation are both insufficient in conception and inefficient in operation.

This dawning awareness has manifested itself both in practice and in academic expression. It has emerged in the development of the still half-illegitimate field of estate planning, which has advanced beyond the primrose path of tax avoidance, to pursue less purely asocial and more comprehensive goals.¹ In terms of academic expression—since it is clearly intended rather for the intellectually curious than for the professionally ambitious—this little collection of four essays, by an anthropologist, an economist, a sociologist, and a minister,² suggests some of the possibilities for constructive reexamination of basic notions in a hitherto unreconstructed field of law.

Adamson Hoebel, who has been a pioneer in the anthropological education of lawyers,³ contributes perhaps the most stimulating piece in the collection. He reminds us that inheritance involves primarily the acquisition of status rather than the transmission of goods, and that status is created and protected not only by the state, but by every form of familial and customary organization. With vivid example, he evokes the tremendous range and variety in the institutions of inheritance. The bulk of his paper is devoted to a demonstration of the weakness in the anthropological foundations of Marxism. The point has been made before that Morgan's conclusions, upon which Engels drew in *The Origin of the Family*, are incorrect; but the demonstration is no less effective in employing anthropological methods for the analysis of legal relations.

The sociologist, Paul Tappan, is almost as successful in his objective, which is "to provide some documentation of the relationship between law and society,"⁴ and specifically of the relation of inheritance law to the in-

1. See, e.g., SHATTUCK, AN ESTATE PLANNER'S HANDBOOK (1948).

2. Jerome Nathanson, a Leader of the New York Society for Ethical Culture.

3. See LLEWELLYN AND HOEBEL, THE CHEYENNE WAY (1941); Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law*, 51 YALE L. J. 951 (1942). See also Malinowski, *A New Instrument for the Interpretation of Law—Especially Primitive*, 51 YALE L. J. 1237 (1942).

4. P. 55.

stitution of the family. He traces the development of kinship organization from primitive nomadic and agricultural peoples, through feudal society, to the tenuous ties that now scarcely serve to bind, and he points out a number of anachronisms and inconsistencies in our law of inheritance. The essay is evidence of the illumination his discipline can contribute.

Equally stimulating, if perhaps less satisfying, the contribution of economist A. Anton Friedrich is an analysis of inheritance in terms of the competing principles of equality of opportunity and freedom of initiative. The author attempts to resolve the problem by pointing to the development of institutional investors and self-investment by corporations as substitutes for the investment impetus of inherited wealth, which in turn is being reduced by progressive income and estate taxation. He concludes that "inherited wealth is of decreasing importance in our economy."⁵ But in reaching his conclusion he by-passes the growing problems of new sources for risk capital, and of minimal protection for those beyond the ultimate desirable reach of social security plans. This is the area of "estate planning" in which creative cooperation between economists and lawyers is most needed, and least in evidence. It is the area on which Mr. Friedrich would surely have focused, if his attention had not initially been directed to legal concepts rather than to social problems.

The final essay in the collection, Jerome Nathanson's piece on the Ethics of Inheritance, points up the limitations on the method of the symposium. Putting aside the investigations of his colleagues into the roots and functions of the institution, Mr. Nathanson asks whether inheritance is a Good Thing or a Bad Thing, and, having decided that it is a Bad Thing, he suggests we abolish it, except as to minor personal possessions. While his criticism of the lawyer's fetish of testator's intent is certainly deserved, he dismisses the problem of individual social security, observing that "society as a whole has an obligation here, whatever techniques it may develop to meet it."⁶ His plan to eliminate private accumulations of wealth over the generations necessarily results in a substantially increased concentration of wealth in governmental hands, in order to perform functions formerly accomplished by private accumulations. It may not produce a net gain in achieving the author's expressed goal of making individuals count as persons. Indeed the difficulty in making ethical generalizations about inheritance becomes speedily apparent when one considers that the concept covers fortunes so large they grow faster than they can be squandered, and savings inadequate to maintain the dependents of the decedent. Differing problems require differing solutions, and the expert on ethics must give way to the (one trusts) ethical expert.

We are only beginning to realize that all of commercial law is not controlled by the simple sale of a haystack, but that there is rather a whole

5. P. 53.

6. P. 89.

continuum of transactions, for example in the field of credit transactions, from the purchase of a dining-room set to the purchase of rolling stock, each of which must be examined individually in its economic setting.⁷ Likewise in the field of real property we are learning to distinguish the analysis of rights in the land of another sought by the single residential property owner, from those sought by the river valley authority.⁸ But the field of decedents' estates is only in the process of emancipation from a separation of subject matter according to the technical device employed for the transmission of wealth from generation to generation, exemplified by the separate courses in wills and testamentary trusts.⁹ Even where the subject matter is unified, attention is still focussed on the type situation and its consequences for the theoretical individual participants, rather than on the diverse phenomena, from the \$1,000,000 to the \$500 estate, and from the inventory of cash and gilt-edged bonds, to the inventory of active, unincorporated business enterprise, all subsumed under the title of inheritance.

The total impression one receives of the New York University Conference Committee's first attempt is rather like that of a carpenters' convention, where the program committee has arranged for a panel of eminent authorities to talk on "Roofing." The anthropologist leads off with a paper on the development of roof structures from the New Guinea thatch to the pinnacle of the Empire State Building; the economist attacks the problems of the roofing materials monopoly; the sociologist discusses the connection between leaky roofs, poor housing, and juvenile delinquency; while the fourth speaker, a well-known sports writer, discusses the advantages of flat roofs for pigeon fanciers.

The carpenters are enlightened; but they wish their committee had got together with the speakers beforehand, found out what the people who live under roofs are most concerned about anyway, and concentrated on a real analysis of one of those problems.

ADAM YARMOLINSKY †

THE LAW OF FREE ENTERPRISE. By Lee Loevinger. New York: Funk & Wagnalls Co., 1949. Pp. xi, 431. \$5.00.

DURING the last ten years, great bundles of cases have been added to the pile of law on the regulation of business. No Supreme Court term has ended without a batch of decisions on the anti-trust laws, the Robinson-Patman

7. See, e.g., Gilmore and Axelrod, *Chattel Security*, 57 YALE L. J. 517, 761 (1948).

8. See, e.g., McDougal, *Municipal Land Policy and Control*, in PRACTICING LAW INSTITUTE, SIGNIFICANT DEVELOPMENTS IN THE LAW (1946); McDougal and Halper, *PROPERTY, WEALTH, LAND* (1948).

9. See Gulliver, Book Review, 43 YALE L. J. 1348 (1934); GULLIVER, CASES AND OTHER MATERIALS ON THE LAW OF ESTATES (mimeo., rev. ed. 1946); SIMES, CASES AND MATERIALS ON TRUSTS AND SUCCESSION (1942).

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Act and unfair trade practices. In the law reviews, lawyers have tried desperately and lengthily to tell each other about the latest changes in the law of business. Lee Loevinger thinks it only fair to let the businessman in on what is going on.

Only the greedy can question the soundness of the idea. When the average businessman—who will live in legend—has no idea of what the law is and must run to his lawyer before making any decision, you might as well not have any laws. For, as Mr. Loevinger points out, "the whole purpose of having rules is to give people the knowledge of how to act (or not to act) without the necessity of getting specific instructions from someone else on every problem."¹

The author's job was in reality two jobs, both tough. First, he had to puzzle out the present state of the law of trade regulation. And then he had to write so that someone unfamiliar with the legal mysteries could understand what he was talking about. He does both jobs well.

The author starts with fundamentals: the forms of business organization, the history of their regulation, the reasons for our present policies, and the scope of state and federal action. He then traces separately the development in each of the major fields of trade regulation: restraints of trade, monopoly, discrimination among customers, and unfair competition. When black-letter conclusions are justified, his are stygian. But when uncertainty is the true situation, Mr. Loevinger does not try to hide it.

The result is an accurate picture in fairly precise terms of what a businessman can and can't do today—and why. The author then tells the businessman what he can do if someone does to him what no one should have done. And what the Government will do if it has the time and money.

The book is not perfect, even within the limits set for it. Organizationally, it falls down in places—and in an expository work of this type the error is serious. There is, for example, little reason for separating the discussion of restraints on trade from the discussion of monopoly by two chapters on discrimination among customers and unfair competition. In view of the developing idea that market control alone is an offense,² monopoly deserves separate discussion. But not so far separate from the other half of the problem, restraints on trade.

Some readers may regret a few exclusions. For example, Mr. Loevinger fails to point out that the Robinson-Patman Act may have results directly opposed to the spirit of the anti-trust laws. The author notes that the Act springs from a somewhat different tradition. But he neglects the popular argument that, in industries where there are only a few sellers, discrimination among customers is frequently the only possible kind of effective competition.³

1. P. 3.

2. See, e.g., Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947).

3. See Comment, 58 YALE L. J. 426 (1949). The author does lay into a couple of

Probably, omissions of this sort are the result of a healthy disrespect for the available evidence. Mr. Loevinger differs sharply with those who insist that the anti-trust laws have failed. Equally, he refuses to call them a crashing success. Instead, he prescribes an "investigation of the facts throughout the field." You can't ever argue with that suggestion. And, since the book does what it tries to do so well, why ask for more?

That the book was written for businessmen should not disqualify it to a legal audience. With the exception of those happy few who can and do write law review articles on anti-trust, the lawyers are rare who would not like to know more about the field. Mr. Loevinger, as a contributor to law reviews on the subject and as a member of the staff of the Anti-Trust Division under Thurman Arnold, is qualified to fill the need. The book is profusely documented—no footnotes, but page references to an appendix; and another appendix contains digests of every Supreme Court anti-trust case. Moreover, unlike some law review articles, *The Law of Free Enterprise* can be read easily.

Style-wise, the book follows the sound idea that "The use of ordinary English, rather than legal jargon, is more likely to clarify than to obscure the thought."⁴ This does not mean that Mr. Loevinger is a stylist, for he is not. He merely tries to write English without mystery. There are, of course, a few slips. One will live: "Perhaps the inference of a theoretical relationship of causation between an abstract relationship of discrimination and an intangible condition of competition simply becomes too abstruse even for a judicial hypothesis."⁵

The example merely shows the sort of thing the author has tried to avoid. Generally, he succeeds. The pity, of course, is that his success requires comment.

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STURGES: CASES ON DEBTORS ESTATES (4th ed.). By Eugene V. Rostow. St. Paul: The West Publishing Co., 1949. Pp. xxi, 1306. \$9.00.

THE publication of the new edition by Professor Rostow of Dean Sturges' casebook on Debtor's Estates will undoubtedly be greeted with enthusiasm by its friends in the teaching profession. Of course, a review of the fourth edition of a well known casebook, such as this is subject to intrinsic limitations and can achieve little in fundamental appraisal of the accomplishment or in basic criticism. Professor Rostow, who this time did not enjoy the co-

practices that are outrageously inconsistent with the idea of competition: the laws which permit a seller to dictate minimum resale prices, and the quaint municipal habit of licensing everything "that moves, stands still or makes a profit." P. 202.

4. P. 268.

5. Pp. 140-1.

† L.L.B., Yale Law School, Feb., 1949.

operation of his former co-editor, Professor Poteat, makes it clear in his preface that other professional burdens deprived him of a much hoped for occasion to experiment with a fundamental reorganization. His own words reveal, however, that he would have retained "the comparative approach which is the basic premise of this book." It is also worth noting that the present editor makes specific reference to the divergent theories of how to organize a casebook in this field which the reviewers of the pertinent casebooks have voiced, but obviously considers the question closed so far as his own judgment in the matter is concerned.

To Professor Rostow, then, the law of Debtor's Estates remains essentially and categorically the law of *insolvent* debtor's estates and their liquidation or rehabilitation. The general law of execution—including such topics as judgment liens, the operation of the recording acts in that respect and redemption¹—as well as the auxiliary remedies of attachment, garnishment, supplementary proceedings, creditor's bills, third party orders etc. appear on the stage only through side entrances, such as §§ 67 and 70 *c* and *e* of the Bankruptcy Act, if at all. Important and troublesome conflict problems such as involved in *Sanders v. Armour Fertilizer Works*² and *Huron Holding Corp. v. Lincoln Mine Operating Co.*³ or cases laboring over the priorities between the various individual remedies are thus excluded from Professor Rostow's show although they also may influence the lawyer's choice of his proceedings or forum. But, as said before, the reviewer believes that the major premises in the selection of materials must now be accepted as the editor's established prerogative.

The editor has exhibited great diligence and wise choice in keeping the materials up to date. His ever improving hand can be seen not only in the addition and deletion of numerous cases, but also in the addition of new subsections, the changes of subtitle headings, the rearrangement of numerous cases, the insertion of new paragraphs in his introductory or supplementary notes, the inclusion of copious new footnote material and finally the enlargement of the bibliographical references. According to the somewhat cursory count of the reviewer, 65 new cases, almost all of them decided since the last edition,⁴ have been inserted, while 41 of the old cases have been totally deleted, 12 others (two of which might be missed⁵) have been reduced to

1. See in this connection Note, *Judgments—Limitations Upon Actions, Executions and Liens*, 24 MINN. L. REV. 660 (1940); Note, *Execution Sales—Rights of Bona Fide Purchasers*, 24 MINN. L. REV. 805 (1940); Note, *Redemption From Judicial Sales*, 5 U. OF CHI. L. REV. 625 (1938); Brown, *Execution Sales: Lien Divestiture and Distribution of Proceeds in Pennsylvania*, 17 TEMP. L. Q. 217 (1943).

2. 292 U. S. 190 (1934).

3. 312 U. S. 183 (1941).

4. The lion's share of the new cases belongs, of course, to the Supreme Court of the United States in its interpretation of the Chandler Act which had been in force for less than two years when the former edition appeared.

5. *American Surety Co. v. Connor*, 251 N. Y. 1, 166 N. E. 783 (1929); *Feist v. Druckerman*, 70 F.2d 333 (2d Cir. 1934).

cases mentioned in the editor's notes and 22 have been given a new place in the presentation.

The only two major changes in the new edition appear in Part 2. Chapter 2 of it is now entitled "The Process of Administration," and embraces "The Status of Continuing Contracts" and "The Control of Negotiations for a Settlement" in addition to the "Continuation of the Business" which was the only topic dealt with in the previous edition. Chapter 4, Section 3, entitled "Priorities" gained two new subsections entitled "The Plan of Reorganization or Composition" and "Equitable Adjustment of Priorities and the Classification of Claims." Of course, the additions mentioned have caused an increase in size. The casebook now contains 1016 pages as compared with the 871 pages of the previous edition, not counting the statutory supplement in either instance.

To be sure, only the actual use in classroom can furnish a final test for the success of the new edition. But at first blush it reveals careful workmanship in addition to great skill and experience. All the more is the reviewer saddened by the fact that many valuable annotations in the *Minnesota Law Review* have escaped the editor⁶ and that not one of the reviewer's own writings in the field which appeared since the last edition⁷ has been noted by the editor as useful and worthy of reference. Somewhat annoying is the fact that the author has not brought his statutory citations up to date. A great many of them have been long superseded by more recent revisions or codifications. It is particularly regrettable that the author apparently was unable to refer to and quote from the sections of the new Federal Judicial Code and to indicate his views on the possible effects of the revision.

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6. See, for instance, the comments dealing with *First Nat. Bank of Albuquerque v. Robinson*, 25 MINN. L. REV. 103 (1940), and *In re Schwartz Bros.*, 30 MINN. L. REV. 638 (1946) (cf. Casebook pp. 204, 208); Note, *Priority and Effect of Liens on Distribution of Insolvent Estates Between Federal and State Claims for Unemployment Taxes*, 31 MINN. L. REV. 479 (1947) (cf. Casebook p. 719 *et seq.*).

7. See, e. g., *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1 (1942); *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401 (1947); *Jurisdiction in Bankruptcy*, 13 LAW & CONTEMP. PROB. 88 (1948).

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