

Perhaps the best survey of contemporary conditions in these countries is Warshaw's new book. In this work the author, presumably a teacher in the College of Business Administration, University of Nebraska, dwells at length upon economic matters, but he by no means neglects the political and the social. The New Latin America, which is the subject of his volume, he declares to be "onward moving," "progressive." In order to find support for this optimistic thesis he compares the Latin American countries with those of southern Europe; dwells upon the common misconceptions regarding them, availing himself of the analogous attitude of the English toward the early development of the United States; and even derives encouragement for Latin America in a comparison of the material progress it made during the first century of its independence with our achievements for the same length of time. In fact, he goes so far as to venture an assertion seldom found in the productions of authors of Anglo-Saxon America. He says: "I am persuaded that Latin Americans have the same number of merits and defects as other peoples: but I am positive, likewise, that they have no more." After all, may not Warshaw's picture be more nearly true than those set forth in the depreciatory and patronizing productions so freely issued during the last decade? At any rate, it will not be unwise to read his book carefully as an antidote to Ross's South of Panama and Franck's "vagabonding" stories.

Hitherto there have been only a very few attempts on the part of North Americans to recount the complete story of the development of the Hispanic American republics. In fact, Dawson, Akers, Shepherd and Sweet constituted the list of authors who had essayed the task prior to the publication of Robertson's text now under consideration. With the possible exception of Professors Shepherd and Bolton, Robertson is easily the best equipped man for the task. His interest in Hispanic American history dates back some twenty years when as a student under Professor Turner at Wisconsin University he wrote his first essay on the subject. In 1907 he published a monograph on Francisco Miranda which was immediately recognized as a piece of historical research of exceptionally high grade. Seven years later he issued an excellent series of biographies which served as a history of the Wars of Independence. These two works immediately won him a place among the foremost historians dealing with the national period of Hispanic American history. Now he publishes a volume of more than six hundred pages which not only sets forth the results of twenty years of diligent study in his own particular field, but presents also some of the findings of a large group of scholars who have specialized in the colonial history of Hispanic America.

Following his own inclinations, perhaps, or—what is still more probable—acceding to the demand of the public which has little interest in historical events prior to the French Revolution, Professor Robertson has given only about one-fourth of his book to the colonial period. This part of the work he divides into five chapters—The Environment, The European Background, Discovery and Conquest, The Latin-American Colonies in the Sixteenth Century, The Old Régime in Latin-America. The author then presents an exceedingly vivid account of the winning of independence and, proceeding on the thesis that each of the Hispanic American peoples is a "distinct political entity constituting a nation," he devotes a chapter to the national development of each of the republics, with the exception of Cuba, Central America and Santo Domingo,

which are disposed of in a single chapter. And, last of all, apparently overcome by the resemblances of these countries, which he formerly considered of less importance than their differences, he gives the concluding fifty pages of his narrative to the common problems and ideals of the Latin-American nations and to their relations with other states.

Mr. Robertson has stated the purpose of his undertaking as follows: "I have aimed to write a book that would be instructive to the general reader who desired a survey of Latin-American history and that might also be used as a text for colleges and university classes in the history of Latin-America." (Preface, p. vi.) This purpose he has accomplished in very adequate fashion. He has perhaps written the best book of its kind dealing with the history of Latin-America in any language. He has forever removed one of the best excuses for ignorance of Latin American history on the part of the North American people, and it is hoped that they will soon avail themselves of the opportunity to read this timely volume.

J. FRED RIPPY.

Law and Reason

The Nature and Sources of the Law, by J. C. Gray. Second Edition. New York: The Macmillan Company. \$4.00.

The Nature of the Judicial Process, by B. N. Cardozo. New Haven: Yale University Press. \$1.75.

The Spirit of the Common Law, by Roscoe Pound. Boston: Marshall Jones. \$2.50.

An Introduction to the Philosophy of Law, by Roscoe Pound. New Haven: Yale University Press. \$2.50.

A KEEN French jurist, Duguit, who visited this country last year, is reported to have expressed astonishment at the pedagogic excellence of some of our law schools and the complete absence of any attention to the philosophy of law. Like other foreign visitors, Professor Duguit was not altogether fortunate in his guides. He certainly would not have made the latter part of his statement if he were acquainted with the work that the present Dean of the Harvard Law School has been carrying on for two decades. But taking the country as a whole there can be no doubt that we are woefully behind in the philosophic or scientific study of law as a social institution. Indeed the most influential leaders of the American bar seem distinctly hostile to such study. A decade ago the leaders of the New York bar took the position that the "sea of theoretical economics" was altogether irrelevant to the discussion of the Income Tax Amendment; and our State Court of Appeals in the Ives case similarly ruled that law had nothing to do with economics, sociology or statistical information of any kind. When in the great progressive campaign of 1912 dissatisfaction was expressed with the antiquated philosophy back of a great many of our judicial decisions, the American Bar Association embarked on a campaign of "education" to convince the public that judges merely declared the law and had no part in making it what it is—though this view of the judge as a kind of animated phonograph had long been characterized as a childish fiction by scientific jurists. A very instructive parallel, indeed, may be drawn between the conservative lawyer's attitude to social science and the old clerical attitude to physical science—for legalism and clericalism are both efforts of ruling castes endeavoring to hold on to prestige and power. Despite however the in-

transigent attitude of the high priests of the legal profession, our courts did begin to show some effects of the unanswerable criticism that the traditional legal premises and conceptions of rights were antiquated, that many of their previous decisions were necessitated not by eternal legal principles but by obsolete or very questionable assumptions as to economic facts and social policy. But the war has strengthened the reactionaries and has perhaps added new illiberal prejudices to what is regarded as patriotic interpretation of the law. Under the circumstances there can be no better augury to the friends of enlightenment than the appearance of these four books.

Gray's *Nature and Sources of the Law* originally appeared over a decade ago and was at once recognized as a classic. Though this second edition, edited by the author's son, is not much of an improvement over the first, it is gratifying that a second edition of a book on the general theory of the law should be called for. Professor Gray, to be sure, was in many respects an old fashioned lawyer unduly preoccupied with property law. But unlike the vast majority of his profession, he was a thorough and liberally learned man who did not despise foreign learning and experience, and did not allow conventional respects to interfere with the perception of fact. Thus he does not hesitate to admit that, in our system, law is the "opinion of half a dozen old gentlemen, some of them conceivably of very limited intelligence." The argument that law is the will of the people because, if it were not, the people would overthrow it, is met by grim analogy of the power of the horses of a regiment to overthrow the riders. His remarks on Judge Story, one of the tin gods of the legal profession, are alone well worth the price of the book. Above all, this book seems to be characterized by the mature wisdom which comes from long grappling with difficulties rather than from clever devices for avoiding them. This shows itself in the variety of concrete homely illustrations with which he always confronts high principles, as when the supreme principle of morality, the greatest good of the greatest number, etc., is confronted with the question of the liability of a Pullman Car Company for samples of hat-pins left by a traveling salesman. The incautious reader may be misled by the humor of the illustration and see in it the fashionable contempt for general principles. But in fact Professor Gray does believe that the judge's general philosophy will influence his particular decisions. But if principles will not directly or indirectly throw light on these daily cases they are of no value to the philosophy of law.

By close reasoning Gray establishes the position that law may be viewed as the body of rules followed by courts in their judgments and decisions. Judge Cardozo, who in the main accepts Gray's position and indeed builds upon it, is somewhat frightened by the robust consistency with which Gray maintains his thesis. For if law be nothing but what the courts will recognize as such, then it follows that rules according to which people actually regulate their conduct do not constitute law unless judges put their stamp upon them. Judge Cardozo regards this as obviously absurd. To me it seems rather the beginning of logical sanity to start with this very distinction between the social rules which prevail in popular opinion or practice and the jural rules which prevail in judicial decision. Though these two sets of rules obviously influence each other, they are certainly not identical; and sociologists have fallen into inextricable confusion by indiscriminately applying the term law to these different sets of rules. Gray does not

contend that in making the law judges are entirely untrammelled—no human being is ever completely untrammelled. The body of judicial decision is in fact limited by the same forces which rule the state, though who the real rulers are it is hard to say. In any case Gray's position is much more in accordance with the fact that on a great many questions that come up before the courts there is no popular opinion at all. Indeed, it is precisely because in modern society it is as impossible for people at large to make laws as to build suspension-bridges that experts are employed to do both. Hence, more or less organized professional tradition and opinion is probably what judges care for most, and is thus the strongest single factor in making the law what it is. Intelligent laymen can pass judgment only on the results and pronounce them good or defective.

Judge Cardozo is one of the regrettably small number of our judges whose writings would command respect even if the accidents of politics had not elevated them to the judicial bench. His analysis of the different elements which influence the judge in making the law, to wit, analogies, precedents, and considerations of social policy, is characterized by a rare delicacy of perception—a saving grace in a field where inordinate complexity makes it often fatal to rely exclusively on simple theories. One who values consistency above all may perhaps object that the admitted judicial power to mitigate wrongs and hardships cannot be restricted merely to filling gaps in the existing law. Indeed the phrase, "gaps in the law," offers the suggestion of a sharp line between the part of the law that is absolutely fixed and a blank space where the judge can write anything he pleases, whereas in fact the different parts of the law differ only in degree of fixity or fluidity. However, Judge Cardozo's engaging modesty and his earnest warning against what modern progressives are so apt to overlook—the dangers of judicial impressionism which would sacrifice permanent interests of humanity to the interests of the moment—are likely to add to the respectful attention which will be accorded to his main contention.

Eight years ago when I published something to the same effect on the Process of Judicial Legislation, the lamented Dean Thayer of the Harvard Law School and others wrote to me that though what I said was true it was not good public policy for judges to know or admit it. But now that a highly respected judge has said it, let us hope that public policy will adjust itself to the truth.

Dean Pound is one of our very few scholars who have so thoroughly mastered the details of their field that they can see them in their totality and in their relation to the needs of social life. At a time when the high priests of legalism regard all criticism of our legal system as unpatriotic, it is gratifying to find that our foremost jurist is not blind to its serious defects. Dean Pound finds in fact that "the real danger to the administration of justice according to law is in timid resistance to rational improvement and obstinate persistence in legal paths which have become impossible in the heterogeneous, urban, industrial America of today." This does not mean that he is one of those who uncritically confuse the new and the good and thus ignore the relatively permanent human interests which the law, like other social institutions, is designed to protect. Eighteenth century ideas of natural rights and even feudal ideas of social relation are not all necessarily false because we live in the twentieth century; and Dean Pound is careful to point out the precise elements of these ideas that are still of value to our legal system. What is most characteristic of his work is not only the insistence

that law is a means to human welfare and must justify itself by its results, but that these results must be studied, not simply as they appear in law books and legal presumptions but as they actually operate in life. Thus he calls our attention to the significant fact that while the major energy of our legal studies has been devoted to the reported cases of our higher courts, the vast majority of our people have their cases tried in lower courts where different conditions prevail.

The Introduction to the Philosophy of the Law is the first American book devoted to an analysis of the leading philosophic theories in this field, and it is to be hoped that it will increase the interest of students in this subject. The *Spirit of the Common Law*, on the other hand, is addressed to a wider audience and is by far the best available survey of the resources of the law, the elements which make it up and the leading ideas which have determined its growth.

Six factors according to this survey have tended to make our common law excessively individualistic. Four of these, to wit, its Germanic origin, the fight of the courts against the king, the theory of natural rights, and the general philosophy of laissez-faire and free will, have been operative in England as well as here; but two, Puritanism and the ideas adapted to a sparsely settled rural population living on the frontier, have emphasized and given a peculiar turn to this individualism in America. At the same time the common law has never abandoned the feudal principle and has always insisted on the reality of the relations in which individuals have to stand, or function which they have to fulfill, as a result of their social interdependence. Dean Pound therefore concludes that the law today needs no revolution from without but is capable of absorbing the teachings of the newer social sciences in a way to protect social security and the development of free individuality.

Optimism with regard to a social institution as basic to decent life as the law, is always exhilarating; and no one is more entitled to his optimism than one who has studied the law as carefully as Dean Pound and has indicated its limitations as honestly as he has done. Nevertheless there is a certain unfortunate absoluteness in his argument against the recall of judicial decisions or any other political interference with the courts. We live in a country where, for good or evil, every political issue except possibly the tariff is likely to get finally into the courts. How then can we maintain law, or at least constitutional law, independent of politics?

In no other country are political questions of taxation or labor legislation involved in so much uncertainty because of the impossibility of predicting how the judges will finally rule. This state of affairs cannot be justified by Coke's dictum that judges rule under God and the law. The ancient Germans may have believed it, but modern man can find little evidence for the claim that the work of judges is more influenced by God than is the work of any other men; and, in view of the uncertainties and large arbitrary elements which actually enter into the decisions of our highest courts on public issues, there is no justification for identifying the political opinions of judges with reason and the opinions of the legislature or voters with arbitrary will. If our actual system whereby the fate of untold millions is decided by a chance majority of a very small number of elderly judges is to be defended at all, it should be by an enumeration of the instances

where judicial opinion has actually turned out to be wiser than that of legislatures and voters. Indeed, as an absolute proposition the supremacy of the law or of the actual decisions of courts would be intolerable and immoral. At all times the law, while protecting public order, also involves certain immoralities, and is actually administered in a way to oppress certain elements of the population most unjustly. This is an inevitable consequence of the limitations of human knowledge and goodwill in framing laws as well as in administering them—limitations from which judges are not free. If the law, then, like the Sabbath is made for man, occasional political interferences with the legal machinery may be necessary, *though as a rule dangerous*. Lincoln, for instance, in his effort to preserve the Union flatly disregarded orders from the courts—even that of the Chief Justice of the Supreme Court; and patriotic citizens were with him, as they were in recalling the Dred Scott decision by force of arms. Nor did the English people lose the benefits of civilization when their Parliament recalled the decision of their highest court in the Scottish Church case. No one, indeed, has pointed out with greater justness than Dean Pound this very necessity for occasional relapses to justice without law, or the limitations of judicial law-making because "courts have no adequate machinery for getting at the facts required."

Though an unusual amount of nonsense has been written on behalf of the economic interpretation of legal history, I think more can be said for it than Dean Pound indicates in this volume. Against the crude assertion that ethics and logic are of no importance because judges are inevitably determined by their own class interests, he is undoubtedly right in insisting that tradition, the force of analogy, and ideas of right, have always been active influences. But the situation is not one of a simple alternative between logical and ethical forces on one side and economic motives on the other. The actual presence of logical reasons and ethical motives is no evidence of the absence of economic motive, conscious or unconscious. No fact about human nature seems so certain as that our honest convictions of right and wrong are apt to be largely shaped by our interests. Slave owners fervently believed slavery to be right, but not because they first reasoned it out on abstract grounds and then became slave owners. Similarly do our interests tend to make certain analogies appear more logically cogent than others. Would the fellow-servant rule and the doctrine of the assumption of risk, which Dean Pound regards as intrusions into the common law, have been invented if Lord Abinger and C. J. Shaw had been laborers? Might they not have found some analogy in the feudal element of our law for the burden on the master rather than on the servant? Similar remarks can be made about the law of fixtures in England and America. Indeed, the whole law of property, of bills and notes, and of the rights of labor, is really unintelligible apart from the economic interests which demand it. However, Dean Pound himself has given us a model example of the economic interpretation of legal history in the chapter on the Pioneers and the Law, and I understand that since writing this book he has become even more friendly to the economic interpretation. Caution in the acceptance of sweeping hypotheses is natural to one who formerly was able to achieve distinguished results also in the natural science of botany.

MORRIS R. COHEN.

Our Primitive Heritage

Early Civilization: An Introduction to Anthropology,
by Alexander A. Goldenweiser. New York: Alfred A.
Knopf. \$4.00.

WHILE the formal science of anthropology was, in a sense, founded by Edward Burnett Tylor only some forty years ago, man's interest in his primitive predecessors is as old as folklore and tradition itself. To limit ourselves only to written records, the Oriental creation tales and heroic lore, the Hebrew legends of Adam and Eve, the age of giants and Noah and the dispersion, Plato's interest in primitive civilization and the troglodytes, Seneca's conception of a primitive golden age, the patristic account of pristine paradise and the fall, the early modern interest in the life of man in "the state of nature," which culminated in Rousseau's grotesque eulogy of the noble savage, and the beginnings of a pseudo-scientific study of primitive life with Herder, are but a few of the well known examples of the perennial concern of the typical leading thinkers of history with the problems of primitive culture. And while most of their doctrines on the subject were wholly a priori, deductive, and grotesque as to details, their "hunch" as to the importance of early civilization was a sound one. Modern man is pleased to think of himself as quite different in kind from the savage, yet this is but a defensive delusion and a flattering fiction. Except for a precarious and variable veneer of material culture, and the alteration of psychic responses and secondary rationalizations conditioned thereupon, our whole biopsychic and social background and equipment is one which we share in common with primitive man and, to no small degree, with the animal kingdom in general.

The great impulse to the study of anthropology came from the evolutionary hypothesis and the discovery of the geological age of man. A vast literature grew up around the subject of the life of early man in the period from 1860 to 1890. Most of these works, however, were based on deductive theorizing, founded on the assumption of the possibility of applying the processes and mechanisms of biological evolution to an explanation of social and cultural development. Classic examples of this type of work were Spencer's theories of primitive mentality, Morgan's synthesis of primitive social organization, Frazer's voluminous analysis of religion and mythology and Tylor's studies in primitive culture. Tylor was much the most scholarly of the early group, and his *Anthropology*, first published in 1881, was the best comprehensive statement of the outlines of anthropological science as it was formulated by the evolutionary school.

Penetrating students of primitive culture were soon to see the necessity of supplanting arbitrary deductions by critical and discriminating analysis of adequate collections of representative data, thus raising anthropology to the level of a science. It may be something of a satisfaction to Americans to know that it has been almost solely due to the efforts of an American scholar, Franz Boas, that this significant achievement has been realized. By his extensive field researches, his elaboration and application of a severely scientific method and his training of a number of worthy disciples, he has created the real science of anthropology. The nature and results of his methods he has summarized in his notable work on *The Mind of Primitive Man*. Clark Wissler has put the synthesis of native American culture on a scientific basis in his *American Indian*. Robert H. Lowie has contrasted the actual

facts of primitive social organization with the imaginative fictions of the older anthropology in his *Primitive Society*. Many others among Boas's students have done notable work in the way of a discriminating collection of data in the field. Now Dr. Goldenweiser has attempted the difficult but extremely necessary task of summarizing the findings of critical anthropology in the various fields of method, cultural development, social organization and mental evolution. His work may be regarded as occupying something like the same position with respect to the newer critical anthropology that Tylor's *Anthropology* did to the views of the evolutionary group.

The book opens with an analysis of certain general considerations which may be regarded as the essential prolegomena to any detailed survey of anthropological material, such as the psychic unity of man, the lack of correlation between race and culture, the nature of civilization as a cultural concept and the weaknesses of the older evolutionary and comparative method in anthropology. It would have been well if the discussion of the relation between culture and environment, which appears much further on in the work, had been included in the introduction. Next comes a section devoted to the concrete description of some five representative primitive cultures selected from the most diverse areas. This material is utilized to confirm the introductory considerations and to furnish the basis for subsequent reflections throughout the work. In the third part of the book, primitive industry, art, religion and social organization are surveyed in an illuminating manner, and the laws and processes of cultural and institutional growth are discussed. The work closes with a critical examination of the theories of primitive mentality and mental evolution held by Spencer, Frazer, Wundt, Durkheim, Lévy-Bruhl and Freud. A number of helpful diagrams and illustrations are introduced into the text. While the book is well organized and clearly written, the vocabulary is somewhat scientific and the treatment methodological and generalized. For this reason it is scarcely an ideal book for beginners in the study of anthropology or for introductory courses in undergraduate work in college. It has little of the intimacy and literary charm of Tylor's old manual or Martt's admirable little summary, and while it will be of infinite value to teachers and advanced students it can scarcely be hoped that it will popularize the newer anthropology.

Dr. Goldenweiser adheres to the general point of view of the Boas school that civilization must be dealt with chiefly as a cultural fact and process. Older concepts of a racial hierarchy or geographical determinism are rejected. Culture is the vital and dynamic element in human development, though Goldenweiser handles this "culture-concept" in a moderate manner and does not push it to the border of the mystic and the occult, as do Kroeber and some others. Throughout the book is well-balanced. In the development of culture the contributions of both the individual and society are weighed and estimated, and, in the explanation of cultural parallelisms, due consideration is accorded to the operation of both independent development and diffusion. The latest views on the origin of religion, such as the mana concept, are well presented and the diversity of forms of early social organization clearly indicated. The anachronisms in the anthropology of Spencer, Letourneau, Frazer and Morgan are thus fully revealed. The criticism of the chief attempts to construct a psychology of primitive man is judicious and constructive.

Dr. Goldenweiser's book should do much to arouse