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Jurisprudence

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BOOK REVIEWS

Jurisprudence. By ROSCOE POUND. St. Paul: West Publishing Co., 1959. 5 Vols. Pp. xxvii, 547, 466, 738, 543, 855. $90.00.

It has proved extremely difficult for me to work out a review of this book—chiefly, I think, because the book will mean such different things to different groups of men. Thus if you are the ordinary reasonably intelligent but very busy lawyer, a review ought probably to state that this holds rather little for you, and, so far as it does hold anything, is too expensive, at its enormous price, and that it is too sprawling in its organization to be accessible.

But if you are a lawyer with an interest in the wider aspects of his profession who is also taking some time off for serious reading, this may be a very good book for you indeed. One thing is sure: there is nothing gathered in English which reports the same general range of legal thinking as does this. In the main, moreover, the ideas, like their sources, are translated into language—and often into application—which we can all understand. And the whole is infused with the powerful and critical home-grown insight about us-folk, our legal problems, and our legal ways, which has been the foundation of Pound's greatness and which has been so strikingly absent in so many (I do *not* mean, e.g., Radin or the Cohens or Seagle or Cairns) who have quarried abroad not to enrich, but to substitute. If you are this inquiring lawyer, you will meet skillful presentation and critique of law-directed thinking especially from the Latin, the German and the French, informed by an encyclopedic acquaintance with Anglo-American judicial writing up to say 1930 which few have ever matched. The result will lift your eyes, stir your mind, and, it may be hoped, refresh your soul. It will also ornament your shelf: bound in handsome brown with Roscoe Pound's signature in gold, and with the paper thick or thin as may be needed to make all five volumes harmonious in bulk.

If you are another type of reader or public, you begin carpingly by asking why the end-results of the most prolific writer on Jurisprudence in our language should come feather bedded in wide margins, half in extra-large type and fatted paper, with much of the most pungent older stuff cut out, and with an index which screeches its inadequacy. As one of the professionals in the field who began with this reaction (one goes on, e.g., to find no substantial mention or understanding of Arnold, of either Cohen, of Cahn, Fuller, Michael, Radin, or Seagle, all of whom were writing while Pound was still in powerful spate)—as one such, let me start here by reminding my brethren that if they read they will find these volumes full of cliché ideas—somewhat in the manner of Shakespeare. Pound is indeed no Shakespeare; nevertheless, to

take an instance, the basic content of, say, *Law in Books and Law in Action*,[1] *The Limits of Effective Legal Action*,[2] *Spurious Interpretation*,[3] *Mechanical Jurisprudence*,[4] etc., is the basis of our forward-looking thought of the '20's and '30's and has provided half of the commonplace equipment on and with which our work since has builded. It is not to the point that I have not found these particular papers reproduced in text in the present volume, much less rearranged and expanded as is *Justice According to Law*;[5] their flavor and ideas are nevertheless present. So is the turning of eye and mind to other-than-English sources, where Pound, even more than Wigmore and Kocourek, and Radin, laid the foundation for the American lawyer to broaden and deepen his vision—a foundation which even world tragedy and threatened disaster have found it hard to persuade that same American lawyer that he truly needs (including among such American lawyers most of the "sophisticated" snooters at Pound).

Thus before I come to my own estimate of the value of the present work I should like to repeat first that for the practicing lawyer whom the author used to so impress with the sweep and learning of his after-dinner speeches, these volumes are a store-house of what today is called continuing legal education.[6] Secondly, that the modern sophisticate finds here much of the fundament on which he rests, and that most of him will find also a rude, shrewd challenge to his provincial self-sufficiency, a challenge to move on into the work recorded in other tongues than ours (including the Scandinavian, and the Russian), and proof that such moving is needed and can pay.

These matters out of the way, what does this work, in the light of Roscoe Pound's work in general, mean to the contemporary jurisprude?

The author tells us that the job was planned and begun in 1911,[7] completed

[1] 44 AM. L. REV. 12 (1910).

[2] 3 A.B.A.J. 55 (1917).

[3] 7 COLUM. L. REV. 379 (1907).

[4] 8 COLUM. L. REV. 605 (1908).

[5] (pts. 1–3) 13 COLUM. L. REV. 696 (1913), 14 *id.* 1, 103 (1914).

[6] Such a lawyer should add, especially, (1) STONE, THE PROVINCE AND FUNCTION OF LAW (1950), the best one-volume job on the whole field; its author was responsible for much of the up-dating of the Pound footnotes. (2) REUSCHLEIN, JURISPRUDENCE—ITS AMERICAN PROPHETS (1951), which gives not only the best available whole-picture of Pound's work, but also deals rather surely with many American writers whom Pound neglects. (3) COHEN & COHEN, READINGS IN JURISPRUDENCE (1951), which is an admirable selection of first-hand material, and which, in supplement to Pound's material, builds up the institutional and operating side of law. (4) CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL (1949), tough going, but extremely useful in the way in which it brings the elders to bear on current problems and thinking.

[7] Vol. I, p. xi. SETARO, A BIBLIOGRAPHY OF THE WRITINGS OF ROSCOE POUND 4–5 (1942), notes, in addition to the well-known *Scope and Purpose of Sociological Jurisprudence* (pts. 1–3), 24 HARV. L. REV. 591, 25 *id.* 140 (1911), 489 (1912), an original OUTLINES OF LECTURES ON JURISPRUDENCE CHIEFLY FROM AN ANALYTICAL STANDPOINT (67 pp.) from 1903, and an original READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW (404 pp.) from 1904.

in 1952, and twice revised (1949–1952, 1956–1958).[8] It must be taken as the final full word of a titan who during forty or so of his 65 years of prolific legal writing threatened to make American jurisprudence a one-man show. Significantly, his first listed article, back in 1896, was *The Influence of Civil Law in America.*[9] Significantly again, in the ten preparatory years, even while only five out of eighteen items appeared in other than local Nebraska publications, yet well more than half were jurisprudential. The first great paper, that "mother of symphonies," came in 1906: *The Causes of Popular Dissatisfaction with the Administration of Justice.*[10] A paper—not merely a review—about Pound's work is listed as early as 1914.[11]

One gets the impression that the major lines of the present book shaped up rather early, along with the major insights. Thus as against Pound's *Outlines of Jurisprudence*, 3d ed. 1920, and 5th ed. 1943 (the two editions with which I happen to be familiar), the present table of contents shows not too much elaboration of basic plan between 1920 and 1943, and very little since. It is worth noting, perhaps, that 1943's "Conditions of non-Restraint of natural *powers*" has turned into one of "natural *freedoms*" (where the plural is of course peculiarly useful to clear thinking); and that the "Law and ethics" of 1920 (an emphasis on writing and theory) and the "Law and morals" of 1943 (with necessary emphasis on practice and mores, along with theory) has moved, in plan, into a rethought, reanalyzed, combination: "Law and Morals —Jurisprudence and Ethics." The text does not realize this more mature plan, but, even so, it represents a gratifying advance over one of Pound's less happy early ventures.[12]

The over-all scheme divides thus:

1. *Jurisprudence.*—History and "schools," some 350 pp.: mostly meat, sometimes deep insight, sometimes superficiality. Thus I, pp. 34–38 on Greek philosophy and Roman law seems to me mere words; and Savigny, in this part and elsewhere, is dealt with in conventional stereotype and as if Kantorowicz's blinding paper[13] had never been written, and indeed as if "the" histori-

[8] Vol. I, p. xii.

[9] SETARO, *op. cit. supra* note 7, at 3.

[10] 29 A.B.A. REP. 395, reprinted 40 AM. L. REV. 729 (1906), 14 AM. LAWYER 445 (1906), 20 J. AM. JUD. SOC'Y 178 (1937).

[11] SETARO, *op. cit. supra* note 7, at 139.

[12] LAW AND MORALS (1924). This little book, though heavily documented, gets almost nowhere, and Pound's wisdom shows in not using it as one of the prior works to be incorporated *verbatim*, or nearly so, into the final word. But that word (ch. XI) is itself not satisfactory in this area; its concern is too much with doctrine. Doctrine is indeed one lesser phase of the relation of law and morals; but the bridge and the tension lie in practice—here would have been, e.g., a place to discuss fiction in general, and such matters as modern American consent divorce, with "ethics" as they hit judge and practitioner, legislator and layman. Kant, Stammler, Kohler, etc., have stuff, but one wants to see ethics, for lawyers, get down from "books" and into "action": the court-room and the office.

[13] *Savigny and the Historical School of Law*, 53 L.Q. REV. 326 (1937).

cal "school" had not, with Goldschmidt, blossomed in codification. In contrast, Ihering receives thoughtful treatment.

2. *The End* [-Goal] *of Law*, 187 pp.—One asks chiefly: Why the singular? This type of over-simplifying of a complex set of issues recurs. For instance, notwithstanding some four decades of insistence by Sunderland, Green, and especially J. Frank, on the difference—peculiarly in a jury-culture—between appellate justiciation and justiciation at trial, Pound still writes of "*the* judicial process"; and again, notwithstanding the report in 1941—a time when Pound was a central figure in the discussions—of the U.S. Attorney General's Commission on Administrative Procedure, we find the relevant discussion here full of "*the*" administrative process, as if administrative processes did not come in Heinz varieties.[14]

3. *The Nature of Law*, 464 pp.—Theories of law; law and the state, and morals; justice according to law (this last as fine and full as anything in the book.)

4. *The Scope and Subject Matter of Law:* interests, 371 pp.—This is discussed below.

5. *Sources, Forms, Modes of Growth*, 362 pp.

6. *Application and Enforcement of Law*, 34 pp.—It escapes me why this is a separate "part," rather than being added to "justice according to law," or else really developed on its own by the author of *Limits of Effective Legal Action* and co-editor of the *Cleveland Crime Survey* of 1919.

7. *Analysis of General Juristic Conceptions*, 507 pp.—Rights, powers, non-restraints, duties, persons, acts, things.

8. *The System of Law*, 713 pp.—Classification, proprietary rights, obligations, reparation, enforcement, comparative civil procedure. (But why should "Law" be "*private*" *law?*)

Save for the problems of crime and governmental organization (which are hardly brushed) international matters (which are scanted) and taxation,[15] the range is thus huge; it is worthy of Reuschlein's intitulation, "The Pre-emptive Pound."[16] The underlying data and literature have, as mentioned, a vastness unfamiliar in American scholarship; Wigmore had something of the same omnivorous quality, Radin had much of it and Seagle some, but in general it

[14] This is strikingly so in one of the later-written (and useful) additions, in which Pound, contrary to his older practice, recognizes and responds to an attack. The passage—it is III, 469–72, based on *The Judicial Process in Action*, 1 N.Y.L.F. 11 (1955)—is sprightly and has power; but it misses the beauty of Dewey's exciting analysis (first put forward about coevally with Pound's own first major effort on the theory "of judicial decision": *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924)); and the reason Pound misses here is, I think, almost wholly because for him "the" judicial and "the" administrative stand as obscuring over-simple entities between the eye and understanding.

[15] Among matters not mentioned in the Index are Taxation, Budget, Defense, Military Establishment, National Defense, and War.

[16] REUSCHLEIN, *op. cit. supra* note 6.

has been rare since Kent and Story. One of the main values of the present volumes lies in the results of these explorations, whenever Pound lets his results take shape with enough detail to carry meaning. Thus, for instance, the comparative treatment of Gény and Duguit[17] is, except for its source,[18] the most illuminating job on the subject I have read; and Gény is among us the most neglected of the valuable Continental authors.

It is indeed in relation to this job on Gény, excellent in itself, that I can perhaps best indicate my own troubles with the book at large. The points are two, and they are applicable throughout: (1) In the very process of discovering and lauding Gény's *Science et Technique*, Pound pushes off the *Méthode* as having "no more than incidentally raised the questions as to values *and made some suggestions as to a measure.*"[19] (My italics.) But the guts of the *Méthode* lies in the most magnificent single job that has ever been done of *mediating*, by way of a single, simply formulated, way of work ("measure"), between *any* ideal, and *any* authoritative text, and what proves in each case in hand to need doing. Gény's formula is not all-sufficient, but he added to it literal volumes of specific application until, if you really read, you get by that very reading to where you can do it for yourself in your sleep, and do it not so badly. This is genius: it is also lawyering, it puts jurisprudence to work, for anybody. It is an instance of that *technique* which the later book stresses as a matter of theory—and, as Pound sees it, rightly. Holmes muffed this aspect completely.[20] Patterson muffed it.[21] Even Pound's versatile and sensitive sniffer really missed the *technique*, too; nevertheless, in a day when Duguit was the fashion, Pound smelled out Gény as the sounder man.

This is Pound's sniffer at work. It is an amazing sniffer. It reminds me most of the general genius of the American case-law judge: *most* of the time it is *amazingly on-target. And so rarely in the bull's eye.* For Pound is of course not in the bull's eye here. He recognizes Gény's quest for "starting points" for legal reasoning; but he just plain ducks discussion of what those starting points are or should be. He recognizes the importance of *technique*, in general. But he turns his back, then, on the *craft*-aspect, the daily working aspect for daily working lawyers, of this great *Méthode* of Gény's—even while, I repeat, he is sniffing out the greatness which has been missed by every other American writer except Cardozo.[22]

[17] Vol. I, pp. 181–89.

[18] Pound's *Fifty Years of Jurisprudence* (pts. 1–2), 51 HARV. L. REV. 444, 777, at 464–72 (1938), is abbreviated in the current text, whereas it deserved to be much expanded.

[19] Vol. I, p. 182.

[20] Holmes' *Natural Law*, 32 HARV. L. REV. 40 (1918), started off as a review of Gény's *Méthode*. I cannot believe that Holmes ever got beyond Gény's second-rate philosophical introduction. The latter's philosophy matures in the later work, but it never achieves a stature comparable to the method of the *Méthode*.

[21] JURISPRUDENCE—MEN AND IDEAS OF THE LAW (1953), 353–54.

[22] NATURE OF THE JUDICIAL PROCESS (1921), *passim.*

The second point illustrated is Pound's preference for the study of theory, verbalized theory, writer's theory, over study of results, or of how it gets done: over process and know-how either in the concrete or in theory. Gény's *Méthode* (if I may quote from Pound in a not dissimilar context about our appellate courts) seemed to him only to "ring changes on the familiar," so he went on to Gény's theoretical discussions.

Let me try to state it this way: Pound has contributed, for my guess, more than any other individual (unless perhaps John Dewey) to making legal thought in this country result-minded, cause-minded, and process-minded. Yet such lines of thinking leave little mark upon the whole, and almost no marks upon the structure, of these final volumes.

Let me illustrate: by 1903, we have *Outlines, Chiefly from the Analytical Standpoint.* Those 67 pages get developed, with love and skill, into more than 1200 working pages of the final word. Contrast the relative non-use here of the famous and seminal basic articles published up to say 1910. The Theory of Interests itself, the Poundians' delight, which one might have hoped to see developed as the true center of a Sociological Jurisprudence, as the place where one really gets down to cases, comes in for only 371 pages. The *Interests* themselves are slighted. They are developed with no similar love. Take as an instance "Security of Transactions," an old, old friend: In connection with Ehrlich[23] there is indeed a suggestion about the importance of *what* is relied on by the people doing the transaction; for a moment Pound shows there even in regard to commercial matters the sensitivity which he brought so powerfully to his System. But by the time the guts are reached (the Interests) it is as if neither Ehrlich, nor Ely (unmentioned[24]) nor Cohen & Cohen (also unmentioned[25]), nor Hershey's work (though it, too, is cited previously)—nor, to push forward, the interesting effects of a compulsory labor bargain on the old law of offer-and-acceptance—had ever been around.[26] Neither is there any concrete discussion of one of the leading modern German figures, Heck, although there is a 1914 paper of his cited,[27] and although his influential *Interessenjurisprudenz* surely demanded the attention of any follower of Ihering, and had long been in full print, directly devoted to "interests" and even to transactions.[28] Fuller's paper on form in contracts[29] is another source

[23] Vol. I, pp. 334–37.

[24] So far as discovered.

[25] So far as discovered.

[26] This is the type of systematizing point frequently developed in Parts 7 and 8: in a business negotiation "for a contract" one has the familiar offer, counter-offer, etc., sequence. In a labor negotiation "for a contract," points get tied down one by one. The two theories "of formation of contract" have never been harmonized: Which is *the* right theory?

[27] I have mislaid the reference.

[28] *E.g., Grundriss des Schuldrechts* (1929); *Begriffsbildung und Interessenjurisprudenz* (1932); *Interessenjurisprudenz* (1933).

[29] Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

of value which goes unregarded. In the case of my own *What Price Contract?*[30] one can be sure that the disregard was not due to oversight, because Pound and I, at the time, had been collaborating in the Encyclopedia of Social Sciences article on Contract of which the paper was an immediate offshoot; and one can be sure that the disregard is not due to Pound's regarding the author as valueless, because he treats me in the main with more than gentleness: he sometimes even uses me to build on. Such treatment, or neglect, of the workings of a major "interest" can, it seems to me, be explained only by lack of interest. In similar fashion, the elaborate development of "the" theory of the corporate "person"[31] proceeds without touching the exciting and troubling problems of the government corporation, and substantially as if there had never been the *commandite, G.m.b.H.*, or close corporation problem, and certainly without treatment of Berle and Means or of the SEC. So the theory of inheritance[32] is developed from "The Indo-European peoples," but says nothing, for example, of the seeming effects of English primogeniture on colonial expansion, or of the philosophy or effects of modern inheritance taxation. So, finally, in developing either Proprietary Rights[33] or Property as an Interest,[34] there is no wrestling with that shift of American "private" property law into the "public law" field which has characterized zoning, water, minerals, and urban redevelopment.

Now, let me repeat, no man in his senses who has either read Pound or seen Pound in action can believe that ideas of this kind are beyond his reach. *Nothing* has ever been beyond his reach. Such ideas are instead, I suggest again, outside his range of interest; the inoculation of Pound with Ehrlich simply did not take.

Try this hypothesis, to put all of this together.

Suppose that Pound's native bent has all along been really in those areas of "System" with which he began, and which he has managed to develop, these later years, in the teeth of all or any of those multitudinous demands on his time which have derived from administrative or from emergency pressures: Pound has always loved abstract theories. He has always loved them best when they came readily available, in other peoples' writing, for his own careful, penetrating, and *systematic* analysis. One can instance his sorting and dissection of the various single-line theories of "juristic person," already referred to. Each theory he tests with clean scalpel, as to whether it explains the whole. Each theory fails. At the end comes a brilliant synthesis;[35] but the origin-of-theory aspects of *Interpretations of Legal History* (where Pound, independently, matched one of Pareto's most significant contributions) has no part in either the presentation or the synthesis. It is quite characteristic that Dewey's

[30] 40 YALE L.J. 704 (1931).

[31] Vol. IV, p. 191 and *very* nice at 260–61.

[32] See especially vol. III, 142 pages.

[33] Vol. V, pp. 77–195.

[34] *E.g.*, vol. III, pp. 105–55.

[35] Vol. IV, pp. 260–61.

theory[36] (which is the best) is not mentioned (much as Dewey's exploration of the appellate judge's operation is left to Cairns' interpretation). Dewey's lines of thought just do not fit the Pound mind. The Dewey emphasis, indeed the Dewey necessity, was always to reach for effects, for function, for "what it has been *doing*."

My net judgment comes to this:

If, contrary to the basic Pound nature (gathering, observing, portraying, arranging—with a reasonable feel for growth), the times called—as they did call,[37] for process-and-result-directed work, then the most versatile legal scholar in our history could produce that, too. And he did, out of a cornucopia, until the 1914 papers; one can even add, though in much lesser measure, *The Theory of Judicial Decision* in 1923.[38]

If, moreover, there is in the Pound nature a deep, passionate love for the American judicial approach to the things of law, and so for judicial supremacy (*two* things)—then there ought to be—and there is—one functioning and functional piece really developed in the final book—"the judicial process"—and that may explain why *Justice According to Law* grows and shines in these final volumes.

But if the Pound nature did not take, by its nature, to problems of *how* things *work*, and especially not to the dirty detail and to the working out of theory about detailed *process*, then one can understand why pressures of time and circumstance could keep the Old Master from developing theories of process, while at the same time setting him free to develop theories of structure.

[36] Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

[37] There was at the turn of the century a ferment-period of process- and result-directed work in the social disciplines (sparked and symbolized, I have always thought, by the first Roosevelt). Consider, in general, Chicago and Wisconsin in Economics, Sociology, Government, Philosophy. Consider, more particularly, Dewey, Veblen, Ely, Ross, Mitchell, Commons, Merriam, Thomas. Consider, then, in law, and in relation to a proud Nebraskan, the following titles *in addition to those mentioned above: The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905); *Do We Need a Philosophy of Law?* 5 COLUM. L. REV. 339 (1905); *Executive Justice*, 55 AM. L. REGISTER 136 (1907); *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (Here Pound "made" his first goal: the *Harvard Law Review*. That *Review* was only five or ten years late, in recognition); *Enforcement of Law*, 20 GREEN BAG 401 (1908); *Liberty of Contract*, 18 YALE L.J. 454 (1909). These go on: *Puritanism and the Common Law*, 45 AM. L. REV. 811 (1911) (rather deep); *The Scope and Purpose of Sociological Jurisprudence* (pts. 1–3), 24 HARV. L. REV. 591 (1911), 25 *id.* 140 (1911), 1489 (1912); *Democracy and the Common Law*, 18 CASE & COM. 447 (1912); *Social Problems and the Courts*, 18 AM. J. SOCIOLOGY 331 (1912); *Social Justice and Legal Justice*, 75 CENT. L.J. 455 (1912); *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1913); *The Organization of Courts*, 70 LEGAL INTELLIGENCER 86 (1913); *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302 (1913); *Legislation as a Social Function*, 18 AM. J. SOCIOLOGY 755 (1913),

By 1924 the net tone of the titles has completely changed.

[38] (pts. 1–3) 36 HARV. L. REV. 641, 802, 940 (1923).

I cannot tell. What I can report to jurisprudes is this:

The number of holes you (or I) can pick in these volumes is, if you are a pick-ax fan, gratifying. They are not at all that gathering and ordering of Pound's insights and knowledge for which many of us have been hoping. You find here, for example, few traces of his thought about judicial organization, or about the bar, or about dealing with crime.

On the other hand, the number of holes in your (or my) equipment for sound thinking on our own problems, *of today*, which these volumes offer good cement to fill: that is dismaying.

Ave, Caesar!

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Quantitative Analysis of Judicial Behavior. By GLENDON A. SCHUBERT. Glencoe, Illinois: The Free Press, 1960. Pp. xxi, 392. $7.50.

Any law tribunal presents this puzzle: since for any one case both the facts and the law are given to each judge (or juror for that matter) in exactly the same form, what causes them in many instances to arrive at different conclusions? The mystery is only partly clarified if the judges, as is the custom in our appellate courts, state the reasons for their differing views in written opinions. These opinions normally clarify only the exact points of disagreement, identifying the fact or rule of law which is interpreted differently or given different weight. Much of the puzzle remains. What is the source of the difference? Is it likely to recur in a similar case in a way that may affect the result? Glendon Schubert's substantial volume is the most ambitious of the several attempts in recent years to utilize statistical methods to explore these and other puzzling problems of judicial behavior.

Schubert employs four distinct research techniques with ingenuity and perseverance. A long chapter on "summary decision-making" at the outset of his book analyzes the work of the Supreme Court in terms of its own published statistics; a second section builds on C. H. Pritchett's analysis of voting blocs; a third section, expanding on the interesting work of J. Tanenhaus and F. Kort, discusses the predictive possibilities of scalogram and content analysis of Supreme Court opinions; and a fourth section, very much the author's own original contribution, attempts to apply game theory to judicial decision-making. Thus the book is statistics throughout, statistics that are never dull and which are poised at every page to suggest intriguing solutions. The novelty and interest of Schubert's research make it all the more unfortunate that his work is so beset with shortcomings that the solutions are often more intriguing than meritorious.