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BOOK REVIEWS

CRIME AND JUSTICE. By Sheldon Glueck. Boston: Little, Brown, and Company. 1936. pp. viii, 349. \$3.00.

This book is based upon eight lectures delivered to a lay audience by the Professor of Criminology in Harvard Law School. Although he has added some fifty pages of elaborate notes for the benefit of specialists, he has written his book, as he prepared his lectures, primarily for the purpose of informing laymen about what is undoubtedly a sorry state of affairs and of advising them regarding what ought to be done in order to make it a better state of affairs, in the hope, apparently, that they will firmly resolve that what must be done shall be done.¹ In view of his purpose, it is not surprising that Professor Glueck's book should contain little that has not been often said before either by himself or by others; with great skill he has fashioned out of twice told tales a very comprehensive, although necessarily a very general, survey of the problem of crime as it exists in the American society.

Justice is the name by which he refers to the totality of our efforts to deal with crime by law. He believes that Justice is very sick indeed and he diagnoses and then prescribes for her ills. Although I am also of the opinion that she is far from well and in need of immediate and extensive therapy, I fear that his diagnosis may lead laymen to expect too much of her when she is restored to health. For, unless we have a physiology of the healthy organism, there is always the danger that we may be mistaken as to the existence and extent of disease, that we may regard the inherent weaknesses of the organism as pathological rather than as natural imperfections. While some of the inadequacies of Justice are surely attributable to pathological conditions, others are just as surely intrinsic to her nature. Because of the fallibility of human wisdom, the intractability of human behavior and the insufficiency of law, efforts to deal with crime by legal devices can be only partly successful, however prudent they may be and whatever their objectives. Professor Glueck nowhere distinguishes sharply between those imperfections of Justice which are essential and therefore ineradicable and those which are accidental and hence remediable, but to some extent confuses them.

His first major diagnostic finding is that Justice suffers from evil social and economic conditions which not only make it more difficult for her to perform her tasks than ever before, but also breed more and more crime out of human frailties. He therefore prescribes numerous changes in our social order designed to improve the health, the education, the recreation and the economic status of the disadvantaged among us; the purpose of these remedies is to prevent crime by extirpating or controlling the factors that produce criminals. While he does not believe that these measures can prevent all crime,² he is very confident that they will greatly reduce crime; and I

1. As he himself has put it, he has "stressed the ills of criminal justice in the belief that by studying the diseased organ we may be able to obtain some light on the destructive forces at work and perhaps some hints as to the therapeutic and prophylactic measures that are indicated." p. vii.

2. After quoting Parmelee to the effect that the criminal class consists in part of intractable, rebellious, and unadaptable persons who are sure to react against any form of social control, he says: "This is one reason why it is naive to assume that either crime or a 'class struggle' would completely disappear in a socialistic state. If there were not one motive for the struggle of man against man, there would be another in its place. . . . As long as the springs of human nature spurt forth anger, hatred, fear, jealousy, envy and like emotions, we may expect aggressions by some members of society against their fellows." (p. 266) In short, only an impossible metamorphosis either of human nature or of human society can wholly prevent crime.

fear that his confidence may lead laymen to expect too much of even the most wisely contrived programs of crime prevention. For, according to Professor Glueck himself, criminologists do not know precisely what factors cause crime or how those which appear to do so, cooperate to produce criminality. In short, they cannot really answer such crucial questions as why some of the disadvantaged children who are reared under similar deleterious conditions become criminals but the majority do not.³ In answer to such questions they can only advance a "reasonable theory," the essence of which appears to be that "the criminal act occurring at any given time is the outcome of constitutional and acquired personal and social forces."⁴ Now that is surely ancient wisdom and not modern science, a commonplace which has long been used to direct efforts to prevent crime, and with less success than we should have liked.⁵ Professor Glueck's confident belief that it can now be used more successfully seems to rest ultimately upon the fact that as a result of recent criminological investigations, including his own excellent researches, we now know more than we have previously known about the characteristics of particular criminals and of their environments.⁶ But this new descriptive knowledge is of precisely the same sort as the old and intrinsically of no greater utility. Like the old, it is useful only in so far as it has revealed that some criminals, at any rate, have characteristics of which we were previously unaware, and has thus suggested to us new ways of attempting

3. Professor Glueck discusses the present status of criminology at pp. 4, 98, 108-9, and 175-6. He says that while criminologists have been able to draw some rough generalizations about the characteristics of criminals and the results of peno-correctional treatment and to formulate a fruitful hypothesis or two regarding the interplay of individual and cultural factors (p. 108), there is still a vast amount to be learned about the influences operative in crime and punishment. (p. 109) And the learning is beset with great, if not with insuperable, difficulties: we cannot obtain completely valid samples of criminals or comparable control groups of non-criminals; it is almost impossible as yet completely to differentiate innate from acquired tendencies; the very mechanisms of human heredity are as yet far from clear. (pp. 175-7)

It seems to me that Professor Glueck has underestimated the difficulties. In that connection see MICHAEL & ADLER, *CRIME LAW AND SOCIAL SCIENCE* (1933) c. IV, and ADLER, *ART AND PRUDENCE* (1937) pp. 250-259.

4. I am not at all sure that I have penetrated through his psychoanalytic terminology to the heart of Professor Glueck's reasonable theory, and it may be more novel and subtle than I suppose. Stated more fully it is something like this: Human conduct and personality are realized and directed by two streams of influence, stimulation by the environment and selection of the environment. Environmental elements are introjected into the human personality and, according to its peculiarities, become part of its vital being by some process which is as yet a mystery. But individuals differ in the quality of their introjective capacity and in their gifts and weaknesses; every person has his breaking point; and as it is made increasingly difficult by raising social demands or through social stress or neglect for men to conform their impulses to legal requirements, more and more men will commit crimes. (pp. 177-180)

5. For a discussion of attempts to control crime by procedures based upon this and like commonplaces about human nature and behavior, and of what is known about their efficacy, see MICHAEL & ADLER, *op. cit.*, cs. VII-VIII and pp. 400-1.

6. It is true that he says that we are beginning to learn something about the internal and external pressures at work in the determination of human behavior. (p. 181) But if he means more by this than I attribute to him, it appears to be inconsistent with what he has previously said about the state of our knowledge of the etiology of crime. See pp. 108-9, 175-180.

to control crime. But since it has not itself enlarged our knowledge of the factors entering into criminality or of their interrelationships, or increased our capacity to control them, these new efforts to prevent crime can hardly be more reliable or dependable than the old. Professor Glueck's faith in them would therefore appear to be justified only by the consideration that the more varied, comprehensive and systematic are our attempts to control crime, the greater the number of possible causal factors at which they are directed, the greater is the chance that some of them will hit their marks.

However, he takes the position that whether or not the social reforms which he proposes will result in the diminution of crime, they will surely make for a better society and, hence, that they should in any event be undertaken in the interests of justice. The point is an excellent rhetorical one, but it seems to me that unless he makes it only for its rhetorical effect he either denies the faith which he has previously expressed in the preventive efficacy of these reforms or else misconceives the nature of political justice. My point is that political and social arrangements which are not at all adapted to the end of crime prevention cannot be means to the creation of a just society; if they serve that end they are just; if they disserve it they are unjust; and if they neither serve nor disserve it they are indifferent from the point of view of justice. For a society is just precisely to the degree that it provides for all its members the external conditions of the good life and develops and implements their varying capacities to live that sort of life. In the ideally just society, which would be just because composed of just men, there would be no crime; men who live well do not commit crimes. Every effort to make men good is necessarily an effort to prevent crime although it has, of course, a much larger purpose; and every effort to prevent crime is necessarily an effort to make them better than they might otherwise be.

Professor Glueck also finds that Justice suffers from a diseased legal order. He holds that just as our chief concern with crime in the larger social order should be to prevent as many persons as possible from becoming criminals, so our chief concern with it in the smaller legal order should be to reform⁷ as many as possible of those who nevertheless become criminals. But criminals cannot be reformed unless they are caught and convicted, and Professor Glueck is convinced that Justice does not catch and convict as many criminals as she should. This is because the officials who conduct her affairs are on the whole incompetent or corrupt and because capable and honest officials are frustrated by the inadequate organization and equipment with which they are provided, by archaic constitutional provisions and procedural rules which regulate their activities, and by the complex and creaking legal machinery by which the guilt or innocence of those whom they charge with crime must be determined. Professor Glueck therefore prescribes numerous changes in the legal order designed to improve the moral and intellectual qualities of officials and to facilitate the apprehension and conviction of criminals. Now while I agree that Justice suffers and suffers seriously from these disorders, I fear that Professor Glueck's preoccupation with the seamy side of the administration of the criminal law may lead laymen to believe them to be more extensive and critical than they really are. For even if the congeries of legal institutions and activities which he personifies as Justice can be regarded from any point of view as a single organism, there are surely forty-nine such organisms in this country, and only a few of them have been examined clinically. While these examinations have revealed conditions symptomatic of the disorders which Professor Glueck specifies, it is nevertheless a genuine question whether those organisms which have not yet been studied suffer, or suffer as badly, from the same maladies.⁷ Indeed, it is also questionable whether

7. Professor Glueck's account of the organization, personnel and activities of the agencies

those which have been examined are as sick as they once were, since none of them has been kept under constant observation.⁸ Moreover, while there is reason to believe that too many criminals now escape, in the nature of things Justice will never be able to catch all of them or to convict all who are caught; and it is impossible to say what proportion of them she ought to catch and convict. And while there is also reason to believe that some criminals now go free because the legal apparatus makes it difficult to apprehend and convict them, it does so because there are other things which we hold even dearer than catching and convicting criminals. To what extent it is possible to make it easier for officials to catch and convict criminals without sacrificing these other values, is a very difficult question upon which men may reasonably disagree, as Professor Glueck's excellent analysis of the problem of unreasonable searches and seizures discloses.

Criminals who are caught and convicted cannot be reformed unless they are dealt with for the right purpose and in the right ways; Professor Glueck also finds that Justice suffers from an inadequate and outmoded criminal law which requires them to be dealt with for wrong purposes and in wrong ways. As he sees our criminal law, it is in the main based upon the notion that most persons are absolutely free to commit or not to commit crimes as they choose; consequently, if they choose to do so it is because their wills are vicious and they should therefore be held responsible for their criminal behavior and punished according to the viciousness of their wills. He therefore regards the criminal law as unscientific because based upon a naive conception of freedom of will from which responsibility is assumed to flow and which leads to excessive emphasis upon "criminal intent" both in defining crimes and in fixing penalties. He also regards it as inconsistent because based upon conflicting peno-correctional philosophies which lead to inconsistencies in the purposes for which criminals are treated and in the methods by which they are treated: criminals are treated by punitive and by non-punitive methods; they are sentenced to imprisonment for fixed terms and for indeterminate terms; punishment serves the end of vengeance chiefly but it also serves the ends of retribution, expiation, retaliation, incapacitation, deterrence and reformation. Professor Glueck therefore prescribes a new code of criminal law which should be predicated on "one or a few underlying social-ethical principles"⁹ and have the reformation of criminals as its chief end.

engaged in detecting crimes, in arresting and prosecuting persons accused of crime, or in determining their guilt or innocence, is based principally on surveys of various aspects of the administration of the criminal law in Cleveland, Missouri, Illinois, New York, Chicago, Philadelphia, Georgia, Baltimore and Boston. Most of these investigations were made prior to 1930 and most of them were concerned with conditions as they existed in very large cities or metropolitan centers. Professor Glueck presents the results of these studies as typical of the conditions which exist today throughout the country; the exceptions are a "saving grace." (See pp. 62-3, 173) Now while they may be typical, he surely does not demonstrate that they are. Indeed, he himself sums up what such investigations have taught us in these words: "The recent investigations of police and prosecutors' offices, courts and prisons, have given us some insight into the anatomy and pathology of these bodies, less into their physiology." (pp. 108-9)

8. Professor Glueck presents some evidence that the conditions found to exist from two to fifteen years ago, as the result of the investigations referred to in the preceding footnote, still exist, but he relies chiefly in that regard upon an "historic sense" which should cause us to "know how deep-rooted are the evils" and "how slow is fundamental reform." (p. 204) While his opinion that these conditions persist may be correct, it is not clear to me that an historic sense is a sufficiently substantial basis for it.

9. p. 212.

It is with this part of his diagnosis that I find myself in sharpest disagreement, although I quite agree that our criminal law is in need of reexamination and revision. Seen as he sees it, it is, as he says, "like the temple of some insane architect,"¹⁰ but I think that his vision has been distorted by his failure to realize that a body of criminal law can be seen from different points of view, from that of the ends which it ought to serve, an ethical and political question, or from that of the ends which it was intended to serve, an historical question, or from that of the ends which it in fact serves, a question of cause and effect which is very complicated because a single legal device may serve many ends. Punishment, for example, may in fact serve both the end of retribution and the end of the prevention of crime through the intermediate ends of vengeance, incapacitation, deterrence and even of reformation,¹¹ whatever the end it was intended to serve. It seems to me that Professor Glueck never sees our own criminal law very clearly because he so often looks at it from all these points of view at the same time. As far as I know, the great students of our criminal law have been unanimously of the opinion that it ought to serve the end of preventing crime and not the end of retribution or retaliation. Moreover, there is good reason to believe both that it was intended to¹² and does in fact chiefly serve the end of prevention through deterrence. I think that Professor Glueck's vision has also been distorted by his failure to realize that codes of criminal law designed to serve quite different ends, retribution and deterrence or reformation and deterrence, for example, will necessarily look very much alike.

I should like to offer another view of our criminal law, the view that one gets when one looks at it through the eyes of its great students to whom it has appeared to be neither the perfection of reason nor the work of a madman. It makes behavior criminal, which it is desirable and possible to prevent; its major purpose is to deter men from engaging in such behavior. It proceeds upon the notion, held by Professor Glueck himself, that most men are capable, although in varying degrees, of "consciously and purposefully guiding their behavior to conform to legal sanctions";¹³ and that most men and even most "lunatics are usually capable of being influenced by ordinary motives, such as the prospect of punishment";¹⁴ but that there are some persons who are not, because of a youthful or pathological lack of understanding or self-control. Consequently, to paraphrase Holmes,¹⁵ the law threatens all persons of the first sort with certain pains if they commit crimes, intending thereby to give them a new motive for not committing them; if they nevertheless persist

10. p. 104.

11. For example, while our criminal law is probably intended to satisfy whatever popular desire there is to be avenged upon actual criminals who commit particularly shocking crimes, it is also intended to serve the end of deterring potential criminals from committing crimes, shocking or otherwise. I do not see how it can be said either that it was intended to or that it does in fact chiefly serve the former end. Punishment is a means adapted to both ends; the severer the penalty the better it is adapted to both; the crimes which arouse the greatest popular indignation are on the whole those which we are most eager to prevent; and it is precisely in the case of those crimes that the severest penalties are usually administered.

12. This is indicated by Coke's statement in 1603 in *Beverley's Case*, 4 Coke 124b, that "the punishment of a man who is deprived of reason and understanding *cannot be an example to others.*" (Italics mine.)

13. p. 97.

14. The quotation is from Kenny. Professor Glueck quotes him to that effect with approval.

15. *THE COMMON LAW*, p. 46.

in doing so, it has to inflict the pains in order that others whom it hopes to deter may continue to take its threats seriously. The severity of the penalties varies, not with perverseness of will, but with the harmfulness of criminal behavior and the importance of preventing it most completely, the dangerousness of criminals and the desirability of incapacitating them most thoroughly, and popular attitudes towards different sorts of crimes and criminals and the necessity of respecting them in order to avoid nullification; these factors in large part account for the emphasis of the criminal law upon "criminal intent," that is, the knowledge, the purposes and the motives of those who commit crimes. These and similar considerations also account for the fact that the criminal law has come to serve the end of reformation as well as of deterrence: (1) while deterrence still remains the dominant end of treatment, some attempt, however feeble and unintelligent, is made to reform the more promising of those who are punished that others may be deterred, and (2) in the case of youthful and some other types of offenders reformation rather than deterrence has become the dominant end of treatment.

Professor Glueck also regards our criminal law as ineffective because it does not succeed either in reforming actual or in deterring potential criminals; he believes that if its dominant end were reformation it would not only have greater reformatory but, probably, greater deterrent efficacy; that it would, in short, prevent more crime.¹⁶ And he regards it as unjust because since society as well as the criminal is responsible for his criminality, it is not just to punish him even for the sake of deterrence.¹⁷ It is therefore required in the interests not only of "science" and consistency but of crime prevention and justice that reformation be made the principal end of the treatment of criminals.

How much crime the criminal law now prevents and how much it would prevent, whether more or less, if reformation were its chief object, are difficult and, I fear, unanswerable questions. It is quite clear that it does not now deter all potential criminals from becoming actual criminals; each year many of them do so. It is also quite clear that a very large, perhaps the larger, proportion of actual criminals who suffer imprisonment do not thereafter desist from crime. What is not clear is how many more potential criminals would commit crimes but for the fear of punishment¹⁸ or why so many actual criminals become recidivists, whether as the result of imprisonment or for other reasons.¹⁹ But we may nevertheless doubt that the code of criminal law which Professor Glueck proposes would have greater preventive efficacy than our present criminal law; we have reason to think that the result would be a loss in deterrent efficacy without a corresponding gain in reformatory efficacy. In the first place, there is ground for believing that "appeal to fear has some socially desirable effect as a deterrent,"²⁰ although we do not know how much;

16. pp. 5, 214, 233.

17. pp. 4, 5, 214.

18. "Nobody," Professor Glueck says, "can say what the effect of existing methods is on the 'rest of us'." (p. 209) He also says that the development of statistical technique has enabled investigators to draw only some rough generalizations about the results of peno-correctional treatment. (p. 108) Yet he does not hesitate to assert elsewhere that we know that the criminal law is bankrupt "so far as its failure to reform criminals is concerned and also, though perhaps to a less extent, as a general deterrent to wrongdoing." (p. 214)

19. Cf. pp. 61 and 202. Nevertheless, what we know of human nature and of the ways in which prisoners are treated justifies Professor Glueck in asserting that the prison must bear a large share of the responsibility for recidivism; he makes out an unanswerable case for more intelligent and humane prison administration.

20. p. 202.

that what men fear is pain and that the greater it is the more they fear it; that punitive treatment is therefore better adapted to deterrence than non-punitive treatment, but that, on the other hand, non-punitive treatment is better adapted to reformation. In the next place, there is reason for believing that even less is known about how to reform criminals than about how to prevent criminality; as Professor Glueck says, there are but a "few bottles of peno-correctional medicine" and if a criminologist were asked whether "one type of punishment or correction is more effective than another," he would be put "in a difficult position."²¹ Nor do I think that considerations of justice require that reformation be substituted for deterrence as the dominant end of treatment. Whatever the social roots of crime, criminals are at least partly responsible for their criminality; other equally disadvantaged persons do not become criminals. Consequently, it cannot be absolutely but only relatively unjust to punish them for the sake of deterrence; it is relatively unjust to do so to the extent that society fails in its duty to them. Moreover, there is another and, in view of our ignorance of how to reform criminals, perhaps a better way of attempting to correct that injustice than by making reformation the principal end of treatment, and that is by constant effort to prevent them from becoming criminals, that is, by unremitting attempts, to create a just society.

Finally, Professor Glueck finds that Justice suffers from popular unenlightenment. His book should do much to correct that condition if laymen will only read it. Its scope required him to speak to them not only as criminologist but as ethicist, political scientist and jurist as well. As criminologist, he has spoken to them clearly and, on the whole, with great wisdom; I fear that he has been less clear and less wise in his other capacities.

JEROME MICHAEL†

SAM ADAMS. *Pioneer in Propaganda*. By John C. Miller. Boston: Little, Brown & Co. 1936. pp. 447. \$4.00.

When John Adams arrived in France, 1778, as the Minister of the New Republic, he was asked¹ if he were the "Famous Adams." Sam, not John, was at that time, in Europe, the "Famous Adams."

A graduate of Harvard College and a serious student of the philosophy of John Locke, Sam Adams early began to agitate for the redress of Colonial grievances, and finally for independence. Though a Puritan in religion, and taking his religion seriously all his life, he yet found it possible to reconcile his conscience to the use of mobs to attain his purpose. If the English Government of Colonial days had the broad imperial outlook which it has today, all America would still be a British Dominion. The American people of that day were predominantly loyal to England. But the English Government never missed a chance to give provocation, and Sam Adams was always there ready to take advantage of every blunder. The Stamp Act, the Boston Massacre, The Townshend Duties, all were so much fuel to feed the fire he had started. He was an astute politician, pretending to follow when in reality he led. Finally, when the Declaration of Independence was promulgated, the people were prepared for it.

21. pp. 125, 109. Space will not permit me to develop this point further. I have dealt with it at greater length in my review of ONE THOUSAND JUVENILE DELINQUENTS by S. & E. Glueck in (1935) 44 YALE L. J. 908.

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1. P. 344.

It was necessary for Sam to have a philosophy underlying his propaganda; and, since positive law offered him no aid, he fell back on natural law.² Every movement of the Government which he opposed, he denounced as contrary to natural law.

Sam Adams undoubtedly was a great force in bringing about the Declaration of Independence. But why Tom Paine and his "Common Sense" are not credited by the author with some influence upon the movement, it is not easy to understand.

After the Declaration of Independence Sam Adams was *superstes sui*. True, he lived on into the next century; but, for the rest of his life, he was mostly a nuisance, and an anachronism. Yet he was, and will ever remain, the "Famous Adams," the man who made the American Revolution inevitable.

The author has a great theme, and handles it well. We have given only the high spots of the story, which have long been known. The great contribution which the author here makes to the antecedents of the Declaration of Independence is the mass of detail about the methods and persons involved in bringing it about.

The sub-title is significant. This book demonstrates that this country is not immune from propaganda or from revolution, and it suggests a warning particularly applicable to the present time. For today we have in our midst propagandists as clever, as persistent and as unscrupulous as Sam Adams. They, too, aim at revolution. The revolution of Sam Adams has had very happy results. The revolution now on the horizon would destroy all the institutions which the prosperous hold dear.

This is, indeed, a biography with a lesson.

JOHN X. PYNE, S.J.†

A TREATISE ON THE LAW OF CONTRACTS. By Samuel Williston. Revised Edition, Volume III. New York: Baker, Voorhis & Co. 1936. pp. xii, 1725-2579. \$85.00 per set of 8 volumes.

The two previous volumes of the new edition of "Williston on Contracts" have been reviewed in these columns by Professors Bacon and Finn, who have pointed out that Williston's work, valuable in its original form, has been improved and brought to date in this new edition by Mr. Williston and George J. Thompson.

The third volume deals with the performance of contracts, including their interpretation; usage and custom; the doctrine of conditions and of dependency and independence of promises.

When "Williston on Contracts" appeared in its original form, some sixteen years ago, the present reviewer stated in the columns of the New York Law Journal, that it would prove of great practical value to lawyers. A short time after reviewing the book there came up in my office a very interesting question in connection with the admissibility of parol evidence to establish that common words may have been given a peculiar meaning by customary trade usage.¹

Under the contract in that case, defendants bought, and plaintiff agreed to deliver, "1800 tons of Number 1 heavy books and magazines, guaranteed *free from ground wood*" (italics are mine). The defendant claimed that the legal and necessary meaning of the words "*free from ground wood*" was that there was to be no ground wood in the stock delivered. The Trial Court (Justice James O'Malley, now a mem-

2. P. 243.

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1. *Gumbinsky Bros. Co. v. Smalley*, 203 App. Div. 661, 197 N. Y. Supp. 530 [decided December 22, 1922, *aff'd without opinion*, 235 N. Y. 619, 139 N. E. 758 (1923)].

ber of the Appellate Division of the Supreme Court, First Department) permitted the plaintiff, my client, to prove a universal custom or usage in the trade as to the meaning of the words "free from ground wood," over defendant's objection and exception. The witnesses testified that there was an established custom and usage in the trade whereby that description was understood to mean paper containing not to exceed 3% of ground wood. The Appellate Division, by a bench divided four to one, and the unanimous Court of Appeals, held that the ruling of the Trial Judge was correct.

In the brief written on behalf of plaintiff-respondent, reliance was placed upon the discussion of this subject in "Williston on Contracts," citing and quoting Sec. 650 as follows:

"A very learned author, the leading living authority on contract law, Professor Williston, has stated:

"But there are now numerous decisions (not all of them of recent date) where words with a clear normal meaning have been shown by usage to bear a meaning which nothing in the context would suggest. This is not only true of technical terms, but of language, which at least on its face has no peculiar or technical significance; though even today it is still occasionally said by courts that usage cannot control words having 'a definite legal meaning'; or cannot be used to interpret a contract unless there is an uncertainty on the face of the instrument. So it is often said also that usage is admissible to explain what is doubtful but never to contradict what is plain. If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of usage were excluded (and this is what the statement seems naturally to mean), it is inconsistent with many decisions and wrong on principle."

The Appellate Division, in affirming the judgment, writing by the late learned Justice Greenbaum, quoted this language of Professor Williston at length.

In the new edition, the *Gumbinsky* case, *supra*, is cited and quoted in Sec. 650, p. 1876, footnote 10, showing that the editors have not overlooked the recent cases.

Reference must be made also to the able opinion of the late Judge Hough, writing for the United States Circuit Court of Appeals, Second Circuit, in *Nicoll v. Pittsvein Coal Co.*,² in which the Court again gave approval of the statement of Professor Williston, above quoted. In the *Nicoll* case, the contract was for 50,000 gross tons of coal, to be shipped in equal monthly instalments during a year. The Court held that it was competent to prove a usage in the trade that, when there was a shortage, deliveries by the seller among his buyers were apportioned *pro rata*. Judge Hough, in following Williston's statement of the law, said in part:

"... Indeed, when tradesmen say or write anything, they are perhaps without present thought on the subject, writing on top of a mass of habits or usages which they take as matter of course. So (with Prof. Williston) we think that anyone contracting with knowledge of a usage will naturally say nothing about the matter, unless desirous of excluding its operation; if he does wish to exclude, he will say so in express terms. Williston, Contracts, Sec. 653. Courts for a long time have rightly been influenced by this belief, until a survey of decisions leads the same learned author to conclude, as we do, that usage has been more potent than any other collateral parol matter to affect, if not control, contractual interpretation. Section 654. . . ."

The *Nicoll* case is also found in the new edition, Sec. 650, p. 1876, footnote 10.

Here is practical, concrete, vital testimony of the value of "Williston on Contracts." What more can be said in reviewing any book?

"Williston on Contracts" has passed the acid test.

I. MAURICE WORMSER†

2. *Nicoll v. Pittsvein Coal Co.*, 269 Fed. 968 (C. C. A. 2d, 1920).

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THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW. By R. M. Jackson. Cambridge: At the University Press; New York: The Macmillan Company. 1937. pp. xxxi, 134. \$3.75.

This very technical work¹ will be of value to those legal scholars who regard the historical technique as indispensable for an adequate comprehension of law, and a true appreciation of its present state. According to Dr. Hazeltine, this book "is in fact the first detailed account of an important historical development, continuous from the time of Bracton to our own day, to make its appearance in the literature of English law."² It is a demonstration of the possibilities of analytical historical jurisprudence.

After adopting Professor Winfield's³ conception of quasi-contract, as one which "connotes liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit,"⁴ Mr. Jackson⁵ traces the evolution of the Common Law idea of quasi-contract in terms of a category lying between contract and tort. The most essential element of quasi-contract is shown to be a duty imposed by positive law, regardless of agreement,⁶ so that actually, quasi-contract is in some respects more delictual than contractual. This anomaly is explained on the ground that contract and quasi-contract were bracketed together for the convenience of the adjective law, and for the preservation of the Justinian division of obligations into contractual, and quasi-contractual, and delictual, quasi-delictual.⁷ This classification was borrowed by the early English legalists, such as Bracton, Britton, and Fleta, and preserved in later centuries. In quasi-contract, the obligor is regarded "as if" he had entered into a contract with the obligee.

The history of quasi-contract has been divided into two parts, namely, the period prior to the rise of the action of *indebitatus assumpsit*, in the seventeenth century, and the era thereafter. This symmetry of pattern is preserved by means of an equal number of sections in each part.⁸ The key actions in the first period were account and debt,⁹ which made possible the recovery of money paid by mistake.¹⁰ The action of debt eventually superseded that of account, which withered because of the assump-

1. Only the Common Law phases of the subject are covered, not the Chancery aspects, see p. xiii. There is an excellent preface by Harold D. Hazeltine, Litt. D., F. B. A., of the Inner Temple, Barrister-at-Law, Downing Professor of the Laws of England, at Cambridge University, and editor of the Cambridge Studies in English Legal History. Mr. Jackson's book is the most recent publication in this series.

2. P. ix.

3. Jackson's study of the history of quasi-contract complements Winfield's wellknown work on modern tort law, namely, *THE PROVINCE OF THE LAW OF TORT* (1931).

4. P. xxiii. At pp. xxi, xxii, Jackson writes: "We can describe quasi-contract in rough outline, as consisting of liability not based on tort or contract, using the word 'contract' in its common meaning of an enforceable agreement."

5. Mr. R. M. Jackson, M.A., LL.B., is Solicitor of the Supreme Court of Judicature, and Lecturer in Law at Cambridge University.

6. P. 129. The propriety of the name "quasi-contract" is discussed at length in Section 32.

7. P. xi.

8. There are indexes, respectively of Year Books, Cases, and Statutes. There is also a list of modern authorities referred to by abbreviated titles.

9. Pp. x, xi.

10. P. 6

tion of jurisdiction over accounting by Chancery.¹¹ In the second period, there arose the action of *indebitatus assumpsit*,¹² which was "obviously the most important event in the history of quasi-contract."¹³ This action was extended so as to include quasi-contracts.¹⁴

In *indebitatus assumpsit*, there was an allegation that the defendant "being indebted did promise."¹⁵ This action was made concurrent with debt.¹⁶ At first, it was necessary not only to prove the existence of the debt, but also an express promise to pay it.¹⁷ But in *Slade's Case*¹⁸, it was settled that the action of *indebitatus assumpsit* would be allowable wherever there was a simple contract debt, because a promise of payment would be implied from the debt itself. Nevertheless, the theory of *Slade's Case* was consensual or contractual. It was not until the end of the seventeenth century that *indebitatus assumpsit* was held to be concurrent with debt through a fiction, in cases where there was no justification in actuality for implying a promise, or a consideration,¹⁹ but where such implication was necessitated by public policy or natural justice, as where a sum of money was due by statute.²⁰ In such cases, the right to recover was apparent. But it could not be based upon a tort theory, because there was no violation of a right good against the whole world. The stiff system of pleadings of the Common Law necessitated the preservation of the categories of remedies in contract and tort. The English courts decided that such rights should be regarded as quasi-contractual, instead of quasi-delictual. Mr. Jackson has traced this whole evolutionary process carefully and in detail.

Mr. Jackson brings out that when he emphasizes the various subdivisions of quasi-contractual obligations, rather than the remedies through which these equities were enforceable, he is approaching an ancient situation with a modern mentality,²¹ for the theory of the medieval English Common Law was that the writ gave the right, not *vice versa*. Yet the main tenor of the book is not jurisprudential. It is principally a citation of a series of cases and rules of law placed in chronological order, characterized by juristic realism. Indeed Mr. Jackson eschews the fabrication of theories or doctrines of quasi-contract, and attacks the efforts of Langdell²² at transcendentalism. For the most part, the growth of quasi-contract is explained by Mr. Jackson as an empirical matter,²³ despite occasional suggestions which indicate that underlying the whole law of quasi-contracts there is a vitalizing equitable philosophy.

Perhaps the most jurisprudential part of the book is that which deals with the influence of Lord Justice Mansfield, who "by turning the minds of lawyers from the theory of fictitious contract to a theory based on considerations of natural justice and *aequum et bonum* introduced into the study of quasi-contract certain notions of an equitable character which, still of influence, have given to the obligation, from some points of view, the appearance of an equitable institution enforced by common

11. Pp. xii, 36.

12. P. 39 *et seq.*

13. P. 39.

14. Pp. xii, 41 *et seq.*

15. P. 42.

16. P. 40 *et seq.*

17. P. 42.

18. 4 Co. Rep. 92 b (1603).

19. Pp. 40, 117.

20. P. 43.

21. P. 3.

22. Pp. 32-34.

23. Pp. 34, 120.

law remedies."²⁴ Lord Mansfield's theory of quasi-contract is perhaps most in accord with a scholastic or theophilosophical jurisprudence of a natural law. Mr. Jackson has well brought out that in the celebrated case of *Moses v. Macferlan*,²⁵ Lord Mansfield was correct in stating that the formalistic theory of a contract, fictitiously implied by law, was itself dependent for its validity upon an anterior material authority, called "*aequum et bonum*,"²⁶ i.e., the natural law in the language of the scholastics.

It has been stated by some jurists that the present prevailing view of the law of quasi-contract, which has substituted hard and fast rules for Lord Mansfield's concept of "natural justice," is irreconcilable with the great judge's doctrine.²⁷ But Mr. Jackson ably shows²⁸ that a natural law jurisprudence does not militate against the working out of specific, technical rules, for the effectuation of the ideology of "natural justice," called "public policy" by the author, which "requires ill gotten gains to be restored, but . . . also finality in law suits."²⁹ The effect of the modern positivistic sociological school of juridical thought may, perhaps, be discerned, in so far as it may have caused Mr. Jackson to choose the phrase "public policy" in place of "natural law."

The author has acknowledged³⁰ his great indebtedness to American legal scholarship, and has stressed the powerful influence which the writing of the American Justice, Joseph Story, had upon the English courts, during the middle of the nineteenth century, in the matter of quasi-contract.³¹ On the other hand, American legal historians have already begun to cite Mr. Jackson's work with approval.³² This praiseworthy reciprocity among Anglo-American jurists must continue, if there is ever to be an adequate unfolding of the history and philosophy of the Common Law.

In the opinion of the reviewer, the shortcomings of the book seem to be all in reference to form. These include, first, the lack of sufficient generalization; secondly, the placing in the text of too many cases, which might have been included in the footnotes, with the result that reading is sometimes difficult; thirdly, insufficient demarcation between the provinces of Chancery and the Common Law, respectively, in reference to quasi-contract; and fourthly, the apparent absence of an attempt to relate the various sections by adequate orientating transitional paragraphs. But these adverse opinions are more than overbalanced, first, by the originality of the book, resulting from a careful examination of all the pertinent Year Books, cases, and statutes, and of the primary sources relied upon by Mr. Jackson's predecessors in research in regard to the history of quasi-contract; secondly, by its thoroughness and insight; thirdly, by its unique and pioneering qualities; and fourthly, by the effective interpreting use of Roman law. In virtue of this splendid piece of work, it is to be hoped that Mr. Jackson will, in the very near future, further enrich the literature of the law of quasi-contract by his "promised work on the principles of the present day law"³³ of this subject.

BRENDAN F. BROWN†

24. P. xiv.

25. 2 Burr. 1005 (1760).

26. P. 119.

27. Pp. xiv, 117 *et seq.*

28. P. 118 *et seq.*

29. P. 121.

30. Such as Ames and Langdell. See pp. xxiv, 14, 19, 23, 32, 36, 40, 42, 75, 129.

31. P. 112.

32. Thus see RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY (1936) 460, n. 34.

33. Pp. xix, xxiii.

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CASES ON CREDIT TRANSACTIONS. By Wesley A. Sturges. (Second edition). St. Paul: West Publishing Co. 1936. pp. xiii, 1082. \$6.50.

This book contains a collection of cases and materials dealing with the rights and privileges, duties and liabilities, attaching upon the failure to perform obligations arising from borrowing and sales contracts, when the performance is secured by personal responsibility or collateral security. The division and treatment is similar to that appearing in the First Edition. The author's division of the matter should aid tremendously in presentation. His first chapter is entitled "Accommodation Contracts." It contains, for the most part, cases and matter wherein a purchaser has given his personal responsibility or a third party has extended his personal liability to secure performance by another. This is to be distinguished from the matter contained in Chapter 2, which contains, mainly, matter wherein collateral security has been given to secure performance. The material appearing in Chapter 3 is properly separated from that contained in the first two chapters. It deals largely with instances wherein the vendor has temporarily financed his vendee and includes cases wherein the financing is done through the medium of trust receipts. Because of the statutory control in this field the author wisely deals with it as *sui generis*. Logically the question of enforcement of remedies is the subject of the last chapter.

The inclusion of the Uniform Negotiable Instruments Law, National Bankruptcy Act, Uniform Real Estate Mortgage Act, Uniform Chattel Mortgage Act, and the Uniform Conditional Sales Act is desirable. It facilitates their use by the student and makes readily convenient the acquisition of information needed in order to deal accurately with the cases and material contained in the body of the book. It is submitted that the inclusion of the Uniform Trust Receipts Act would have been equally desirable.

The author contemplates hourly lectures, three times each week, for the school year. The matter contained in the cases and notes should produce lively discussion for this class-room period.

This book is of course designed for use in a school which has wholly or partially abandoned the long recognized division of courses for the purposes of legal study and the resulting curriculum. It contains cases appearing in case-books upon the subjects of Bankruptcy, Mortgages, and Suretyship. But it goes much further than that,—it, according to the preface, is being used to give a course, which "has displaced the separate courses in Bankruptcy, Mortgages and Suretyship which were formerly given." Does this book contain such matter as would render courses in these three subjects unnecessary; as would render the giving of them redundant, or mere intensification of principle contained therein? It cannot be said that the matter contained in the book is a satisfactory substitute for a course in bankruptcy. It devotes a total of 66 pages to "Insolvency and Bankruptcy." The cases contained therein deal with Sections 63a, 57i, 70a, 47a, 60a, 60b, 64b, and 77B. But there is much more to the study of bankruptcy than the subject matter of the above sections, to wit,—provable claims, the rights of sureties, the property which the trustee takes, preferences, and reorganizations, even though these matters are dealt with at some length. A course in bankruptcy should, in addition to the matter referred to, contain cases dealing with the essential allegations of the petition, the required qualifications of petitioning creditors, the acts of bankruptcy, the trustee, the discharge, and much more matter under Section 77B. It would seem advisable also to include matter dealing with the constitutionality of the recent amendments to the Act.

May the course in Mortgages be abandoned because the curriculum has a course called "Credit Transactions"? The book does not cover the capacity of parties to

a mortgage, what interests may be the subject of a mortgage, equitable mortgages, future advances, recording and its effect, or assignments of mortgages. These matters would seem essential to any adequate substitute for a course in mortgages.

The course in suretyship could be safely abandoned. The cases and materials in this book provide excellent and fully adequate suretyship matter. The author's approach is mainly from the surety or guaranty point of view.

The cases and materials used by him form an excellent "spring-board" for profitable and penetrating class-room discussion.

Mr. Sturges has used an exceedingly efficacious method to excite the interest and enthusiasm of his students. His plan of varying the text case by stated questions and reference to cases dealing with the question raised should form the necessary vehicle of interest which will carry his students into the library. His questions are incisive and yet practical. The use of excerpts from leading legal periodicals should successfully draw the student to the source of the excerpt. Indeed the author, throughout the entire book, has never lost sight of his fundamental purpose—the stimulation and maintenance of energetic and enthusiastic student interest.

EUGENE J. KEEFE†

CASES ON TRIALS, JUDGMENTS AND APPEALS. By Thurman W. Arnold and Fleming James, Jr. St. Paul: West Publishing Co. 1936. pp. xxvii, 869. \$6.00.

The authors of this book, professors of law at Yale Law School, have felt that not enough attention has been devoted in the ordinary law school curriculum, to training the student to meet the arguments and procedural situations with which he may be suddenly confronted on the trial of a case. To make up this deficiency the authors have assigned material in this book to train the law student in the proper "argumentative technique" of a trial attorney. The authors approach their subject by devoting the first chapter of the book to "The Mystical Conception of a Court." In this chapter a point is developed, among others, which is concurrently much in the public mind, namely that the courts cannot properly perform their functions in our system of government unless "the ideal of an independent judiciary" is preserved.

Having commenced their thesis by bringing out what the proper concept of a court should be, the authors proceed to demonstrate that a court cannot speak with authority unless it sits at the proper time and place and has before it a controversy which is cognizable by it. The second chapter deals with the "Time, Place and Subject Matter of Judicial Decisions."

The place of the trial depends largely upon whether or not the court can obtain jurisdiction of the defendant by service of its process upon him. As a natural sequence to the second chapter, the authors in the third chapter devote themselves to the "Ritual of the Commencement of a Suit." Under this heading there is discussed the form of the summons and the different methods of service, personal and substituted, on individuals, partnerships and corporations.

The authors recognize that an attorney before he brings his suit must be prepared to put forth a "plausible argumentative answer" to the following questions: (1) Has the court jurisdiction of the subject matter? (2) Has the court jurisdiction over the person of the defendant? (3) Has the suit been brought in the proper venue? To answer this last question Chapter 4 is given over to "The Place of Trial of Civil Actions," embracing within its scope general rules as to venue and also the proper

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place of trial in particular situations, as for instance where the question arises between different States, and between State and Federal Courts.

Sometimes the commencement and trial of the action and the subsequent rendering of a judgment in favor of the plaintiff may be simply "lost motion" because of the inability to enforce and collect the judgment. This unsatisfactory result may perhaps be prevented by taking certain preliminary steps prior to the entry of judgment and so Chapter 5 treats of the powers of a court to seize property prior to judgment. This involves a discussion of the extraordinary remedies of "attachment" and "garnishment."

The judgment in the ordinary course of events is enforced by an "execution" issued against the property of the defendant. The "execution" and the "supplementary proceedings" in aid of the execution are covered in Chapter 6 of the book.

The successful trial of the action depends to a great extent to the preliminary preparation or "spade work" which is done by the attorney in advance of the trial. He is given remedies which enable him to ascertain the case he has to meet on the part of his opponent, such as the motion to make more definite and certain and the motion for a bill of particulars. It is equally important for the attorney to prepare proof in support of his own case and in aid of this he is given two remedies of equitable origin, "Discovery against his Adversary and Depositions of Witnesses." All of these remedies form the subject matter of Chapter 7 under the heading "Pre Trial Devices for Preparation of a Case and Clarification of Issues."

On the trial of the action it is important for the trial attorney to have a proper understanding of the distribution of power between judge and jury in determining the issues raised on the trial. It may become expedient and necessary from the standpoint of the trial attorney to withdraw from the province of the jury the right to pass on some or all of the issues. There are various devices in the form of motions made before or after verdict which may be used to accomplish this purpose, such as the motion for a "nonsuit" or a "directed verdict" and the motion to set aside the verdict and for a new trial which are dwelt upon in Chapter 8 under the title "Methods of Controlling Jury."

Chapter 9, the final chapter of the book, is devoted to the subject of "Appeals." In their introduction to this chapter the authors point out that the number of decisions in the digest under the title "Appeal and Error" is staggering. It is larger than any other subject and the reaction of the student is one of confusion. The central idea underlying appellate practice is not complicated however and it is the authors opinion that if it is briefly and simply described it will furnish the student with a background by means of which he may read and understand the appellate practice of his own state. Commencing with "Appeal" as distinguished from the "Writ of Error" and then taking up in turn the "Record on Appeal," the "final judgment rule" and the disposition of the case by the Appellate Court, the chapter is then concluded with a discussion of Appeals from administrative tribunals such as "commissions," as distinguished from appeals from "Judicial tribunals."

The form in which this case book is gotten up is excellent. It illustrates the modern tendency of trying to make a case book something more than a mere reprint of selected cases and statutes. At the beginning of each chapter the authors have an "Introduction" outlining the problems which they hope to solve in that particular chapter. Interposed between the decisions and the statutes are "comments" by the authors, reflecting on the holdings of the different courts and their bearing on the solution of the matters under discussion. The authors have drawn their material not only from the official reports of the different states and the selected statutes of different so-called code states, but also from such widely divergent sources as Holdsworth's History of the Common Law and the New Yorker Magazine.

The question of whether or not Procedure can best be taught in the law schools by the use of a text book or from a case book is a controversial one. The main disadvantage of the case book is that the subject of procedure is so voluminous and the time available for the teaching of the course is so limited that it is hard to cover ground except by making heavy case assignments, only a portion of which can be discussed in the lecture room. The text book seems to afford a speedier vehicle for covering the subject matter, at least in outline, than the case book.

To obtain the most satisfactory results from a case book such as this, "time should not be of the essence." It should be contemplated taking up the study of procedure in installments during the three or four years of the law school course. This book the authors state in their preface is designed for a four hour course lasting one semester. Its most effective use would be as part of a three point program in connection with the two companion courses of "pleading" and "motion practice."

EDWARD Q. CARR†

NEW YORK CIVIL PRACTICE MANUAL. By Harold R. Medina, Edward Q. Carr and John F. X. Finn. St. Paul: West Publishing Co. 1936. pp. viii, 719. \$5.00.

New York Civil Practice Manual succeeds a series of manuals compiled and published from time to time by experienced teachers of Pleading and Practice. Experience in the use of the earlier manuals appears to have disclosed some limitations and to have suggested desirable additions, for this latest development in the evolutionary process clearly surpasses its predecessors. While the compilation is surprisingly compact, the selection of statutes and rules relating to procedure is almost exhaustive. It would probably have satisfied David Dudley Field, who complained that our first Code of Procedure was but "the fragment of 1848."

The 1936 edition of New York Civil Practice Manual contains, in their entirety, the Civil Practice Act, the Rules of Civil Practice, the Surrogate's Court Act, the New York City Court Act, and the New York City Municipal Court Code. In addition, excerpts from many chapters of the Consolidated Laws bearing directly or indirectly upon civil procedure have been incorporated, including among others, sections from the Arbitration Law, the Employers' Liability Act, the General Construction Law, the Vehicle and Traffic Law, and the Workmen's Compensation Law. A substantial part of the manual is devoted to a comprehensive statement of Court Rules. The editors, in taking cognizance of the numerous procedural changes effected in 1936, have made the scope of the new legislation easily discernible by a table of 1936 amendments.

The practitioner, exasperated by the necessity of referring to numerous volumes to ascertain the text of the various statutes relating to a single problem, will welcome this manual for its wealth of material under one cover. The student, desiring quick and easy access to a civil practice manual for supplementing class-room discussion and the study of case-books and text-books, should welcome this manual for the abundance of source material at a price commensurate with the work of preparation. The Rules of the New York State Board of Law Examiners, which appear at the end of the Court Rules, should meet a need of students who are desirous of meeting all preliminary requirements for the bar examination.

The manual does not purport to set forth references to the adjudicated cases construing the statutes and the rules. The editors make no pretense of offering the manual as an exposition of the adjective law of the State of New York. But

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the subject matter has obviously been selected with a view to assisting law students and the younger members of the profession. It would perhaps be within the scope of this objective, without transcending the limits of a civil practice manual, to include in future editions a bibliography of works of reference to which the student might quickly turn when he finds it necessary to look beyond the text of the statutes and the rules for the purpose of determining their full significance. It would no doubt add materially to the value of the manual if some device could be employed to keep the manual abreast of new developments in the law during the interim between publications of successive editions.

ALLEN B. FLOUTON†

THE ULTIMATE POWER. By Morris L. Ernst. New York: Doubleday, Doran & Co., Inc. 1937. pp. xv, 344. \$3.00.

In view of the transcendent importance of the problem which the author undertakes to discuss and resolve, his book deserves a far sterner criticism for its relevant omissions than for the many rather obvious weaknesses in the structure of the affirmative thesis which it elaborates.

Adopting the usual short-sighted strategy of the overly enthusiastic protagonist of a cause, the writer—whose sincerity we do not for one moment question—has ignored central and material facts in the totality of the situation out of which the actual problem has developed. By reason of so doing he has posited for discussion, not the actual problem, but a purely supposititious one, and consequently, be it carefully noted, ‘an illegitimate one.’ The carefully isolated object of attack which the author proceeds valiantly and enthusiastically to overwhelm is, after all, nothing but a straw-man of his own making—a mere figment of his imagination. This makes the protagonist of such discussion a sort of twentieth century Don Quixote.

When the earnest sober-thinking seeker after truth has waded through the whole rather boresome elaboration he is in fact just exactly where he started—in the dark. He has been given no opportunity to grasp and reflect upon an honest to goodness two-sided presentation of the real objective problem. We take it to be the serious bounden duty therefore of those who are genuinely concerned with the common well-being to sternly reprobate this dangerous type of controversial discussion—only too common in our day—whenever and as often as it sticks its head up since it is essentially disintegrative and nullifying in its results.

This reviewer is frankly at a loss to understand how any intelligent worth-while unbiased judgment can be passed upon the manner in which the Supreme Court of the United States has acquitted itself of the tremendous responsibility laid upon it by the Fathers of the Constitution unless the philosophy of government which they actually wrote into that instrument be lucidly and frankly presented. Moreover it is of equal importance that this orthodox constitutional tradition be clearly differentiated from the later, alien born, crudely naturalistic, and drably egalitarian viewpoint of Jefferson and his adherents. Undeniably the two philosophies of government differed substantially, and the Court was committed without recourse to a sound realization and expansion of the former, and can be justly criticised only in so far as it has failed in that task, within the ambit set for it by the basic law and its subsequent amendments. If, outside of this prescribed ambit, the functioning of our constitutional set-up affords ground for well-taken criticism then the

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responsibility for that criticism must be rested upon the proper shoulders. The entire onus cannot be laid upon the Court.

Unwarrantably assuming, as the author seems to do, either the substantial identity of the two traditions or the greater orthodoxy of the Jeffersonian viewpoint he has provided himself with a powerful club with which to belabor the Court unfairly and at will. In gaining this advantage, if such it really be—in the light of all the material facts in the historical record—the author has done so at the cost of maneuvering himself into the unstrategic and unenviable position, from a controversial standpoint, of begging practically his whole thesis.

Turning to a criticism of his affirmative case suffice it to say that the cumulative weight and effect of the historical inaccuracies, the Constitutional misstatements, the misleading innuendoes and implications, the superficial interpretations, the banal irrelevancies, and the woeful lack of dependable evidences of real scholarship which it develops can only seriously weaken, if not entirely destroy, the confidence of the discerning and thoughtful reader in the writer's thesis as a whole. In a word we might confidently submit that practically all of the major conclusions upon which the author rests his thesis not only could be successfully traversed by a well advised hostile critic but in fact should be in the interests of both historical truth and sound American scholarship.

In the judgment of this reviewer the book is dangerous and unwholesome reading for tyros in the field of Constitutional history and theory, while from the standpoint of mature students in that field, for the reasons above stated, it is just another one of those partisan literary "duds" which only too often of late have clouded the proper atmosphere of calm deliberate political thinking and consequent effective political action.

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