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Book Reviews

other than the person specified by the controlling regulations. Recently an Ohio court held that the act of Congress authorizing the Secretary of the Treasury to issue United States Savings Bonds and authorizing the Treasury Department to prescribe regulations for the payment of said bonds takes precedence over the state laws of succession. *Lanfersweiler v. Richmond,* Prob. Ct., 8 Ohio Supp. 76 (1942). Other courts have taken a like position. *In Re Stanley's Estate,* 102 Colo. 422, 80 P. (2d) 332 (1938); *Franklin Washington Trust Co. v. Beltram,* 133 N. J. Eq. 11, 29 A. (2d) 854 (1943); *United States v. Dauphin Deposit Trust Co.,* 50 Fed. Supp. 73 (1943). The power of a State to regulate the devolution of property is unquestioned, and the courts have never hesitated to uphold the State's right where exercised within Constitutional limitations. *Riggs v. Del Drago,* 317 U. S. 95 (1942). But under the clause of the Constitution providing that acts of Congress shall be the supreme law of the land, no State law can vary the terms of Federal obligations or derogate from their full enforceability. Art. VI, Cl. 2.

BOOK REVIEWS

THE MIND AND FAITH OF JUSTICE HOLMES. Edited by Max Lerner. Boston: Little, Brown and Company. 1943. Pp. L, 474. $4.00.

Max Lerner introduces this Holmes anthology with a brilliant thirty-page "Personal History" of the famous Justice. The introductory essay in careful swift-moving prose outlines the life story and evaluates the place of Holmes in the contemporary scene. For it becomes increasingly apparent as the Holmes literature comes from the presses month after month that his influence plays an important part in that scene. Mr. Lerner's portrayal, though written from the standpoint of a devout admirer, escapes (by a little) inclusion in the fulsome adulation which characterizes the utterances of some of the worshippers at the Holmes shrine. For both in the introductory essay and in the extended interpretative comments which preface the selections that compose the anthology Mr. Lerner's attitude is that of the critic who is evaluating Holmes' genius, and who in spite of very general agreement finds his hero wanting now and then.

It is almost a mistake to call this work an anthology. I incline to feel that in writing it Mr. Lerner must have hesitated at times whether to write a book about Holmes or to let Holmes speak his own piece. For the introductory comments are sometimes much longer than the selections they introduce—with the result that the book gives us not only a fair idea of Holmes, and of what Mr. Lerner thinks about Holmes, but also, naturally enough, more than an inkling of Mr. Lerner's own mind on some of the larger problems of government, economics, civil liberties, etc. In Holmes' prefatory essay to an edition of Montesquieu's, *Spirit of the Laws* he writes: "It would be out of place to offer an analysis of a book which is before the reader . . ."[1] which may explain why Mr. Lerner finds the essay lacking in political depth.[2] Holmes restricted himself to other works of Montesquieu. Mr.

1. P. 381.
2. P. 369.

Lerner decided on the other course, and gives us the sum and substance of the selections he is about to reproduce, colored by his own thinking, in a way that at times makes the reading of Holmes himself seem repetitious. But let not the reader complain of that. Mr. Lerner has warned him: "Those who prefer their own paths will, in any event, know well enough how to ignore my notes."[3] My only fear is that many who read the book will be men who have read most of these decisions and essays long since, and feeling that their vague memory of them constitutes a sufficient acquaintance, will be content to skip Holmes and read Mr. Lerner. I say "I fear" this, not because Mr. Lerner has failed to write valuably and searchingly about Holmes, but because I think his own principal intent is to give us "Holmes himself", not "Holmes through Lerner's eyes"—whether that vision be perfect or imperfect.

The book contains about 500 large pages and divides the Holmes selections into three parts:

I. "Campaigns of Life and Law", which contains many of the speeches, some important book reviews or case-notes, parts of *The Common Law,* and nine opinions of Holmes written when he sat on the Massachusetts bench.

II. "Supreme Court Justice", contains a large selection of decisions and dissents "fired off" by Holmes as a Justice of the Supreme Tribunal of the United States. This part has two sections: 1. America as a Going Concern—a title with an economic flavor which aptly describes the general content of the decisions here set forth. They deal to a large extent with economic issues involved in the relationship between government power and the regulation of business. 2. State Power and Free Trade in Ideas, continuing the economic analogy, gives us the free speech cases and other civil liberties decisions or dissents.

III. "The Savor of Life" contains more of the essays, including the famous controversial ones on *Ideals and Doubts* and *Natural Law,* letters to James, Wu, the Pollocks, and a few "Last Words." An exhaustive bibliography is not attempted, but there is a full and helpful, Note on the Holmes Literature, a Table of Cases, and an Index.

I said that Mr. Lerner dissents from Holmes here and there. A great many of the cases he chooses deal with economic issues, and usually he agrees with Holmes whether the latter agrees with the Court or not. Occasionally, as in the *Northern Securities* case, he feels that Holmes did not go far enough in allowing the government to exercise its control over capitalistic trends. I am not sufficiently familiar with Holmes' entire Supreme Court output to say whether the number of "social-economic" cases included is disproportionate, but Mr. Lerner's point of view seems to be largely inclined toward an economic interpretation of the phenomena of government.

With regard to free speech, on the other hand, Mr. Lerner seems to think that Holmes went too far. Or perhaps it would be more accurate to say that he considers the "clear and present danger" test too liberal for our present circumstances. He speaks of the "obscene scribblings of Coughlin and Pelley or the divisionist articles in the Chicago *Tribune* which represent the danger in the time of the Nazi thrust for world empire".[4] He apparently would favor putting all these out of

3. P. ix.
4. P. xiv.

business, for he says: ". . . it is becoming increasingly clear that the government which waits until propaganda has reached the point of clearly threatening the immediate survival of the nation is likely to wait until it is too late, and will probably never have the strength to strike when the time comes."[5] He thinks that Holmes' economic analogy ("free trade in ideas") ". . . probably assumes too much. For one thing, is it ever possible actually to achieve free trade in ideas? It is far more likely that what we have in the intellectual sphere, as in the economic sphere, is not a competitive system but something that the economists call 'imperfect competition'. And assuming that one can get a situation roughly approximating the competition of ideas, the question is raised, here as in economics whether that is possible without *drastic government intervention in order to establish the conditions of competition*".[6] Mr. Lerner would undoubtedly answer the question in favor of drastic government intervention—a solution which fails to take into account that the government is the principal competitor and might conceivably (as in Russia, Germany) "establish the conditions" in favor of itself.

This tendency to recognize more and more power in the government to control even the speech and publications of its citizens is not entirely foreign to Holmes' mind, as Mr. Lerner shows. "What Holmes is saying in effect is that free speech is not an absolute value, to be guaranteed under every circumstance and at any social cost".[7] On the other hand he twice quotes approvingly Holmes' statement in the Gitlow case: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces in the community, the only meaning of free speech is that they should be given their chance and have their way."[8] I do not mean to imply here that Mr. Lerner (any more than Holmes himself) is approving of proletarian dictatorship. But he seems to adopt the position that free speech is so sacred that we must not interfere with it even if it ends in proletarian dictatorship, but it is not so sacred that it has to be protected when it might in the long run end in Nazism.

The two points of view are not entirely irreconcilable. I do not know how Mr. Lerner would reconcile them. But Roger Baldwin, a national executive head of the American Civil Liberties Union, reconciled them as follows, writing in *Soviet Russia Today*:[9] "Those of us who champion civil liberties in the United States and at the same time support the proletarian dictatorship of the Soviet Union are charged with inconsistency and insincerity. . . . Everybody takes a class position . . . consciously or unconsciously. . . . I too take a class position. It is anti-capitalist and pro-revolutionary. I believe in non-violent methods of struggle as most effective in the long run for building up successful working class power. Where they cannot be followed . . . only violent tactics remain. I champion civil liberty as the best of the non-violent means of building the power on which workers' rule must be based. If I aid the reactionaries to get free speech now and then, if I go outside the class struggle to fight against censorship, it is only because those liberties help to create a more hospitable atmosphere for working class liberties. The

5. P. 316.
6. P. 290-291. Italics added.
7. P. 293.
8. Pp. xliv, 323.
9. Soviet Russia Today, Sept. 1934.

class struggle is the central struggle in the world; all others are incidental. *When the power of the working class is once achieved as it has been only in the Soviet Union I am for maintaining it by any means whatsoever.* Dictatorship is the obvious means in a world of enemies at home and abroad."[10]

The liberal Holmes could never conceivably have stultified his liberalism by saying anything like that, one obvious reason being that for him the class struggle was not the higher absolute in which all conflicts are resolved. Besides, as a judge, he worked honestly within the framework of the Constitution. But there is nothing in Holmes' fundamental philosophy of government, no principle, no absolute, with which he could gainsay Baldwin. What Mr. Lerner's higher absolute would be it is hard to say. He agrees with Mr. Frankfurter's principle in the *Gobitis* decision, though not with the decision itself.[11] Religious liberty is not the higher absolute. Very likely he would accept Holmes' view that "public policy" is the ultimate principle. Public policy is another name for state power. He speaks of democracy as the thing we are fighting for, but I do not find any dissent from Holmes' idea that "what the crowd wants" is the touchstone of democracy. Incidentally, as to government power Mr. Lerner notes a trend not only to concentration of power in Washington but in the hands of the President himself.[12]

A re-reading of the Holmes essays and other selections in this book confirms a view I have expressed elsewhere, that in his fundamental philosophy of law Holmes was a materialistic, atheistic devotee of public policy, and that this philosophy, when analyzed, adds up to a crude form of totalitarianism in which might makes right. Holmes defined the law, Mr. Lerner tells us, as "the prophecies of what the courts will do in fact, and nothing more pretentious", and he goes on: "On this suggestion, dropped almost casually in 1897, was built the school of American legal 'realism' which is our characteristic contribution to legal thought."[13] But Mr. Lerner recognizes elsewhere that this view of the law was at the bottom of Holmes' legal philosophy.[14] In his preface to Montesquieu's *Spirit of the Laws,* Holmes says, speaking of government: "What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not, the proximate test of a good government is that the dominant power has its way."[15]

I do not find anything in Mr. Lerner's comments to indicate that he disagrees with the fundamental force philosophy of Holmes. "Today more than ever we stand in need of Holmes the good soldier, Holmes the partisan of civil liberties, Holmes who was skeptical of the omniscience of any elite, yet Holmes who for all his skepticism *rested finally on a fighting faith.*"[16] This "fighting faith" in the last

10. REP. SPEC. COMM. TO INVESTIGATE . . . SUBVERSIVE ORGANIZATIONS (Mass. Legislature, 1938) 56.

11. P. 320n.

12. P. 286.

13. P. 368.

14. *Cf.* pp. 190-191, 197, 47, 372-373.

15. P. 378.

16. P. ix. Italics added.

analysis reduces itself to a blind surrender to an innate prejudice or desire, and the expression of that desire by force. The book is inscribed to Mr. Justice Frankfurter, who has made known his disagreement with the view that for Holmes force was the *ultima ratio*—though Holmes himself said it was, more than once. Under the inscription to Mr. Frankfurter stands a quotation, nevertheless, which aptly epitomizes Holmes' force philosophy. "The final test . . . is battle in some form. . . . It is one thing to utter a happy phrase from a protected cloister; another to think under fire—to think for action upon which great interests depend." Apropos of Mr. Frankfurter the quotation merely has reference, I suppose to the fact that he is engaged in the active rather than the contemplative life at the moment. But Holmes, when he used the phrase, was talking of human energy, with the emphasis on the material and the physical. ". . . I know of no true measure of men except the total of human energy which they embody—counting everything, with due allowance for quality, from Nansen's power to digest blubber or to resist cold, up to his courage, or to Wordsworth's power to express the unutterable, or to Kent's speculative reach. The final test of this energy is battle in some form—actual war—the crush of Arctic ice—the fight for mastery in the market or the court."[17]

Mr. Lerner's work shows deep scholarship, a thorough acquaintance with the Holmes literature, and is valuable as collecting in one place all the more important of Holmes' productions. But its principal value to the present writer consists in this: it is one more proof that there exists in this country a powerful ideological trend which is materialistic, atheistic, and which in its neglect of spiritual values and human dignity and exaggeration of "dominant force" can lead us to the absolute state.

JOHN C. FORD, S.J.†

LIE DETECTION AND CRIMINAL INTERROGATION. By Fred E. Inbau. Baltimore: The Williams and Wilkins Company. 1942. Pp. vii, 142. $3.00.

It is especially fitting that this book be reviewed in a Fordham publication from a school where Father Summers had pioneered in the usage of the galvanometer in criminal investigation. Unfortunately space does not permit an exposition of the inaccuracies and inconsistencies of this book. The glaring mistakes and the lack of familiarity with basic physio-psychological and pathological principles involved can be understood when we remember that the author is primarily trained in law and has no degrees either in physiology, medicine or psychology. Training in these fundamental disciplines is necessary for a proper research program in this controversial field. The operation of physiological apparatus has too often been exploited by lawyers, policemen, business men and investigators. A graduate lawyer, the author assisted Keeler for some years and in this manner became familiar with methods introduced years before by pioneers, physiologists and psychologists antedating Keeler. Inbau then went to the Chicago Police Department, taking over the Northwestern University Laboratory which had been purchased by the police department.

17. P. 39.

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Although the author stresses that the fundamental disciplines involved in the so-called "Lie-Detector" are physiology and psychology, the reviewer is familiar with no experimental studies published by him in these disciplines. Yet in a critical and arbitrary fashion he disposes of the work of Father Summers, a professor of psychology and formerly a professor of physiology in the Georgetown Medical School. He repudiates the physiological, psychological and medical workers; he shows pages of charts with involved, inaccurate interpretations and then presents garbled formulations in an attempt to explain a technique which is incorrect as described. He is apparently unfamiliar with the scientific literature, or he deliberately ignores key contributions which have scientific priority and arbitrarily assigns credit at will. Although he rejects the disciplines involved stating that the workers in this field are not interested, it was Münsterberg, Marston, Burt, Larson, Summers, Lyons, Canty, Kubis and others who have made and are making the constructive as well as the pioneering experiments.

The procedures of hundreds of untrained operators are stimulated and encouraged by the present book. The author wrote: "Anyone who seeks to detect deception by this technique should have a fair understanding of psychology and physiology and preferably an extensive knowledge of each, but it is not necessary that he be either a physician or an expert psychologist. In any event, however, it is essential that before attempting to conduct his own independent examinations in actual cases he should have had considerable experience in the use of the technique, either as a result of extensive experimentation and study, if working alone and unassisted, or else as a consequence of an extended period of instruction from a qualified examiner."[1] This has in no wise been the case as some of the foremost polygraph operators started out on their own without having conducted a test or after having had only two weeks training.

Again he wrote: "As previously stated, even when the best available instrument and methods are employed by skilled and competent examiners there is a margin of probable error of approximately ten per cent. There is also an additional group of cases, approximately twenty per cent, in which the test records are too indefinite in their indications to permit a diagnosis; and it is usually with this group that the less competent examiners make their higher percentage of error, because of a failure to exercise the degree of caution deemed advisable by experienced and trained examiners. This leaves at best an estimated accuracy of seventy per cent."[2] Yet in none of the author's previous publications that the reviewer knows of has he published any scientific protocols showing where he gets his claims of statistical error or accuracy. The reviewer in some of his own work has found errors of interpretation even as high as fifty per cent.

To quote again "The present lie-detector technique is not adequately standardized either as to instrumentation, or the manner in which the tests should be conducted, or the interpretations of the recordings, therefore, the courts would be unable to properly determine whether or not the results of some particular test should be admitted in evidence."[3] Later, he says: "Unfortunately, however, the two professions [i.e. psychology and physiology] by and large have not been sufficiently interested

1. P. 58.
2. P. 62.
3. P. 63.

to investigate the possibilities of the technique or to conduct their own independent research and experiments (except perhaps as regards class room demonstrations); and for this reason they are actually not prepared to offer an authoritative opinion upon the subject. In any event, and despite whatever the reasons might be, the lie-detector technique at the present time lacks not only the legally essential acceptance by psychologists and physiologists but also their active interest in the potentialities of the technique."[4]

The reviewer must disagree with the above excerpts, as it was the physiologists and psychologists who made the pioneer contributions in this country and whose methods were published in the scientific literature long before the formation of any Scientific Crime Detection Laboratories. Aside from the type of recorders, the techniques used for years by Keeler, Inbau and other operators were not essentially different in principle from those introduced into police procedure by Larson alone in 1921. Although the reviewer has publicly insisted that the operators must have recognized status, the majority of operators are either police or private investigators or lawyers with no recognized graduate status in the disciplines involved. Because of this lack of basic training these operators have oversold the field, exploited machines, even made clinical diagnoses of the records. This of course is neither possible nor have their findings been confirmed by psychiatric workers. Serious investigators would question such diagnoses by non-clinical operators and it is because of the latter that deception techniques have not had a better scientific reputation. All students of law interested in these questions should consult the summary of the medico-legal symposium of Wayne County, Michigan (1938) presented in the Journal of the Michigan State Medical Society.

Although repudiating medical and psychiatric training the author does not hesitate to make all sorts of diagnostic statements and conclusions and practically states that the operator not formally trained in these fields can rule out medical and mental pathology by an inspection of the suspects or their records. To bolster his statement that intensive training in these fields is not essential he cites the opinion of a prominent medico-legal consultant for a police department where a Keeler trained operator did most of the test work. However, this opinion was taken from an editorial survey of a medico-legal journal and apparently was based upon no experimental protocols published in the basic sciences. In the opinion of the reviewer the material as presented can only do positive damage by encouraging the work of operators without authorized basic training in the fundamental disciplines. It was such problems of training that were foremost in the mind of Dean Seashore of the Iowa Graduate School when he asked Larson to train graduate students of psychology in this procedure. Unfortunately this could not be done at that time.

The reviewer will not discuss in detail the second part of this book which he does not feel is a new or dignified contribution as contrasted with such writers as Osborn or Wellman and for the police field from Berkely, California, the work of Kidd. The reviewer doubts if the experienced jurist or prosecutor would publicly accept such techniques as: ". . . sympathizing with the subject in condemning his victim, etc.

4. P. 65.

. . .";[5] "utilization of trick and deception . . .";[6] "the friend and enemy act . . .";[7] "reduce a subject's guilt feelings by minimizing the moral seriousness of his offense. . . ."[8]

JOHN A. LARSON, PH.D., M.D.†

THE GROWTH OF AMERICAN CONSTITUTIONAL LAW. By Benjamin F. Wright. Boston: Houghton Mifflin Company. 1942. Pp. viii, 276. $2.25.

Professor Wright has written this book for the purpose of tracing the institution of judicial review in American constitutional law. He considers this power of judicial review "our most characteristic political institution" and more distinctly American than any other innovation of our dual form of government. Having this limited, but important, phase of constitutional history as his single objective, he freely concedes that his treatise does not purport to deal with the entire body of constitutional law, but only with that part which is related to the stated doctrine of judicial review—the "veto" power which permits the courts to declare statutes, both federal and state unconstitutional.

His book follows the promise inherent in his title; he develops the growth of judicial review from its early beginnings to the present day and points out that the American doctrine of judicial supremacy did not originate in the Federal Convention of 1787. It owes its origin to the then current belief in a "higher law" and in "fundamental principles superior to man-made rules."[1] This theory of natural law was accepted by our forefathers, found its way into the Declaration of Independence[2] and provided a suitable base for the contention that legislatures must conform to the dictates of a higher law. But what department of government should be given the right to have the final word in the shaping of law? Congress, President or Court?

It was Marshall, the "superb strategist", who wrote the doctrine of judicial review indelibly into American constitutional law in *Marbury v. Madison.* "It is a theory of the judges as the only true guardians of the permanent will of the people which is incorporated in the Constitution. The assumption throughout is that the Congress and President cannot be trusted to interpret that will."[3]

Professor Wright points out that the doctrine of judicial review, firmly established during the Marshall era, was continued and strengthened by the Jacksonian judges[4]

5. P. 87.
6. P. 127.
7. P. 92.
8. P. 85.

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1. P. 9.
2. Wright points out that the framers of the Declaration of Independence "placed their sole reliance upon the 'Laws of Nature and Nature's God.'" P. 11.
3. P. 37.
4. Ch. IV.

and has continued without abatement down to our own day.[5] He devotes considerable attention to the last decade in his chapter entitled "The New Deal and the Old Supreme Court"[6] and proves that the solidification of judicial power was evidenced in the early days of the New Deal. "Between January 7, 1935, and May 25, 1936, the Supreme Court handed down twelve decisions in which Congressional statutes were held to be unconstitutional."[7] The result of the excessive judicial nullification of legislative acts, he contends, was the Roosevelt court plan, a proposal which had few merits except that it centered attention about the standpattism of the old Court, Wright argues that the Roosevelt plan brought about "the switch in time"—a reversal by the Supreme Court which resulted in the validation of the minimum wage statute in *West Coast Hotel Co. v. Parrish*,[8] the National Labor Relations Act and similar legislative experiments.[9]

After completing his history of judicial review from 1787 to 1942, Professor Wright attempts an appraisal of the doctrine. He concludes that judicial review has established itself down the years and that as a result of the doctrine, the Constitution is healthier today than it has been for the past 50 years. This doctrine permits the court to meet economic and social changes within the broad principles of the Constitution. It allows the court to act as a "federal umpire"; it provides for a merger of the principles of stability and growth.

Professor Wright's book is interestingly written and well documented and is an able defense of the institution of judicial review which has played an important part in the growth of the American nation.

WALTER B. KENNEDY†

5. Ch. V, VI, VII.
6. Ch. IX.
7. P. 180.
8. 300 U. S. 379 (1937).
9. Pp. 203-207.

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