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Book Reviews

BOOK REVIEWS

AVIATION ACCIDENT LAW. By Charles S. Rhyne. Washington, D. C.: Columbus Law Book Co., 1947. Pp. x, 315. $7.50.

It is significant that the latest book on Aviation Law treats of only a small segment of the "new law" which man's flight through air has occasioned. Once before Mr. Rhyne recognized the need for devoting more pages to narrower scope and authored *Airports and The Courts* (1944), following his *Civil Aeronautics Acts Annotated* (1939).

For as amazing as the fulfillment of Maurice Paurier's vision in 1933 that an airplane would some day cross the American continent in five and a half hours is the fact that in the same fifteen years Aviation Law has emerged as a field of law and its practice a specialty in which many lawyers have evinced considerable interest. Its bulk today warrants such special treatment as the author accords it.

Expressed on the title page is the keynote of this volume: "A Complete Collection And Analysis Of All Reported Court Decisions Involving Aircraft Accidents Together With A Reference To Legislation And International Conventions Which Have Application In This Field"; and among the prefatory remarks, ". . . its chief purpose is to collect this material in one place so that it may be readily available for lawyers who must inquire into liabilities arising out of aviation accidents." But the reader is cautioned, ". . . since the court decisions considered herein are limited to those in aviation cases and since these decisions are based in part upon general legal principles developed for other forms of transportation, lawyers using this volume should supplement the material presented by a thorough study of cases in their various jurisdictions which involve liabilities incurred in other forms of transportation."

Accordingly, where other eminent scholars and writers have given the bar excellent works on Aviation Law,[1] but perforce have been able to allot only a small part of the text to tort liability, the author, by the simple expedient of interposing the word "accident," has come forth with an exhaustive work on negligence in aviation cases.

The tables of source material and court decisions are excellent. The footnotes are thorough and scholarly résumés without verbosity. I was particularly impressed by the chapter format, typical of which is the very first, to wit: Aircraft Operators as Common or Private Carriers.

A. Cases Holding Common Carrier Status Existed.
B. Cases Holding Common Carrier Status Did Not Exist.
C. Degree of Care Required of Common Carrier.
D. Degree of Care Required of Private or Contract Carrier.
E. Statutory Provisions Applicable to Aircraft Operator Accident Liabilities.

This simplicity and orderliness is carried out in the writing and the style is free and easy, the vocabulary understandable. An aviation lexicon is not a part of this book nor required because the author does not allow himself to lapse into the jargon of the pilot or the terminology of his equipment. This will be appreciated by those lawyers who soar to great heights in the courtroom but for the nonce prefer to keep at least one foot on the ground.

Indicative of the thorough treatment are the following chapter titles: Types of

1. DYKSTRA, BUSINESS LAW OF AVIATION (1946); FIXEL, LAW OF AVIATION (1945); HOTCHKISS, AVIATION LAW (1938); LUPTON, CIVIL AVIATION LAW (1935).

Aircraft Accidents, Liability of Manufacturers, Repairmen and Vendors, Damage to Baggage and Express, Liability of Bailees of Airplanes, Violation of Ordinance, Regulation or Statute as Negligence, Inspection or Lack of Inspection as Evidence on Issue of Negligence, Proof of Cause of Aviation Accidents—Doctrine of Res Ipsa Loquitur, Defenses in Aircraft Accident Cases, Workmen's Compensation and Aviation Accidents, Insurance and Aviation Accidents, Aviation Accidents in International Air Transportation. Further sub-titled to develop a superb Table of Contents and supplemented by a twenty-page Index, this work becomes a speedy reference volume, a multiple brief on a varied assortment of points.

No attempt has been made to present systematically in textual form or appendix, the laws of the several states relating to aviation. That would have been an herculean task and its inclusion of doubtful value inasmuch as many states now have under consideration or are revising aeronautical codes or, as in the case of New York, the statutes specifically relating to aviation, aviators and aircraft are to be found in eighteen apparently unrelated Titles of the Consolidated Laws and the Code of Criminal Procedure.

The author neither propounds theory nor adopts a dogmatic position but merely reports the available decisions, sometimes paradoxical and antithetic, with occasional preliminary or concluding comments or helpful analysis. Therefore he presented no opportunity for me to be argumentative in this review. I can only recommend his effort as a magnificent service to his professional colleagues of both bench and bar and express my belief, as does United States Senator Pat McCarren in the Foreword, that this volume will become a springboard for research by attorneys with problems in the realm of aviation accident law, and prove "an invaluable tool with which to work in developing this field of aviation law."

Truly, a provocative little book, particularly for negligence lawyers whose automobile-riding clients are even now or will soon be dropping in to present for merit analysis their causes of action against the "Altostratus Air Transport Company."

VINCENT T. BARONE†

WILLIAM RUFUS DAY: SUPREME COURT JUSTICE FROM OHIO. By Joseph E. McLean. Baltimore: The Johns Hopkins Press, 1946. Pp. xiv, 172. $2.00.

This brief study deals mainly with Justice Day's contribution to Constitutional Law during his years on the Supreme Court bench (1903-1922). Dr. McLean analyzes the most important of Day's opinions and presents him as a "States Rights Federalist" who insisted equally upon a "strict" construction of national powers, and a "liberal" construction of state powers.[1]

So long as our Federal System lasts, the determination of where state powers end and national powers begin will be the central problem of American Constitutional Law. All of us, whether judges or not, make our contribution to the solution of that problem, for our generation at least, by the attitude we take to Federalism. If we regard it as but a temporary stage on the way to complete centralization made inevitable by the pressures of an economic system each year increasingly

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1. P. 157.

unified, we are apt to view impatiently, refined legal concepts developed to give it living reality. If, on the other hand, we regard local self-government as something of permanent value best protected by a constantly vitalized Federalism, we will be more tolerant of such concepts, though admitting they may work, at times, inconveniently and even inefficiently. Believing that we cannot have our cake and eat it too, we will be the more readily convinced that hasty resort to national legislation whenever the working of the Federal System delays or impedes the achievement of social ends deemed in themselves desirable, may well destroy the advantages Federalism concededly affords.

Justice Day apparently saw in Federalism abiding values worth the cost of preservation.[2] Dr. McLean suggests that this attitude may be traceable to Day's distinguished ancestry. Great-grandson of a Chief Justice of Connecticut, grandson of a Justice, and son of the Chief Justice, of the Supreme Court of Ohio, Day is said to have inherited a profound respect for the value and integrity of state governmental processes.[3] This interesting Freudian probing into Day's "inarticulate premises" does not leave enough room for the judge's own sense of intellectual honesty. After all, Day was called upon to interpret a Constitution which "in all its provisions, looks to an indestructible Union composed of indestructible States."[4]

When Justice Day came to the Supreme Court in 1903, after four years as a Circuit Court Judge, the business of the Court was fast losing its earlier common law flavor.[5] More and more was it being called upon to determine how new national and state legislation designed to meet the demands of an age which saw the slow death of nineteenth century laissez-fairism, could be fitted into the frame of the Constitution without warping it. Nationally, the power most often used to achieve the new objectives was the congressional power over interstate commerce. Day realized that if the potentials of this mighty grant to the national government were exerted to the full, the states could easily shrink to the level of mere administrative units of an all-powerful central government.[6] The shell of Federalism would remain after the principle of local self-government which once informed it had long since departed. Inescapable, nevertheless, was the demand for national legislation to meet problems apparently national in scope and seemingly not resolvable otherwise. How could these two imperatives be reconciled within the limits of the Constitution?

Justice Day, as Dr. McLean shows,[7] developed a concept of "transportation" as distinguished from "production" in determining when the interstate commerce power could be validly exercised. "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterward shipped, or used in interstate commerce make their production a part thereof."[8] This distinction Day employed when, speaking for the majority, he found the first "child labor" law unconstitutional.[9] That law attempted to get at the evil of child labor by excluding from interstate commerce, products of establishments wherein children under

2. P. 77.
3. Pp. 13, 79, 161.
4. Texas v. White, 7 Wall. 700, 725 (U. S. 1868).
5. P. 59.
6. P. 81.
7. Pp. 72, 76.
8. Delaware, L. & W. R. R. v. Yurkonis, 238 U. S. 439, 444-45 (1915).
9. Hammer v. Dagenhart, 247 U. S. 251, 272 (1918).

a prescribed age were employed more than a specified number of hours thirty days prior to the shipment of their products over state lines. Day attempted to distinguish the holding from cases where the Court had recognized the power of Congress to exclude other products from interstate commerce,[10] by pointing out that in those cases the articles excluded were either noxious in themselves, or the use of interstate commerce channels was necessary to give them their harmful effect. The articles involved in the "child labor" statute were "harmless" in themselves, and their carriage in interstate commerce did not give them a harmful character which they had lacked before.[11]

The decision was under fire from the outset. It was attacked as creating a "Dual Federalism,"[12] and as creating a "zone of anarchy" into which an effective war on child labor could not be carried either by state or national legislation. In 1941, Justice Stone, speaking for the Court in *United States v. Darby*,[13] buried Day's concepts and distinctions for all time by expressly overruling *Hammer v. Dagenhart*.[14] The basic problem with which Day had struggled cannot, however, be so easily interred. It remains as long as Federalism remains, or at least as long as Federalism is regarded as something worth keeping. If congressional power over interstate commerce carries with it unrestricted power to regulate the incidents and details of the productive process within a state, either because the products are destined for interstate shipment, or because in modern American economic life, productive and transportation processes are inseparable, how is Federalism as a vital thing and not as a mere form to be preserved? Day's approach to the problem, though now repudiated, may still have value, at least as a point of departure, for those who believe as he did, that Federalism has permanent values, and are willing to pay the price preservation of those values demands. For it is by the steady attrition of Day's views that we have reached the stage where we now find ourselves in the ever-increasing scope being given to the commerce clause.

Dr. McLean's able analysis of Day's opinions is a corrective to those who think that insistence upon "States Rights" today is, at best, merely sentimental piety or, at the worst, a desperate rear-guard action by the retreating forces of "laissez-faire." Day, though never writing with Holmes' literary flair, was yet of Holmes' school in insisting upon a liberal interpretation of the states' police power.[15] Day, like Holmes, was reluctant to use the due process clause to strike down state legislation attempting to grapple with the new complex economic and social problems of the Industrial Age. Though some contemporary "liberals" failed to notice it, Day, in the first child labor case, had been at pains to point out "That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit."[16] And Day, like Holmes, dissented when the Court (over forty years ago) used the due process clause to say

10. Caminetti v. United States, 242 U. S. 470 (1917); Clark Distilling Co. v. Western Ry., 242 U. S. 311 (1917); Hoke v. United States, 227 U. S. 308 (1913); Champion v. Ames, 188 U. S. 321 (1903).

11. Hammer v. Dagenhart, 247 U. S. 251, 271-72 (1918).

12. Pp. 78-79, and see CORWIN, THE TWILIGHT OF THE SUPREME COURT 26-27 (1934).

13. 312 U. S. 100, 116-17 (1941).

14. 247 U. S. 251 (1918).

15. Pp. 137-38.

16. Hammer v. Dagenhart, 247 U. S. 251, 275 (1918).

that a state could not fix a maximum ten hour day for bakery workers.[17] In *Coppage v. Kansas*,[18] Day again dissented when the Court struck down an early attempt to outlaw "yellow dog contracts." ". . . nothing is better settled by the repeated decisions of this court," he said, "than that the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interests of the public health, safety, and welfare, and such limitations may be declared in legislation of the State."[19] Dr. McLean finds "that Day judicially approved almost every exercise of the state police power."[20]

Justice Day from the outset of his judicial career, stood for the vigorous enforcement of the Sherman Anti-Trust Act. He favored its literal interpretation. Hence he early opposed reading into it "the rule of reason." True, he silently acquiesced when Chief Justice White adopted that test in 1911,[21] but as Dr. McLean suggests, this change of theory did not seem to involve any serious departure from his position as "one of the strongest, if not the strongest," advocate of strict interpretation of the act itself, for, as the cases show, "Conduct that prior to 1911 was condemned as illegal restraint was generally held unreasonable *per se* thereafter and therefore unlawful."[22]

Justice Day's philosophy with regard to anti-trust cases is well summarized by Dr. McLean. The form the combination took was of relative unimportance. In *United States v. Union P. R. R.*, "the most severe application of the Sherman Act,"[23] Day held the statute violated by defendant's acquisition of a forty-six per cent interest in the stock of the Southern Pacific. To the point that the two roads were not parallel and that the alleged combination neither eliminated competition in the field of transcontinental transportation at large nor shut the door to new competition, Day replied that "It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determine the applicability of the act."[24] Nor was the controlling factor "mere bigness." ". . . bigness was legal if it were the result of natural growth. . . . Whether a combination controlled 95 per cent of the industry, or 50 per cent, or 20 per cent, it was illegal . . . if it possessed even the potential power to stifle or suppress competition."[25] The suggestion that a distinction should be made between "good" and "bad" trusts seems not to have impressed him. Dr. McLean has noted that through all Day's opinions in this field there runs a deep distrust of concentrated corporate power, and that there are deep affinities between this distrust and the equally pronounced distrust of a centralized government with powers concentrated in it at the expense of the reserved power of the states. Day distrusted concentrated power whether economic or political. Perhaps here we have the key to his judicial philosophy rather than in some of the suggestions offered by the author.

17. Lochner v. New York, 198 U. S. 45, 65 (1905) (Day concurred with the dissenting opinion of Justice Harland).

18. 236 U. S. 1, 27 (1915).

19. Coppage v. Kansas, 236 U. S. 1, 28 (1915).

20. P. 137.

21. Standard Oil Co. of N. J. v. United States, 221 U. S. 1 (1911); United States v. American Tobacco Co., 221 U. S. 106 (1911).

22. P. 85.

23. P. 99, citing HANDLER, A STUDY OF THE CONSTITUTION AND ENFORCEMENT OF THE FEDERAL ANTI-TRUST LAWS 82 (TNEC Monograph 38, 1941).

24. United States v. Union P. R. R., 226 U. S. 61, 88 (1912).

25. Pp. 99-100.

Dr. McLean's work also suggests to this reviewer the inutility of attaching the label "liberal" or "conservative" to any Supreme Court justice. This practice smacks too much of Humpty Dumpty's remark to Alice "When I use a word it means just what I choose it to mean—neither more nor less." Dr. McLean's statistics[26] make it ridiculous to label Day as a "reactionary," a "laissez-fairist," or a "conservative." He was not indeed a great "crusader" like Brandeis. The Public did not acclaim him as a great "liberal" like Holmes. Yet his record on the anti-trust cases, as Dr. McLean shows, is stronger than that of either Holmes or Brandeis.[27] Indeed Holmes "generally opposed enforcement of the anti-trust laws. . . ."[28] Apparently, as the prosperity of a jest lies in the ear of him who hears it, the value of the label "liberal" or "conservative" lies in the preconceived notions of the one who affixes it.

The reader will find in this study a truly great, if not a glamorous, judge who did the tasks assigned to him quietly, calmly, modestly. He was indeed, as Justice Brandeis said of him at his death, "a truly great citizen," and the author's conversations with men now living who knew Day and worked with him makes abundantly clear the affection and respect with which he was regarded. Justice Day's contribution to Constitutional Law is now a matter of history. That is not to say that it is a dead thing now of interest only to historians. It forms another link in the lengthening chain of our constitutional development. We have often been told that we cannot know what the law is, nor can we plan what it shall one day be, without knowing what it once was. With us, too, a Constitution "slowly broadens down from precedent to precedent." Dr. McLean, has in a most scholarly manner, vividly recalled the work of one who labored well in that unending task.

EDWARD F. BARRETT†

GENERAL PRINCIPLES OF CRIMINAL LAW. By Jerome Hall. Indianapolis: The Bobbs-Merrill Company, 1947. Pp. x, 618. $7.00.

Twelve years have elapsed between the publication of *Theft, Law and Society*[1] and the publication of the present book. Professor Hall states in his preface that a great part of his time in the intervening years has been devoted to a study of the subject matter of the present book. The breadth of treatment, the historical analysis and skillful exposition, the extensive and scholarly documentation, all disclose a care, research and study which render quite unnecessary the author's modest introductory statement.

The title to *Theft, Law and Society* fairly described the subject matter of that book, which was concerned to a great extent with the impact of social and economic conditions upon the historical development of those crimes involving property which are comprehended under the popular word "theft." The title of the present book is apt to be misleading. The "General Principles of Criminal Law" might easily be thought to refer to the more or less superficial treatment of the rules of substantive criminal law which one will find in most of the commonly used texts on crimi-

26. P. 83 nn. 62, 63.

27. *Ibid.*

28. P. 83 n. 63.

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1. HALL, THEFT, LAW AND SOCIETY (1935).

nal law, such American classics as Bishop, Wharton and May not being excluded. This is not said in disparagement of such worthy texts which do not pretend to be anything more than law books. Professor Hall's recent book is much more than a law book. The copious references in it to ancient and modern rules of criminal law are inserted solely to enable the author to attain his principal objective: to probe for and expound what he believes to be the foundations for penal responsibility. More accurate and revealing titles for the book might be "Moral and Criminal Law" or "Ethics and the Criminal Law."

After commenting upon the relative absence in legal literature of any real criminal law theory concerned with the ethical and moral validity of the rules of criminal law, Professor Hall commences his task with a consideration of the "principle of legality," *nulla poena sine lege*. This principle, he points out, has characterized Anglo-American legal history (with the exception of the period of the Star Chamber); its absence, implicit in the injunction upon some Continental magistrates to employ "legal analogy" has been most sharply evidenced under the Nazi regime and in the Soviet legal system, despite the latter's publicized Bill of Rights. As the author states, this "first principle" affirms "the ineffable value of the individual human being."[2]

Chapters three and four deal with the complex, perplexing and ever-fascinating topic of criminal attempts. The discussion from the purely historical side (Chapter three) is of itself worth-while. However, the analysis of the always present theoretical difficulties required in defining and limiting the crime of attempt, involving as they do the interplay of theories of punishment and the restricted nature of law as an instrument dealing wholly with external social harms—evil thoughts and intents by themselves are not criminal—has a special importance in the structure of what appears to be the central theme of the book, namely, the fundamental purpose of punishment, or in other words, the ultimate basis of criminality.

In the next chapter, five, the author really gets into his main theme with a discussion of *mens rea* and moral culpability and concludes "it is just to punish those who have intentionally committed moral wrongs, proscribed by law."[3] Here again Professor Hall, of course, recognizes that criminal law is a limited instrument, circumscribed by factors of practical administration on the one hand and on the other by certain constitutional principles embodied in the maxim *nulla poena sine lege*. But within these limits, he asserts, "our criminal law rests precisely upon the same foundation as does our traditional ethics: human beings are responsible for their volitional conduct."[4] Later on the author is forced to admit that some of the doctrines of criminal law are not merely amoral, but are definitely invalid on moral grounds.

Most of the discussion on *mens rea* is concerned with the part which motive, as distinguished from intention, plays in criminal law. The author is of the opinion that two fundamental fallacies pervade the extant literature on the subject: (1) referring particularly to Stephen of England and Sayre of this country, the restriction of moral culpability to, and the identification of *mens rea* with, motivation; (2) the complete confusion of motive with intention (Austin's view). Professor Hall seems to take the position, borne out by the case law, that the only relevance of motive, from the viewpoint of criminal law, is its bearing on the intention to do the ex-

2. P. 59.
3. P. 166.
4. *Ibid.*

ternal act proscribed by the penal law. Motive, he asserts, refers to the actor, whereas intention points to the impact of the action on others. It must be conceded that from the viewpoint of ethics one of the principal determinants of the morality of an action is the motive of the actor, *i.e.*, the end aimed at by him. Saint Thomas Aquinas and Aristotle both seemed to think that one who stole money in order to be able to commit adultery was more of an adulterer than a thief. And yet the criminal law, whose specific function is the prevention and punishment of external harms, would not be interested in the motive if the charge were larceny, except in so far as it might be evidential of intent, but would simply designate the act as larceny. The prosecutor, of course, would not indict for adultery, unless that crime were actually committed. This merely confirms the fact that the criminal law does not attempt to enforce the moral law in its totality. It is heartening, however, to hear Professor Hall assert as a "tenable assumption" that "the trend has been from the irrelevance of motive to its recognition as essential to a just administration of the law."[5]

The author's conclusion that modern penal law is founded on moral culpability conflicts sharply with the theory of objective liability, to which Holmes gave an added impetus and which, at least until recently, enjoyed quite a vogue. Therefore, it is not surprising that Professor Hall devotes most of Chapter six to a clear and incisive analysis and, in this reviewer's opinion, convincing refutation of Holmes' theory which the author correctly states "was the product of a Utilitarianism which held expediency not only the sole objective of all law but also an adequate one"[6] and which the author apparently ascribes to "the advanced sophistication in the days of Holmes' youth."[7]

The discussion in Chapter seven of the interrelation of criminal law and torts stresses a basic distinction existing between the fundamental principles which should obtain in the two fields of law—a distinction which Holmes' theory would negate—namely, that moral culpability is of primary importance in criminal law while it is only of incidental importance in torts, unmoral conduct being simply one of the ways by which individuals suffer economic damage.

Perhaps nowhere is this distinction more lost sight of than in the imposition of penal responsibility for merely negligent (*i.e.*, inadvertent) conduct. This rather frequent lapse in the application of the fundamental principles of criminal law has at some time troubled most serious students of criminal law, except, naturally, those who subscribe entirely to the Holmes' school of thought. This phenomenon in the administration of the law forms the subject of discussion of Chapter eight of Professor Hall's book. His position seems to be morally (and, therefore, legally) sound and appears to be supported by the more recent and better reasoned judicial decisions. Negligence in the tort sense judged solely by the objective reasonable man norm has no place in the scheme of criminal responsibility. To find criminal guilt, as distinct from civil liability for damages, recklessness in the moral sense, (sometimes loosely referred to as "gross negligence"), which involves a state of mind tantamount to intent, should be present (Holmes to the contrary notwithstanding). The much abused maxim that a man is presumed to have intended the natural and probable consequences of his act, while it may be applicable substantively in the

5. P. 149.

6. P. 181. See Ford, *The Fundamentals of Holmes' Juristic Philosophy*, 11 FORD. L. REV. 255 (1942).

7. P. 187.

case of certain torts, should in criminal law constitute at most the basis for a permissible (*i.e.*, logical) inference of what is the really significant fact, namely, the *mens rea*. The payment of damages by the negligent tortfeasor is, as Professor Hall so aptly states, "hardly more than a tax on incompetence,"[8] but it is inconsistent with fundamental moral principles to hold criminally responsible for certain consequences a person unless he *consciously adverts* in some degree to the possibility of those consequences occurring.[9]

In Chapter nine Professor Hall understandably experiences difficulty in reconciling the prevalent attitude of the case law with his thesis that it is just to punish those who have intentionally committed a moral wrong. The chapter deals with criminal omissions and treats such cases as the expert swimmer refusing to save a drowning child. Professor Hall's explanation of the apparent lack of conformity between what is generally held to be the moral duty and the legal duty is that to involve criminality there must exist a moral obligation resting *especially* upon the person involved (in the example, the swimmer). The mores of the community, the author admits, have not developed to the point where the public considers everyone obliged to be his neighbor's keeper. Even assuming that the author is correct in his appraisal of the public attitude on such an ethical problem, it does not follow that such a public attitude is a moral one in any real sense of the word. The author suggests that this apparent discrepancy between morals and law may be obviated by legislation imposing less severe penalties upon strangers than upon those who, because of a special relationship, owe a clear duty to protect another, thus it would seem allowing that the mores of the times may not be entirely moral.

To be logically consistent with his main thesis Professor Hall must, as he does, take the position that strict liability cannot be brought within the scope of penal law; that whatever kind of liability it may be, it is not criminal liability. The discussion in Chapter ten relates principally to the so-called public welfare offenses, for the conviction of which the traditional view is that proof of *mens rea* is not required. Professor Hall does not believe that the time honored distinction between *mala in se* and *mala prohibita* furnishes any logical support for the inclusion of the doctrine of strict liability in criminal law; for he avers that it is impossible to determine that behavior is immoral entirely apart from and irrespective of its prohibition in positive law and that such suggested separation of positive law and moral principles ignores the fact that our ethical principles are in a great measure the product of positive law. This certainly smacks of the positivism which Professor Hall on the whole so roundly condemns. In fact there appears to be a noteworthy defect and omission in Professor Hall's presentation. His central theme is that the criminal law should be rooted in morality. However, no real effort is made by him to define morality or its norm; here and there Professor Hall appears to identify the moral law with the temporary mores of the community. No important reference is made to the natural law, which alone gives to positive law the basis of whatever moral obligation positive law imposes. The author, it is true, speaks of an objective morality, but certainly not in the sense of an imperative norm having an objective and absolute validity, an unchanging law of nature and reason. He is of the opinion

8. P. 241.

9. The failure to recognize some degree of *mens rea* as a necessary element of culpable negligence accounts for much of the difficulty in attempting to frame a satisfactory definition of such conduct. This is the principal defect in a recent study of the subject. MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE (1944).

that judgments implying the immorality of well-motivated actions "rest on the premise that morality is objective and may be validly opposed to individual opinion,"[10] because the criminal law represents an objective ethics (the ethical judgments of the community) which is sometimes opposed to individual convictions of what is right.[11] For example, he states that the intentional or reckless failure to remove garbage or to sweep sidewalks is to some degree morally wrong, and yet he seems to admit the "debatableness" of the morality of the "euthanasia movement in respected medical circles."[12] To Professor Hall the weakness in the *malum in se —malum prohibitum* distinction is the fact that acts which are now *mala in se* were not always *mala in se* and *vice versa*. Relativists and positivists, of course, would agree with such a statement.[13]

To fit the public welfare offenses into his concept of the proper subject matter of criminal law, Professor Hall disregards the usual argument in favor of inclusion based on administrative inconvenience and difficulty of proof of *mens rea* and proposes as a substitute for strict liability a "differential treatment" for public welfare offenders, namely, the imposition of "sanctions" varying gradually downward from the punitive, to the corrective, protective and compensatory "each corresponding generally to salient differentiae in certain types of harms,"[14] with the punitive sanctions reserved for harms involving moral culpability. Thus there would be preserved, possibly through the expedient of transferring jurisdiction over offenses having nonpunitive sanctions to certain administrative agencies, the consistency which the author thinks should obtain between fundamental criminal theory and punishment.

Ignorance and mistake constitute the subject matter of Chapter eleven. As to those instances where the criminal law disregards actual ignorance of fact as a defense on the ground that such ignorance was unreasonable, the author is categorical: "This branch of our law is so thoroughly disorganized, rests so largely on conjecture and unsound psychology and effects such gross injustice as to require major reform."[15] In dealing with the maxim *ignorantia legis neminem excusat* and attempting to reconcile it with *mens rea,* Professor Hall is constrained to concede the necessary paramountcy of the objectivity of law over the subjectivity of private opinion and belief and to state that "the rules of criminal law include and reflect certain basic

10. P. 159.

11. P. 355.

12. P. 295.

13. One hesitates to consider what our future law and "morality" will be, when we find a federal court recently stating that the decisions of the courts should follow the mores of the times and holding that the present sentiment of the community does not view as morally reprehensible what amounts to chronic adultery, a relationship which the court characterized as a "faithful and long continued" one. Petitions of Rudder, 159 F. 2d 695, 698 (C. C. A. 2d 1947). Positive law condemns adultery as a crime, and apparently the same court interprets the public attitude as still viewing an isolated act of adultery "prompted by lust" as immoral. Petitions of Rudder, *supra,* citing Estrin v. United States, 80 F. 2d 105 (C. C. A. 2d 1935). *Cf.* Repouille v. United States, 165 F. 2d 152 (C. C. A. 2d 1947), in which in an interesting opinion the majority of the Second Circuit Court of Appeals, writing through Judge Learned Hand, held with some hesitation that the majority of the community still condemns euthanasia as an immoral act. Judge Frank dissented.

14. Pp. 319-20.

15. P. 343.

moral principles; to recognize ignorance of the law as a defense would contradict those values."[16] However, on the troublesome bigamy cases the author is of the opinion that "the continued imposition of strict liability in charges of bigamy, on the rationalization that this is required by *ignorantia legis neminem excusat,* can only be characterized as both cruel and unenlightened."[17] Consistently with the view expressed in an earlier chapter, ten, Professor Hall asserts that as to the petty infractions of the law, criminality should presuppose knowledge that the act is legally forbidden.

United States v. Holmes,[18] because of its drama, and *Regina v. Dudley & Stephens,*[19] because of its stark reality, surely remain imbedded in the minds of most law students. A good part of Chapter twelve is devoted to the contrasting views of the American and English courts on the defense of necessity set up in these two cases. Both cases involved the deliberate killing of a person to save the lives of other persons. The American decision appeared to sanction the defense of necessity but insisted upon a method of selection by casting lots to determine the person whose life was to be sacrificed. The English decision in effect repudiated the defense. Apparently favoring the American view Professor Hall repudiates what he terms the "dogmas concerning self-preservation and consequent indiscriminate exculpation,"[20] and suggests the standard of just punishment with its corollary that where one of two harms is unavoidable, it is right to choose the lesser one. In applying this standard to the classical illustration of two men struggling in mid-ocean for a plank that can support only one of them, Professor Hall concludes that it is better that one live than that both die but that "fair methods" must be used to determine which one is to be sacrificed, following the suggestion of the court in *United States v. Holmes.* Professor Hall distinguishes necessity from coercion by stating that in the former case man bows to the inevitable; that in the latter case there is no such inevitability and, therefore, there should be no submission to the evil-doer exercising the coercion. Hence, even where coercion takes the form of a threat of death, the author concludes that all very serious crimes should be placed beyond the privilege of harm-doing under coercion.

This reviewer is inclined to agree with Professor Hall in his criticism (Chapter thirteen) of the treatment of intoxication in the prosecution of crimes. Even the present view that "voluntary" intoxication is never, as such, a defense, but may be considered by the jury in determining the existence of the particular state of mind required by the definition of the crime, does not appear to be sufficiently enlightened in view of the recent medical approach to the problem of alcoholism. The author is correct in stating that "involuntary" intoxication is simply and completely non-existent, since it consists in the actual, physical and overt forcing of alcohol into a person. The young man who drinks for the first time and the dipsomaniac are, in the eyes of the law, cases of "voluntary" intoxication. The present law represents a crude compromise between a realization on the one hand that the moral culpability of a drunken killer should be distinguished from that of the sober killer, and on the other hand that a person who voluntarily indulges in alcohol should not escape the consequences. To hold that an individual who drinks intoxi-

16. P. 353.
17. P. 372.
18. 26 Fed. Cas. 360, No. 15,383 (E. D. Pa. 1842).
19. 14 Q. B. D. 273 (1884).
20. P. 425.

cating liquor should be responsible for whatever harm he subsequently does while grossly intoxicated can be justified only if his drinking usually leads to intoxication and the latter in turn to commission of serious harms and that he knows this usually is the result. One of the conclusions reached by Professor Hall is "that normal persons, who commit harms while grossly intoxicated, should not be punished unless, at the time of sobriety and the voluntary drinking, they had such prior experience as to anticipate their intoxication and that they would become dangerous in that condition."[21] This conclusion seems sound.

Chapter fourteen on mental disease consists in part of a counter-attack on those American psychologists, psychiatrists and psychoanalysts who have attacked the rules announced in the famous *M'Naghten* case,[22] especially the so-called "right and wrong" test of insanity. Professor Hall's defense of the rules appears to be effective, especially in its rejection of the Freudian disparagement and neglect of the moral judgment and the ability to discriminate between good and evil. The chapter is particularly interesting in its discussion of "irresistible impulse" and "moral insanity," so-called diseases of the will, which most jurisdictions refuse to accept in exculpation of what would be otherwise criminal acts. Professor Hall defends the essential soundness of the *M'Naghten* rules as principles of penal responsibility but favors the theory of the "integration of the self"[23] and suggests an amendment of the *M'Naghten* rules to overcome any defect in their failure to take into account the emotional and volitional aspects of conduct, as by permitting "irresistible impulse" to be considered when it is accompanied by mental disease. The author properly rejects irresistible impulse as a separate ground for exculpation.

Much of the final chapter of the book is confined to adverse criticism of the positivistic school of criminology founded by Lombroso, who, although he professed not to be interested in any precise interpretation of crime, was certain that he knew a "criminal" when he saw one. The first theorist of this school, Garofalo, considered any legal notion of crime valueless for purposes of criminology. Ferri, the school's orator—he eventually became an ardent follower of Fascism and of Mussolini—had a tremendous influence on American criminology. He defined punishable acts as "those which shock the average morality of a given people at a given moment."[24] Professor Hall takes the position that criminology is validated as a distinctive discipline by its ultimate reference to actual penal law and all relevant social phenomena. Any study of the "etiology" of crime cannot discount freedom of the will, the author asserts. The hypotheses that the human being is rational and that his conduct embodies degrees of autonomy and self-control, if accepted, promise greater actual accomplishment in the understanding of criminal behavior and in the reform of criminal law than positivism and determinism. It is just as fallacious to confuse punishment with cruelty as it is to identify retribution or reparation with revenge. The author concludes his book by conceding that criminologists have made scholarly contributions to our understanding of criminal behavior. Yet he ends on a correct note which is the same one which pervades the entire book and which is consistent with the author's recognition that our criminal law imposes an obligation on man, a rational animal, created by God to his own image and likeness, who possesses a free will.

21. P. 475.
22. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).
23. P. 493.
24. P. 549.

The law student or lawyer who is merely satisfied with a knowledge of the positive rules of law will not find Professor Hall's book as interesting and provocative as the legal scholar, especially the teacher of criminal law who will read and reread the book, not only for its textual content, but because of the exhaustive and eclectic footnote references. In fact if the book served no other purpose, it would be most useful for the historical data it sets forth. In this respect, as in *Theft, Law and Society,* Professor Hall has shown himself to be a master.

What has been written in this review must not be taken as an epitome of Professor Hall's book. It is impossible in such a short space to touch on all the problems discussed or even to indicate the serious scholarship it discloses. Undoubtedly there will be some—one hopes they will not be in the majority—who will disagree with Professor Hall's central theme. Many ethicians will most certainly question some of the postulates of the author, especially his assumption that the mores of the community is the basis of moral law. However, on the whole, it appears that Professor Hall's scholarship has been productive of a stimulating and significant contribution to current ethico-legal literature.

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NEW YORK LAW OF DOMESTIC RELATIONS. By Milton Lewis Grossman. Buffalo: Dennis & Company, Inc., 1947. Pp. lv, 1180. $15.00.

Professor Kane introduced his casebook with this comment: "After many years experience in the teaching of Domestic Relations, I find that it has become increasingly difficult to present the subject properly unless it be confined to one state, or at least to a group of states. Family law is now so regulated by statute that it can no longer be classed as a 'common law' subject with Contracts and Torts, but is as much a 'statutory' subject as Sales, or Bills and Notes, with the unfortunate difference that there is no uniformity in the statutes."[1] If the teacher of the law finds it necessary to key his approach to the decisions of one, or at most two or three jurisdictions, we can appreciate the problem of the practising lawyer preparing for litigation in the state courts. Mr. Grossman's book should receive an enthusiastic welcome by the New York Bar.

The last few years have been marked by such radical change of statutory provision and such extensive development of case law as almost to require a complete review of this subject. Mr. Grossman has given us an up to date compendium of ruling case and statute law in New York. The book contains the citation of thousands of cases and of the important statutes each with a short statement of the rule. Any law book is only as good as its index and here the author is particularly to be commended. One hundred and forty-three pages are devoted to the descriptive word index alone with a separate index to cases and statutes. What is in the book can be readily found and the lawyer will find it a prolific source of case law.

This work does not purport to be a thorough text discussion. We have rather an outline treatment with a rule for every case and a case for every rule. Such a treatment will suffice for the busy lawyer who is looking for the case and uses the book as a means to that end. The same treatment is completely unequal to a mature discussion of the fundamental principles underlying the jurisdictional questions in foreign divorces.

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1. KANE, CASES ON DOMESTIC RELATIONS III (1936).

The attempted reduction of groups of cases to a one or two-sentence rule will invariably result in the production of some half-truths. For example Section 91 sets forth the following statement supported by six citations: "The factors of consent, ability, present promise and cohabitation or mutual and open assumption of marital duties and obligations, are all necessary elements of a common law marriage, and the absence of any one is fatal." At least one of the cases here cited points out that cohabitation is not required in all cases to render the marriage valid where a specific agreement is otherwise established.[2] Such general statements as the quoted principle are admittedly to be found in opinions but they are subject to the criticism that they do not accurately discriminate between the fact of marriage and the proof of it, a distinction probably unnecessary in the particular case.

Judge Dye in his introduction to Mr. Grossman's book points out that the author does not attempt a philosophical discussion of the broad general subject.[3] This must be borne in mind in any appraisal of this work. Many of the citations are of the lower courts. The holding of the case is tersely stated and as accurately as possible in view of the brevity. No attempt is made to evaluate the soundness of the court's position. Sections 962 and 963 set forth what is stated to be respectively the former rule and the present rule with regard to injunctions to restrain action without the state. The so-called former rule is that set forth by the Court of Appeals in *Goldstein v. Goldstein*.[4] As indicated in this text a number of New York Supreme Court decisions have held that this rule is no longer law in view of *Williams v. North Carolina*[5] and its express overruling of *Haddock v. Haddock*.[6] Whether this conclusion is logical has been the subject at least of sharp difference of opinion in the Appellate Division, First Department, in *Pereira v. Pereira*[7] and the Court of Appeals has not yet had occasion to express its opinion.

The volume contains a chapter devoted to forms, being chiefly composed of forms of separation agreement, ante-nuptial agreement and complaints in the different types of matrimonial action. Unlike the other portions of the book the forms are not supported by the citation of any decided cases. In the use of any form without further research the practitioner is therefore relying solely upon the authority of the author and his own judgment.

The busy practitioner whose eyes are wearied by the small unbroken type of the law journal will find the large type and the absence of footnotes a restful change. By the same token an adherence to the format of the standard text would have produced a volume less than half as bulky.

For the lawyer schooled in the principles underlying the Law of Domestic Relations there has been a need for a ready reference to the recent and ruling case law in New York. Grossman's "New York Law of Domestic Relations" will fill this need. It is not, nor is it obviously intended to be, a short cut to fundamental principles. Within the limits of its purpose it is a real contribution to the lawyers' library.

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2. Karameros v. Luther, 166 Misc. 376, 2 N. Y. S. 2d 508 (Sup. Ct. 1938), *aff'd*, 254 App. Div. 845, 5 N. Y. S. 2d 319 (1st Dep't 1938), *reversed*, 279 N. Y. 87, 17 N. E. 2d 779 (1938).

3. P. ix.

4. 283 N. Y. 146, 27 N. E. 2d 969 (1940).

5. 317 U. S. 287 (1942).

6. 201 U. S. 562 (1906).

7. 272 App. Div. 281, 70 N. Y. S. 2d 763 (1st Dep't 1947), 16 FORD. L. REV. 288.

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