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BOOK REVIEWS

REVIEW OF UNIVERSITY OF NOTRE DAME NATURAL LAW INSTITUTE, 1950 PROCEEDINGS, VOL. IV. Edited by Edward F. Barrett. Notre Dame, Indiana: University of Notre Dame Press, 1951. Pp. 144. $2.00.

In addition to a brief foreword by Father Cavanaugh, President of the University of Notre Dame, and a short introduction by the editor, this book contains five essays as follows:

The Source of Human Rights. George E. Sokolsky

The Natural Law and the Right to Liberty. Hon. Thomas J. Brogan

The Natural Law and the Right to Property. Hon. Joseph C. Hutcheson, Jr.

The Natural Law and the Right to Self Expression. Felix Morley

The Natural Law and the Right to Pursue Happiness. Rev. John C. Ford, S.J.

Of these, the most interesting is George Sokolsky, and the most scholarly (and scarcely less interesting), Father Ford's. As a whole, these contributions to the *Natural Law* are not as worthy nor as original as some of the lectures at the Notre Dame Natural Law Institute in the years 1947, 1948 and 1949. It would, of course, be difficult to find in these pages, devoted to the 1950 proceedings, anything seriously objectionable—or highly original. One should, perhaps, draw the rein on this quest for the original. But these pages lack something. Except for a few paragraphs in two essays, they need the stimulus and provocative explication which would be brought to this ancient subject by a mind like, say, Maritain's. It is not that I want a new basic doctrine, or even an entirely original presentation. Since we are talking about something that is as old as the *nature of man,* and since we know that that nature is a more profound and pregnant source of knowledge than books can ever be, it would be silly to expect novelty of subject matter. But there is a literary verve and a fresh perception relating to olden realities which make them seem new.

For example, when Maritain in his forthcoming book, *Creative Institution of Art and Poetry* (Bollinger Series XXXV 1, Pantheon Books, speaks of the unique communion of knowledge, he says:

> ". . . the prime fact that is to be observed is a sort of interpenetration between Nature and Man. This interpenetration is quite peculiar in essence: for it is in no way a mutual absorption. Each of the two terms involved remains what it is . . . while it suffers the contagion or impregnation of the other . . . . they are mysteriously commingled."[1]

This is a new and imaginative way of saying what the old scholastics mean when they refer to the spiritual identification which constitutes knowledge: "to know is to become another, in so far as it is another."

Now, it is precisely this type of freshness which the book under consideration mainly lacks. Many of its passages, while bearers of truth, are rather hackneyed. Only Sokolsky manifests a really inviting style. Father Ford has one. But his contribution was so interspersed with quotations and with scholastic jargon that it did not successfully emerge except on occasion. Judge Brogan's derivation of the *right to liberty* from the Natural Law was not particularly compelling or successful. It is all very well to be told that something is an imperative of man's nature. But I thought Judge Brogan missed many a good opportunity to expose this necessary

1. P. 5.

implication clearly and convincingly. His thesis was familiar and reliable. It presented no new or fascinating insights.

Some of the statements in Felix Morley's essay need qualification or explanation:

"Quakers do not subscribe to ecclesiastical distinctions, because of their profound conviction that all men are on an equal footing before God. And this is really the strongest possible affirmation of the belief that Natural Law operates upon and is binding on Everyman."[2]

I question whether all men, saints and sinners, Popes and Soviet Premiers, are on an equal footing before God, unless it be added that "footing" here really means their specific human nature. They are all equally human. They are all equally men. Nor do I think that the profound conviction of Quakers could be the strongest possible affirmation of anything.

Some qualification is also needed for such statements as the following:

"Freedom of expression, even of a corrupting character, is more jealously guarded with us than is, for instance, the freedom to advertise falsely, or to sell impure food and deleterious drugs. . . . We cling to the doctrine of *caveat emptor*—the buyer should beware—especially in the field of opinion because it is so difficult to be sure that any opinion is wholly meretricious. If it contains even a portion of truth, the suppression of a distasteful opinion may destroy that which could be helpful to mankind."[3]

Perhaps some opinions in this field are difficult to justify. I recall the somewhat exacerbated debate, not long ago, on Graham Greene's novel, *The End of the Affair*. There were priests and nuns on both sides of the question whether the book is morally reprehensible. Perhaps, in such situations, it is reasonable to cling to some doctrine analogous to that of *caveat emptor*. But it does not follow that it is "so difficult to be sure that any opinion is wholly meretricious." This overgeneralizes from the particular. In a literal sense, no opinion is "*wholly*" meretricious, evil or erroneous. But, avoiding literalness, I think it is quite clear that some opinions are so wholly meretricious that the doctrine of *caveat emptor* is not a sufficient protection for the immature or the unwary who constitute so large a part of the average collectivity. That is why, for all of the loose talk about censorship and academic freedom, there are some things that we could not and do not in good conscience or in law permit teachers to inculcate and some books so wholly vile that they must be suppressed.

There might be a correct way of understanding the sentence: "The man who denies the Natural Law can scarcely claim the privileges that spring from the Natural Law, and from that source alone."[4] Yet the man who denies the Natural Law continues to be a *man*, even when he is a *bad* man. He might dishonor his nature. But he cannot doff it. That is why even criminals still retain some rights under the Natural Law.

I don't follow Mr. Morley when he says:

"There is an obvious argument for permitting the Communists to talk, and to continue the publication of the *Daily Worker* and their other papers. By self-expression they tend to give themselves away, as has proved true even of some of the clever ones who have infiltrated the Government service. That is better than driving the entire Communist movement underground. But this is a superficial argument, and does not touch the deeper issues.

"Of far more importance is the fact that every statute which encroaches on the Right

2. P. 90.
3. P. 94.
4. P. 98.

of Self-Expression is thereby an encroachment on the Natural Law. There is no doubt that such encroachment may be necessary. It may even serve to bolster, prop and support the Natural Law. But, as a general rule, the greater the political regulation, the less the spiritual development; the more men are regimented by the State, the less they will discipline themselves; the more we depend on statutes, the less consideration we give to Natural Law."[5]

There is much that is sane and accurately truthful about these two paragraphs. But the truth they portray can, I think, be consigned for safer transportation to the carriage of more careful words. Maybe the argument for permitting Communists to talk freely as Communists is obvious. Maybe the argument for silencing them is equally obvious. Maybe much depends upon the time and the circumstances in which you silence them. Since the motives of true Communists and the nature of what they say in their characteristic propaganda can scarcely be defended, some circumstances might forbid suppression and other circumstances might justify suppression. People give themselves away by other means than by self-expression. Communists have been betraying themselves, not only by their consistent preachments, their demagogic appeals to class-hatred, but equally by their *conduct,* which historically fulfils a strategy of enslavement. The conspiracy goes on, even though the chief conspirator who judged so many men without mercy, has within days of this writing shuffled before the Throne of Mercy.

But it is rather strange to hear that something is better than *driving the Communist movement underground.* Where else has it ever been? Why else do they need the apparatus of espionage and sabotage, lies and deceptions?

The Right of Self-Expression is not an absolute, even when Capitalized. Not every statute which encroaches upon the Right of Self-Expression thereby and in all circumstances affronts the Natural Law. A just law is binding in morals. A law can be just, even when it curtails "Right of Self-Expression." The very *necessity* for the encroachment might, in particular circumstances, constitute the Natural Law justification for encroachment. Of course, it is true, as Burke pointed out years ago, that the less man restrains himself internally by religion and morality, the more he involves himself in external regimentation.

Most of Father Ford's article can be summarized in his own precis:

"Now that we have had a bird's eye view of general theories of happiness, and have investigated, superficially at least, some of the sources from which the Founding Fathers drew their notions on happiness as the end of civil society, and the right of the individual to pursue his own happiness, we are in a position to see where this philosophy fits into the general tradition, and to evaluate from the viewpoint of scholasticism the meaning of the proposition: 'Man has a natural right to pursue happiness.'"[6]

Had he been less of a scholar and less of a theologian, he might have left matters rest there. But he was careful to add something that demagogues constantly forget or neglect. I quote it at length, because it is the kind of reflection that ought, more often, be called to our attention in order to avoid that temper of Utopian irresponsibility and Pollyanna optimism which some people seem to think the Founding Fathers enacted into Constitutional Law:

"I find it impossible to show that *all* men have a right to the *actual* attainment of this kind of happiness on earth, for these reasons: First, there is no such absolute right because there are Circumstances in which the observance of the moral law results in unhappiness for this or that individual. Yet the individual has no right to achieve his

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5. P. 99.
6. P. 132.

happiness at the expense of the moral law. Secondly, neither reason nor revelation promises us an infallible reward of earthly happiness in return for observance of the natural law; nor is there anything inherent in the nature of things which prevents me from admitting that life is inevitably unhappy for many people. In fact the doctrine of original sin and its consequences prepares us for much human misery not personally deserved. Thirdly, human experience shows that many people who without blame on their part, and without any injustice on the part of others, are destined to live unhappy lives. Each one of us can think of many instances, but the example that comes to my mind are the thousands upon thousands of mentally ill. If these sufferers have an absolute right to actual happiness here on earth then someone is doing them a grave injustice. Is it man? No one can point to the man. Is it God? *Absit.* Fourthly, we see so much of the I-have-a-right-to-be-happy philosophy and to what it leads amongst the heroes and heroines of fiction as well as the less heroic characters of real life, that we cannot help but be skeptical as to the existence of any such right.

"Men are undoubtedly meant by nature to be happy. They are made for it. And if they observe nature's laws their chances of achieving comparative happiness even in this life are good. (But I have heard a very wise man say that there are no happy lives; there are only happy days.) Furthermore no one will be deprived of eternal happiness except by his own fault. But have *all* men a right from nature to *achieve* actual happiness on earth? Neither experience, nor philosophy, nor revelation warrant the assertion of such a right."[7]

This is one of the best passages in the book. Perhaps the very best. It is one of the excerpts which redeems this book from any charge that it is a platitudinous repetition of what many scholastics have said so frequently and often so dully.

GODFREY P. SCHMIDT†

CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION. By Arthur T. Vanderbilt, New York: Washington Square Publishing Corp., 1952. Pp. 1390. $8.50.

The author is the present Chief Justice of the Supreme Court of New Jersey. He was for many years an active practising attorney, as well as a professor of law at New York University Law School and a former dean of that law school. His guiding genius and inspiration were important factors in the establishment of the magnificent law school center at Washington Square, in New York City, whose facilities are now enjoyed by the law students of New York University. He is a former president of the American Bar Association and contributed greatly to the formulation of our present Federal Rules of Civil Procedure and of Criminal Procedure.

Since his ascendancy to the bench in New Jersey, he has played the leading role in the formulation and effectuation of a completely new set of rules of practice, which became effective September 15, 1948. Since that time, at annual judicial conferences, attended by all the judges of the state and by representatives of the legal profession from every part of New Jersey, as well as by representatives of the legislature and the general public, these rules of practice have been critically reviewed and proposed changes have been debated. As a result, the rules have been modified and refined by the Supreme Court of New Jersey, which body has the constitutional authority under the present constitution to establish the rules of practice for all the courts in the state. New Jersey now enjoys the

7. Pp. 139-40.

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benefits of a modern procedure and of an excellent judicial administration. Cases are now speedily disposed of, the technicalities of the common law pleading have been abolished, and the whole pattern has been changed, so that truth and justice are the ends that are being achieved today in our New Jersey courts.

It is altogether appropriate, therefore, that the man who has played such an important part in improving the federal procedure and in giving to his own state of New Jersey an efficient modern procedure and judicial administration, should produce this book. It is the kind of effort which we would expect from the author who has given so much of his time and talents in the improvement of the law. The book is excellent. The only unexplained fact is how he could find the time to turn out a book of this kind in view of the many and varied activities, which crowd his daily life.

The book itself is built essentially on the Federal Rules of Civil and Criminal Procedure. The cases are, with few exceptions, decisions of the federal courts, interpreting these federal rules. They are up-to-date, authoritative pronouncements, well selected for their clarity, pertinency, and timeliness. Many of the cases are decisions of the United States Supreme Court, and most have been decided during the past 10 years. This follows necessarily from the fact that the present Federal Rules of Civil Procedure were promulgated in 1937, effective in 1938, and the present Federal Rules of Criminal Procedure were promulgated by the Supreme Court on December 26, 1944. The author has based his work on the federal rules because, as he puts it, "The most effective and at the same time the simplest system of procedure thus far developed in our law is that set forth in the 86 Federal Rules of Civil Procedure and the 60 Federal Rules of Criminal Procedure."[1] And again, "The federal rules, as the latest and the most advanced system of procedure known to the common law, furnish a sound standard for evaluating the procedure of the several states."[2]

Before getting down to the rules and cases, the author develops, in his introduction, the importance of procedure in the work of the practising lawyer and in the study of law; the place of the Federal Rules of Civil and Criminal Procedure in the movement for judicial reform; and the major problems of procedure. This scholarly dissertation should prove helpful to students, beginning the study of procedure, and may be read, with much benefit, even by members of the bar.

Following this introduction, there is Chapter II which contains an article by John H. Wigmore, entitled "The Spark That Kindled The White Flame Of Progress," which refers to the speech by Roscoe Pound, given in 1906 before the American Bar Association, on the topic of "Popular Dissatisfaction With Justice." Pound's splendid exposition of the causes of popular dissatisfaction with the administration of justice is printed in full. While much progress in procedure has been made since Pound's famous speech, there is still much cause for popular dissatisfaction with the administration of justice, in many jurisdictions.

Chapter III covers the subject matter of Jurisdiction—In What Court May The Suit Be Brought? This topic is covered only in a very general way, without that completeness which otherwise characterizes this book. The author recognizes this lack, but confesses that "Space will not permit a consideration of their jurisdiction here."[3] This chapter does contain a series of questions, the answers to which

1. P. XVII.
2. P. XVII.
3. P. 56.

in any jurisdiction will determine whether there are the proper standards of court organization necessary for a modern and efficient judicial administration.

The succeeding chapters follow a clear-cut and logical pattern for understanding procedure in the federal courts. In order, the following topics are covered: (a) Who May Sue Whom—Parties; (b) Where May Suit Be Brought—Venue And Transfer Of Cases; (c) How To Get The Defendant Or His Property Into Court—Process; (d) What Relief Is Sought—Remedies; (e) How To State The Controversy—The Pleadings; (f) How to Prepare For Trial—Pretrial Procedures; (g) How To Litigate The Controversy—The Trial; (h) How To Correct Trial Errors—Judicial Review; and (i) How To Enforce A Judgment—Execution.

Each topic is in turn subdivided into appropriate sub-divisions, which are covered in this manner. The federal rule is first stated in full. It is followed by the applicable cases, annotations, and comments of the author, so that anyone who reads and understands the rule, the comment, the cases, and the annotations, should have a thorough grasp of the particular phase of procedure being considered. There is a completeness in the development of each phase of each topic, so that when all of these topics have been studied in the logical sequence in which they have been put, the student or the lawyer who wishes to improve his knowledge of procedure, particularly in the federal courts, will enjoy a feeling of intellectual satisfaction at the conclusion of his study of this book.

The book should be of great practical value to one who wants to know federal procedure. It can be of help in any state, like New Jersey, which has modernized its procedure by adopting rules similar to the federal rules because the interpretation of these rules by the federal courts is some indication of how the state courts might rule in a comparable situation. It should focus the attention of thoughtful lawyers in those jurisdictions which still cling to an archaic system of judicial administration as to how they may develop in their own states a modern procedure that will eliminate the technicalities and delays of litigation which have so frequently thwarted the prompt and efficient administration of justice.

From the law school viewpoint, I believe that this book would be an excellent medium for the teaching of a course in Federal Procedure. I know that it is being used in the two New Jersey law schools, Rutgers and Seton Hall, for students beginning the study of the law, as part of a course devoted to an Introduction to the Study of Law. In the hands of a competent instructor, the material in this book can well be used to give the beginning law student that basic understanding of the procedural side of the law, which will enable him to read and understand in a better way the cases in his other law school subjects. It has always been a problem for the law teacher, in dealing with first year law students, to explain those procedural aspects of the assigned cases, which must be understood, if there would be a complete mastery of the case itself.

There may be some difficulty in using this book, as a sole medium, in the teaching of a course in Civil Practice of a particular state. Thus, in my course in New Jersey Practice, which is limited to 60 hours, and in which I deem it essential to develop as fully as time will permit the court system and the particular rules of practice, peculiar to New Jersey, it would be necessary to use this book in a supplementary manner. Certain selected cases might be assigned to illustrate the New Jersey rule. The discussion of a particular case produces interest and vitality, which a mere lecture on a rule of practice cannot produce as effectively.

The book is topped off by 200 pages of most interesting reading materials which cover such important items necessary to the due administration of justice as:

(a) The Judicial Selection And Related Problems; (b) Jury Selection And Service; (c) The Legal Profession; (d) Judicial Administration; (e) Maitland's "The Forms of Action at Common Law"; and (f) excerpts from the introduction to Langdell's "A Summary of Equity Pleading." All of this gives that complete coverage, which will enable the teacher of the law to impart to the student of the law a knowledge of modern procedure and judicial administration and the desire to improve the procedural side of the law in his own jurisdiction, so that truth and justice may prevail.

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