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## Book Reviews

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## BOOK REVIEWS

JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE. By Donald G. Morgan. Columbia: University of South Carolina Press, 1954. Pp. xv, 326.

It has long been a cantankerous conviction of mine that, of all the professional folk who think, talk, and write about the Supreme Court and its role in the government of the United States, none think so narrowly, talk so superficially, and write so badly as the lawyers. When I first waded gingerly into the literature of constitutional law, the incisive comments of Charles Beard, an historian, and the clarifying perceptions of Edward Corwin, a professor of politics, made far more sense to me than the discursive apologia of Charles Warren, a lawyer who authored what is still his fellow-lawyers' Supreme Court Bible. At law school, the teacher who taught me most and best about the way the Court works and has worked in the past was Walton Hamilton, an economist with nary a law degree. I remember too that, of the spate of books that splashed all over the publishers' lists when the Nine Old Men were murdering the first New Deal, the best of the lot was written by Irving Brant, a newspaperman, and one of the worst by Morris Ernst, a lawyer. Today, the stuff about the Court that comes from the pens—and minds—of such political scientists as Herman Pritchett and Alpheus Mason puts to shame the simultaneous work of such lawyers as Charles Curtis and Paul Freund. The odiousness of comparison goes against the lawyers, every time.

Now comes yet another non-lawyer, to probe and illumine a period of Court history that the legal profession had previously marked out as peculiarly its own. In his volume on "Justice William Johnson, the First Dissenter," Donald Morgan, head of the department of political science at Mount Holyoke College, does considerably more than present the first full-blown biography of a genuinely great Justice, neglected for generations by the legal clan simply because all the lawyer-historians were so monomaniacally Marshall-minded. What Morgan does is to give a long-lacking third dimension to the retrospective picture of a whole era of the Court's life—that vital era, stretching throughout the first third of the 19th century, when John Marshall led the Court from impotence to power. In so doing, Morgan makes plain that Justice Johnson, next only to Marshall himself, was the Court's most important and influential member, and that Justice Story, who has long glowed in legal annals in the reflected light of his mentor Marshall's glory, was the lesser figure of the two.

For, as Morgan also makes plain, Justice Johnson, no less in his prophetic liberalism than in his insistent independence of mind, was the precursor—just one century ahead—of Justice Holmes. The blacksmith's son from South Carolina, who was named to the Court at the age of 32 by Thomas Jefferson, as the initial Republican beach-head on a bench that had theretofore been held exclusively by Federalists, was not only "The First Dissenter" but also the first Court spokesman for the rights of unpropertied man. A constant thorn in King Marshall's crown throughout 30 of the 34 years of Marshall's judicial reign, Johnson ruggedly refused to succumb to his Chief's persuasive charm as most of the other early Republican appointees, notably Story, succumbed; he wrote, during this stretch of years, more than half of all the opinions written by all the Justices which declined—either in dissent or in separate concurrence—to accept the majority "opinion of the Court"; and he lived to see his well-aimed sniping at Marshall's solicitude for wealth achieve an opening measure of success when, toward the end of both their careers, Marshall himself was finally forced into his first important dissent. Not that Johnson was ever unsympathetic, as were many less responsible and less thoughtful Republicans, to Marshall's constant

concern that the new national government be given the strength to survive and grow; indeed, Marshall's perhaps most momentous manifesto in behalf of centralized power, in *Gibbons v. Ogden*, drew from Johnson an even stronger concurrence because he did not think Marshall, at least verbally, had gone far enough. But unlike Marshall, Johnson wanted to see the states merely subordinate where necessary to the central government, not squelched by it (Morgan uses the nice metaphor of "a community and its component family units"); unlike Marshall, he approved the use of the law-making power, state or national, to restrain the excesses of wealth as well as to promote its legitimate development (and here he was a good century ahead of his judicial time); unlike Marshall, he had a deep and dogged belief in civil liberties—from freedom of the press to the right of a fair trial, even for Negroes. And most significantly, where the essentially autocratic Marshall wanted the judiciary supreme over other branches of government, and succeeded in making it so, the democratic Johnson never lost nor wavered in his Jeffersonian faith in elected legislatures as perforce responsive to the people's will, and hence as the proper trustees of top government power.

All this and considerably more is resurrected by political scientist Morgan from the comparative oblivion where conventional legal chroniclers, more concerned with saving Marshall's shining reputation from a touch of tarnish than to grant a dead rebel his historical due, had long let it lie. Perhaps it was righteous resentment on Morgan's part at this slanting of history, by giving Johnson what newspapers call the silent treatment, that led to one of the two most interesting aspects of Morgan's book. This is the peppering of his pages with a sort of shotgun attack on Justice Story, whom the orthodox overlookers of Johnson have, by contrast, blown up to high historical esteem. Thus, Story's narrowly "absorbing passion" for the law, his "economic conservatism," his anxiety "to shield . . . the commercial man," his greater fear of state-bred "anarchy" than of centralized "tyranny," his confidence in "the infallibility of the Supreme Court," make Story sound particularly petty, bookish, and even silly when read in the context of Johnson's wider interests, deeper democratic faiths, and greater concern for the welfare of the whole nation. Let me add that I completely share Morgan's low estimate of Story, and that I rate his almost off-handed here-a-pellet-there-a-pellet attack as an artistic and effective device to bring the overrated academician down to size.

The other most interesting aspect of the book, and indeed the climax of Morgan's tale, is his detailed account of the off-stage part played by an aging but still clear-headed Thomas Jefferson in renewing and bolstering the determination of a discouraged Johnson to continue his one man campaign against Marshall's dictatorial domination of the Court. The correspondence between the old master and his devoted yet independent disciple-in-democracy is the pure ore of which meaningful history is written—with Johnson revealing almost indiscreetly the inner workings of the Court to explain and excuse the recent lapse in his dissents and separate opinions, with Jefferson remonstrating that the Marshall method of having the Court speak with a single voice (usually his) in a single opinion "is certainly convenient for the lazy, the modest and the incompetent," with both men cutting through formal folderol to treat the Court and its members in terms that resound with political realism. As Morgan polishes this epistolary nugget with the perceptiveness of his own interpretations and insights, he sees it, in the phrase that titles the chapter, as "The Origin of Dissent."

Here is Supreme Court history as it ought to be written, with its emphasis on facts and unofficial behind-the-scenes documents and men when they are being themselves—not, as the lawyers write it, with naively narrow concentration on words and official documents, commonly called Court opinions, and men when they are putting on an

institutional public show. My sole and rather small criticism of biographer Morgan is that, while avoiding the errors of the typically word-minded LL.B., he falls prey, on occasion, to the typical errors of the every-little-fact-I-can-find-minded Ph.D. One of the toughest tasks for any writer who has dug and searched and sweated for his material, as Morgan obviously did, is to prune away the unessential and the trivial. This would have been a leaner and harder hitting book if its author, especially in the early chapters, had steeled himself into leaving in his files some of the more digressive, and hence disconcerting, factual items he found, instead of putting them all on scholarly display. But this is a minor flaw in a magnificent job, which is well beyond the competence of almost any legal writer-about-the-Supreme-Court I could name. It might even come to pass that Morgan's book will, for instance, lead the lawyers who advise the editors to rate Johnson worthy of a line or two in the next edition of the Columbia Encyclopedia—whose current edition devotes 47 lines to the glorification of Justice Joseph Story, but from whose pages the name of Justice William Johnson, the First Dissenter, is completely, conspicuously, and conventionally missing.

FRED RODELL†

THE GREER CASE. By David W. Peck. New York: Simon and Schuster, 1955. Pp. 209. Preface by the author.

One of the dictionary definitions of a "mystery" is "an unexplained or inexplicable phenomenon."

This book is not a "mystery" in that sense, inasmuch as a learned Surrogate (once a Professor in Fordham Law School) is ultimately quoted, at the end of the book, as saying of the proof at the close of the Greer case, "the whole is so persuasive as to leave no doubt in the mind of the court."

Did the Court err?

An appeal was taken to the Appellate Division of the New York Supreme Court. Here the problem (of the justice of the claim of a "missing heir" to a fortune) challenged the fertile imagination of the Presiding Justice of the Appellate Court, normally immune to the bizarre.

Did the claimant to a fortune in this "Tale of Three Cities" establish his affirmative burden of proof? Did the opposition establish a negative? Above all, did the opposition affirmatively establish that there was a *different* claimant, an alcoholic circus roustabout, named "Smith," with a good affirmative case? Are there *two* Greer cases?

These problems set the Presiding Justice to thinking, and out of the grist of the busiest appellate court in the world he set aside the record and briefs for intensive scrutiny in two summer vacations.

In his preface he says, "the case provided an excellent example of trial lawyers' work, of their problems in meeting a baffling case, of their resourcefulness, skill and untiring effort in discovering evidence, uncovering the truth and presenting a case in court. Their craftsmanship and creativeness, imagination and integrity, combined with the romance of the case, gave me both a professional pride and a personal pleasure in telling the story . . . a story of lawyers matching wits for a high stake, of their ingenuity and assiduity, and of what goes on behind the scenes of a court drama."

The "hero" of the book is Joseph A. Cox, a graduate of Fordham Law School, who since the Greer case has moved up to the bench of the Supreme Court and thence to the Appellate Division, where he now sits beside Presiding Justice Peck himself.

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† Professor of Law, Yale University School of Law.

The author has given the story "the movement which court procedure retards." He starts with the "measured moment" which the court crier allows for the trial judge to take his place beside the high judicial chair. (p. 7). As the judge is seated, his eyes "looked beyond the transient to the traditional." (p. 8). The courtroom was "the embodiment of the everlasting, fittingly built with nobility of design by unhurried artisans who knew that their legacy was the timeless temple of justice. . . . Embossed on the doors was the scale of justice resting on the point of the sword of righteousness." (p. 8).

The trial judge was "an inexorable and impersonal logician who discouraged all distractions from a single-minded pursuit of truth . . . and the lawyers had the highest regard for him and instinctively met his standards." (p. 15).

"Eyes from all sides of the courtroom were fixed on the witness, and in the hush of expectancy ears were intent on the answer." (p. 168).

These glimpses of the author's style are "a few strokes of the brush. The rest is for the imagination of the artist."

Justice triumphs, and the appellate justices, like the "hero" and the author, have their share in the event.

The book is well written in the clear and lucid style familiar to lawyers who have read the author's court opinions. It is permeated with a love for truth, sound evaluation of evidence and respect for the law.

The trouble with the book is that it fits on a night table beside a lawyer's bed, and if he starts it at a late hour it is going to keep him awake all night.

JOHN F. X. FINN†

FOUNTAIN OF JUSTICE, A STUDY IN THE NATURAL LAW. By John C. H. Wu. Sheed & Ward, New York: 1955. Pp. 281.

Let me begin by frankly avowing that I regard this as the best book on jurisprudence written in our time. It is remarkably different from most of the turgid erudition classified as the philosophy of the law or jurisprudence. Most of the output in this field is cold, at times repelling, often mutilated by narrowness or glaring error, sometimes sterile and almost always devoid of verve, life and humaneness. This book is refreshingly warm. It gushes with an inimitable *élan*. In style it is clear, attractive, at times noble and poetic, at times chatty—almost invariably very wise. It reflects amazingly wide reading and profound appreciation. But it is not merely veneered with cumbrous learning. It is inspirited with genuine wisdom. Never before have I seen the tremendous philosophical and theological problems which lie at the root of all positive law so competently and so gracefully exposed in such few, facile and sure strokes.

There is nothing hidebound or commonplace about the author's method. He is part of and makes a valuable contribution to the oldest and most vital tradition in the philosophy of the law. Yet he makes his contribution in the coin of his own rare, richly endowed and uniquely interesting *aperçus* and personality. This is not a collation of oddments from serious reading artificially bonded in a book. This has the sweep and unity of a personal growth.

The author is the distinguished Chinese student, judge and lawyer, with whom Mr. Justice Oliver Wendell Holmes in times past often corresponded and who now teaches at Seton Hall University Law School. His previous books were *Beyond East and West* and *The Interior Carmel*. In the book under review, Dr. Wu demonstrates how well he has achieved Mr. Justice Oliver Wendell Holmes' famous injunction of

† Dean of Fordham University School of Law.

April 10th, 1924 (the date of a letter which the Associate Justice wrote to "My dear Mr. Wu"): "Probably the direction of your efforts will be modified by your experience at home, but part of life is to feel a direction or effort before it is definitely and articulately known and to persevere with faith. . . . *If I were dying my last words would be: Have faith and pursue the unknown end.*"<sup>1</sup> (Emphasis added.)

In respect of Dr. Wu, Holmes was wiser than he knew. The End which was or seemed "unknown" to Oliver Wendell Holmes became known, richly and profoundly, to Dr. Wu many years afterwards on his conversion to Catholicism. How Dr. Wu pursues that End, what his Faith is, how he feels and follows direction in his efforts and how he has articulated and given determination to the *natural impulses* of his preconscious, shaped and formed by his previous experience, as well as the *super-natural impulses* of Grace—all of these are made abundantly clear in this delightful little masterpiece directly concerned with the philosophy which must somehow underlie law if we are to avoid anarchy on the one hand and tyranny on the other.

Like Jacques Maritain, Dr. Wu is unabashedly and candidly a Christian whose joy and inspiration in the Glad Tidings make it impossible for him to keep those Tidings a secret or to exclude their implementation from any important aspect or effort of his life. One of the things that makes this book so unusual is the fact that it exemplifies what he himself wrote:

"A Christian must not judge others by the measure of his own faith, but he must judge himself by this yardstick, and he need not be ashamed of the Gospel. When a Christian lawyer expounds his philosophy of law to a non-Christian, he should try to confine himself as much as in him lies to natural reason and the facts of experience, and not require the other party to assume his faith; but at the same time he can avail himself of the right of free speech by frankly acknowledging his own faith and, if the listener is willing to hear, expounding his philosophy of law from the standpoint of his faith. . . ."

"The relevance of the Christian faith to law can be proved empirically by the history of jurisprudence. When I compare the jurisprudence of non-Christian nations with the jurisprudence of Christian nations, I cannot help observing that the latter is decidedly superior in quality. . . ." (p. 222).

It is obvious from this book alone that Dr. Wu's reading and absorption of what he has read have been enormous. His comprehension of law and its foundations bridges many centuries and many cultures. His capacity for apposite quotation has been developed to the stature of a fine art. His way of quoting Confucius, Mencius and other Chinese savants is engrossing—and maybe a bit disconcerting to occidental smugness. Wu's experience as a Chinese jurist and lawyer provides the point of departure for his epiphanic discovery and fresh exposition of the Christian jurisprudence to be found in the Gospels and in the tradition of St. Paul, St. Augustine and St. Thomas Aquinas. The Seton Hall Professor is at home with all of the landmark writings in the field of jurisprudence, ancient and modern, Christian and non-Christian. He plants the suspicion that Confucius is just as profound as Plato. Yet the burden of these tremendous intellectual acquisitions never makes his style or content drag or seem heavy. So far as this reviewer is concerned, *Fountain of Justice* is the ideal textbook for a single-semester course in jurisprudence. It scintillates with interesting passages and epigrams. It is stimulating and provocative for almost any kind of student. I think it would invite even the most lethargic reader to the effort of further reading and study in this field.

Dr. Wu writes with kindness and charity, especially in dealing with his friend, Holmes. He is forever digging from someone's writing the best and most defensible

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1. Lerner, *The Mind and Faith of Justice Holmes*, 423 (1954).

meaning. Yet he excises error with a surgeon's objectivity. He is thrilled with his subject. That is why he makes it thrilling.

My own library contains, I think, most of the important works on jurisprudence written in our time.<sup>2</sup> Yet I can think of no work on jurisprudence, no matter how much more comprehensive or ambitiously planned and executed, that I would prefer to Dr. Wu's *Fountain of Justice*.

The "Prologue" to this book sets forth and explains with lucid reasonableness "some basic notions," such as the need of a philosophy of law, the definition of law, the Natural Law as an aspect of the Eternal Law, human law as a compound of Natural Law and positive law, the meaning of jurisprudence, the sources of human law and the role in jurisprudence of rationalism, voluntarism and realism on the one hand and individualism, collectivism and personalism on the other.

In commenting on the "grand manner" in which Holmes wanted men of ordinary intelligence to be educated in the law, Dr. Wu writes:

"But my own point is that there is no other way of teaching law except in the grand manner, for the simple reason that one cannot really know the law without taking account of its sources. If only we delve into the cases deep enough, we should find it literally true that 'the sparks of all sciences are raked up in the ashes of the law.'" (p. 5).

Following St. Thomas, Dr. Wu discourses on the importance of the distinction between speculative reason and practical reason. The former deals mainly with *causes and effects* while the latter mainly with *means and ends*:

"The former has for its object the *true* while the latter has for its end the *good*. The former deals with facts and factual relations, while the latter deals with values and their relative importance, and involves the choice of ends and the determination of means thereto. . . .

". . . Most of the errors of modern jurists can be traced to a lack of clear understanding of the nature and limitations of practical reason. Those who are dogmatically inclined have sought necessity or perfect rectitude not only in the general principles but also in matters of detail. On the other hand, the sceptics have denied necessity not only in matters of detail but also in general principles. . . ." (p. 17).

This distinction might have been strengthened by using Maritain's method of distinguishing between the "two basically different ways in which the same power of the soul—the intellect or reason—exercises its activity."<sup>3</sup>

Then follows a clear and compact explication of the basic notions I listed above. Constantly the author exemplifies a happy faculty for citing current and common law

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2. To mention some important ones: C. K. Allen, *Law in the Making*; Cohen and Cohen, *Readings in Jurisprudence and Legal Philosophy* (1951); A. P. D'Entreves, *Natural Law*; E. Doolan, *Order and Law*; del Vecchio, *Philosophy of Law*; Friedman, *Legal Theory*; L. Fuller, *The Problems of Jurisprudence*; Goodhart, *English Law and the Moral Law*; Paul, *Readings in Jurisprudence*; Hamburger, *Morals and Law: The Growth of Aristotle's Legal Theory*; Hayes and Lebuffe, *The American Philosophy of Law*; Longman, *Between Community and Society*; Paton, *A Textbook of Jurisprudence*; Patterson, *Jurisprudence, Men and Ideas of the Law*; Reuschlein, *Jurisprudence, Its American Prophets*; Ross, *Toward a Realistic Jurisprudence* (1946); Simpson and Stone, *Law and Society* (3 vols); Snyder, *Preface to Jurisprudence, Text and Cases*; Stone, *The Province and Function of Law*; Strauss, *Natural Rights and History*; *Legal Philosophies of Task*, Radbruch and Dabin (Harvard University Press).

3. Maritain, *Creative Intuition in "Art and Poetry,"* 46.

cases which illustrate his point. The manner in which he does this indicates an extensive and well digested reading of many, many cases.

Here is his concise and accurate reconciliation (in the Thomistic tradition) of the elements of stability and change in law:

"To deserve the name of law, all human law must be competent to reason in a three-fold sense. First, it must not be contrary to any dictates of the natural reasons; secondly, it must be ordained to the common good, which is the *raison d'être* of law; thirdly, the means it employs must be in reasonable proportion to the end. The justice of the law depends upon how well it fulfills these conditions. This, of course, does not mean that any system of human law could be a perfect embodiment of reason. In fact, as St. Thomas has said, 'It seems natural to human reason to advance gradually from the imperfect to the perfect.' The universal precepts of the natural law are, of course, unchangeable; but human law, which is derived from the natural law by way of particular determinations and by way of concrete conclusions, must adapt itself to the ever varying conditions of human culture and civilization. Furthermore, inasmuch as natural law is bound up with human reason, as human reason grows, so does natural law. . . ." (p. 37).

After the prologue comes "Part One", a treatment of the Natural Law and the Anglo-American Common Law. The Christian genesis and inspiration of the Common Law are emphasized. A brief outline of the importance of the Magna Carta is followed by an especially interesting, if very brief, appraisal of Henry de Bracton, who died in the year 1268, and of the Year Books. This is climaxed with short, significant descriptions of the importance of St. Thomas More, Christopher St. Germain (author of *Doctor and Student*, 1518, who leaned heavily on John Gerson, the "*Doctor Christianissimus*" and Chancellor of the University of Paris, 1363-1429), Sir Edward Coke (1552-1634), who was a bitter foe of Sir Francis Bacon (1561-1626), Lord John Holt (1642-1710), Lord Mansfield (1705-1793), whose home was burned in the Gordon riots of 1780; and of the role of the Natural Law in William Shakespeare. As the author points out, there came a time in the development of English law when the Natural Law "went underground." Nevertheless: ". . . One may safely conclude that, although the law of nature is deprived of its metaphysical or ontological basis in England, so that it is no longer held to have any power of invalidating a positive law, as in the days of Bracton and of Coke, yet it still holds the residuary power of complementing it. Driven out from the front door, it has returned by the back door." (p. 106).

He might have added that if the *courts* banished the Natural Law in England, *Parliament* rarely did so. Many of the arguments in Parliament were based on Natural Law reasoning and many of the laws enacted by Parliament were nothing but "determinations" (to use St. Thomas' word) of the generality of the Natural Law.

In note 41 of this part of the book, the author comments upon a quotation (from Professor Stephen Kuttner) inserted at page 76 of *The Fountain of Justice*. The quotation was taken from the Natural Law Institute Proceedings, Volume III, page 85 (Notre Dame, 1950), in the middle of an article entitled, *The Natural Law and Canon Law*. In that connection, Dr. Wu says:

"I do not quite see eye-to-eye with Prof. Kuttner where he says that the concept of the Natural Law 'exists' merely 'in the intellectual order in the manner of Universals.' Being derived from the eternal law, which is in the mind of God, I should think that the natural law is rooted in the Reason and Will of God and therefore possesses a higher degree of reality than the words of Kuttner would seem to indicate. . . ." (p. 109).

I think, however, that Dr. Wu is wrong and Dr. Kuttner is right. Kuttner's language here criticized by Wu is as follows:

"The *concept* of Natural Law . . . taken in its strict sense as the principles which are immediately given by the rational and social nature of man, has its own reality, 'exists' in the intellectual order in the manner of universals. . . ." (p. 76).

If Dr. Wu had paid more careful attention to Kuttner's deliberate emphasis of the word "*concept*" (which Kuttner italicizes), he would not have found fault with Kuttner's statement. A "*concept*" naturally and necessarily does exist in the *intellectual order* in the manner of a *universal*. By his statement Prof. Kuttner does not derogate from the *reality* of the Natural Law as a referent. Every *concept* presupposes a *referent*. That is part of the meaning of "meaning". Both the concept and the referent have *reality but in different orders*. Kuttner (and Jacques Maritain) would agree with Wu that the Natural Law is rooted in the divine Reason and Will which are identical in God; and that it therefore possesses a higher degree of reality than any human concept of it. But we can intellectually *know* reality only through *concepts* and by *universals*, which in Wu's sense possess lesser reality than the things they signify.

Next the author treats of the reception of the common law in America. He discourses a little on the Natural Law philosophy which was learned by the Founding Fathers. Indeed, the author maintains that the Natural Law received a more cordial reception in America than in any other part of the world. (p. 127).

In his treatment of "individualism" in the nineteenth century, I think Dr. Wu is to some extent, at least, tilting with the very conceptualism which in other places he so rightly and eloquently condemns. I agree with Dr. Wu in preferring the word "personalism" over the word "individualism" to designate the practical philosophy which must lie at the heart of *sound democracy* (to be sharply differentiated from totalitarian democracies: the Jacobin "democracy" of the French Revolution or the "people's democracies" behind the Iron Curtain today). Many people in this century and in the nineteenth century, I opine, used the word "individualism" to signify approximately what Dr. Wu means by "personalism":

"Individualism, in the sense that every individual person, being made in the image of God, is an end in himself, springs from the Christian ideology, but in this sense it should properly be called *personalism*. Every creature is an individual, but only a rational creature can be a *person*. If individualism is taken in the sense that no one is his brother's keeper, that one is an absolute master of one's property, that one may do whatever one likes with one's own property, even if others are starving to death, it is utterly alien to Christianity. But it cannot be denied that this form of individualism dominated American legal thought for over half a century so far as the law had to do with commercial and industrial transactions. . . ." (p. 132).

I submit that this is, unintendedly, a misleading exaggeration. Most of the people who in the last century spoke admiringly of "individualism" would have been the first to gag at the idea that "no one is his brother's keeper", or that "one is an absolute master of one's property", or that "one may do whatever one likes with one's own property, even if others are starving to death." They would have equated, theoretically at least, their individualism with Wu's personalism. My own study convinces me that many, if not most, of those who defended "individualism" in the last century (and in this one) would be the last to advocate the idea of "absolute liberty of contract." (p. 136). True Christians, then as now, recognized matters "utterly alien to Christianity." It is true that Spencerian individualism, based as it was upon a rugged, ruthless and unprovoked Darwinism, did have some (a relatively few) followers in the last century. It is also true that some industrial and labor-union leaders of the last century, who were as innocent as babes unborn of any knowledge of either Darwinism or Spencerism, seemed to live and act as if they believed in

Spencerian sociology. But no genuine Christian who lived at the time of Spencer or shortly after (his day has certainly long since set) would have approved Spencerism then any more than today. Competition, despite the apologists of progressive education, is an unavoidable part of life and in some form or other is here to stay, despite laudable attempts to curb its barbarities. Doubtlessly, too, there were fanatics who did give a kind of "cosmic sanction" to *utterly free* competition. It is not generally known, for example, that the law of business rivalry and the early law of trade unionism were built upon a foundation of anarchically free competition. Nothing could be more illustrative of this point than an 1892 case used by the author himself (page 34 of his work): *Mogul v. McGregor*, 23 QBD 598. This set of opinions by the English Law Lords served as an important precedent not only for the law of business rivals but also and later for the conduct of strikes and picket lines by trade unions.

The *Mogul* case opinions in support of the majority ruling are a positivistic justification of cut-throat competition between business rivals. Two quotations from that case, the first from the opinion of Lord Esher and the second from Lord Bowen, support this view:

"... any act of fair trade competition, though it injure a rival trader even to the destruction of his trade, is not a wrongful act as against such rival trader's rights but is only the exercise of the . . . trader's equal rights, and is therefore not actionable. . . ."

"(from Lord Bowen's opinion) . . . But the defendants . . . have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. . . . [t]here was no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports. . . . I can find no authority for the doctrine that such a commercial motive deprived of 'just cause or excuse' acts done in the course of trade which would but for such motive be justifiable . . . . To say that a man is to trade freely, but that he is to stop short of any act which is calculated to harm other tradesmen, and which is designated to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair and reasonable. The offering of reduced rates by the defendants in the present case is said to have been 'unfair'. This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right in *rem* or in *personam*, there is some natural standard of 'fairness' or 'reasonableness' (to be determined by the internal consciousness of judges and jury) beyond which competition ought not in law to go. There seems to be no authority, and I think with submission, that there is no sufficient reason for such a proposition. . . ."

It was precisely the so-called "liberal" judges (those who protested against converting Herbert Spencer's Social Statics into ruling case law) who adopted in labor cases a rule of ruthless competition. Three brief excerpts from leading cases in the field of labor law will demonstrate this:

(1) "Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect upon his business that may result from his own competition with other employers. It is one of the risks of the business."<sup>4</sup>

(2) "Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial competents to push

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4. *Parke and Tilford Import Corp. v. International Brotherhood of Teamsters, Local No. 848*, 27 Cal. 2d 599, 612, 165 P. 2d 891, 896 (1946).

their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purpose of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature. . . ."<sup>5</sup>

(3) ". . . the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. . . ."<sup>6</sup>

". . . If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interest. . . ."<sup>7</sup>

". . . The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonists does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business. . . ."<sup>8</sup>

This line could be followed in many opinions by "liberal" judges. The point is that those who took up the cudgels for labor legislation, the very judges who were very articulately reacting against Spencerism, often did so in a very strange way. They seemed to justify an unconscionable competition by which, regardless of the merits of the controversy and regardless of "just cause" (which they pooh-poohed as meaningless), they justified labor unions in ruining employers by strikes and picket lines in a war, to the bitter end, of conflicting self-interest. If industrialists paid lip service to justice and charity, but actually denied them or flouted them because of the manner in which they conducted their businesses, the type of juridical apologists for labor unions to whom I now refer, scoffed at the very idea of "justice" and permitted the decision to go to the victor in economic warfare. Both affronted Natural Law, one by practice and the other by theory. Both, many years before the event, turned their backs on the humble doctrine of Pius XII in his most recent Christmas Allocution:

"The abandonment of the use of prayer in the so-called industrial era is a most revealing symptom of the pretensions to self-sufficiency of which modern man boasts. . . . Conditions being what they are, modern man needs also to pray, and if he is wise, he is ready to pray for security as well. . . ."

"Methinks they are establishing complete security on the ever increasing productivity and on the uninterrupted flow of an ever greater and fruitful production in the nation's economy. This, they say—on the basis of a full and ever more perfect automatic system of production, and supported by better methods of organization and accountancy—will guarantee to all workers a continuous and progressive return for their labor. . . ."

"The ever quickening pulse of life, the constantly multiplying technical productivity are not criteria which of themselves provide authority for declaring that there is a genuine improvement in the economic life of a nation. . . ."

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5. *Duplex Printing Press v. Deering*, 254 U.S. 443, 488 (1921) (dissenting opinion) of Mr. Justice Brandeis.

6. *Vegeahn v. Guntner*, 167 Mass. 92, 106 (1896) per Mr. Justice Holmes.

7. *Id.* at 107.

8. *Id.* at 109.

But I think it is an exaggeration to suggest that most American business men in the last century gave such a cosmic sanction to free competition as to urge or to believe that it scientifically justified even occasional exploitation. That there was exploitation there can be no doubt. There was also prostitution. But the existence of such evils in the last century is not the same as proof that men at that time generally justified them. Many men then and now are selfish. But they do not always justify their selfishness even when they sin by it. I think the critique of "capitalism", even the capitalism of the last century, is carried too far when it is suggested that it was built, historically, upon a Spencerian notion that evolutionary harshness was the only road to gradual progress; that cupidity could be defended as part of the universal struggle for existence; or that the possession or acquisition of wealth constituted a kind of accolade of the fittest. There were indeed a few theoreticians or doctrinaires who wrote that way. But by and large they were outnumbered in this country by the far larger number of ordinary Christians and even pagans who would never think of justifying *cupidity* or of unlimitedly hallowing *wealth* or of approving *exploitation*. I say "ordinary" Christians because it only takes the average, unheroic Christian of this or the last century to recognize the evil and indeed the idolatry of Spencerian divinization of free and untrammelled competition. Maybe Andrew Carnegie could exclaim after reading Spencer: "Light came as in a flood and all was clear." Maybe a few "Robber Barons" who would never think of trying to read Spencer's tumid prose could act as if they had invented or applied Spencerism. But I cannot believe that the "dominant classes of the whole of western Christendom" were "sanctioning ruthless competition in the name of Natural Law and the natural rights", or that the "law was tending to intensify economic and social inequalities under the cloak of maintaining an abstract and formal equality for all." (p. 137).

Belief in the *homo economicus* cannot be attributed wholly to reactionary employers or judges:

"Productive society, which forever appears to the worker as the sole living reality and as the power which keeps all in existence, gives a measure to his whole life. It is therefore his one sure support for both the present and the future. In it he lives and moves and has his being. It grows in the end for him into a substitute for religion. In such manner—the thought goes—there will arise a new type of man, namely a man who surrounds his work with the aureole of the highest ethical value, and worships the workers' society with a kind of religious fervor." (Pope Pius XII).

Many of the United States Supreme Court decisions which are used for the purpose of justifying the thesis of these quotations from Wu seem heartless and even naive to us today. But they were not decided, as is commonly urged, upon a theory of sociology or upon Herbert Spencer's Social Statics. They were decided upon a reading (which I concede was erroneous) of the United States Constitution and of its then extant case commentary. They were the warped result of that conceptualism, that "legalism of the Scribes", which Dr. Wu so properly and so warrantably excoriates.

Nor do I agree with Lord Northington, as a general proposition, that "necessitous men are not, truly speaking, free men". Undoubtedly the men who are brainwashed and metamorphosed into zombies, like Cardinal Mindzenty, as a result of the use of psychological and other twentieth century torture methods are not, in that necessitous state, truly speaking, free men. Lord Northington was not speaking of that kind of "necessitous" human being. He was talking about the men and women who were poverty stricken and destitute. Their lack of wealth does not generally deprive them of the capacity to be truly free. Otherwise St. Francis and the Apostles were not truly free. American labor has long been enjoying a higher standard of living that

that available to most workers throughout the world. "The poor you will always have with you". This observation or prophecy of Jesus Christ means that we will long have necessitous men with us. That is not the same as providing an argument that they will not be free men.

As the author contends, there is a contemporary reaction against rationalism and *individualism in the pejorative sense*. I agree that it was "the juridical rationalism of the eighteenth century that gave birth to the juridical positivism of the nineteenth" (p. 140). But I do not concur with such generalizations as the following:

"... In those days, the legislative and executive branches were alert to the labor problems and to the need of timely measures to improve the conditions of the workmen, but many courts were still intoxicated by the attractive doctrines of individual utilitarianism, which they defended by every method in the armory of the speculative type of natural-law philosophy." (p. 142).

Many of the lower courts were simply following precedents which, unfortunately and improperly, they were reading *conceptually*. Even the higher courts were simply reading the Constitution and the earlier precedents in a conceptualistic sense. Some of the courts, then as now, were influenced in their decisions by their social and economic predilections. But I do not think they were nearly as intoxicated by individual utilitarianism as it is the fashion today to assume.

As for "the ignorant advocates of the Natural Law", they are still with us. They still identify their preferences with the Higher Law. And I agree that they "were even more responsible for its (the Natural Law's) eclipse than the arguments of some of the enemies of the Natural Law". (p. 134).

The final chapter in the first part of the book is devoted to the currently observable "trend toward personalism". In this chapter, too, I cannot help detecting a trace of the very conceptualism of which Dr. Wu himself disapproves. "Christianity", he says "steers a middle course between Communism and capitalism." (p. 146). Does it? (Communism is *per se* evil, say the Popes. They have never branded capitalism as *per se* evil.) What is the meaning of "capitalism" in this context? "Capitalism" so tagged is, I think, a type of *conceptualistic* capitalism that can be written about and spoken about but has had mighty few exponents or advocates in this or the last century. It is the kind that believes in irresponsibly free and unlimited competition; the sheerest liberty of contract; unbridled individualism as the universal panacea; etc. There undoubtedly were some muddleheaded people or rogues, who may have believed in this kind of nonsense. But the leaders of our culture, the great judges and lawyers, clergymen, politicians and educators, cannot, I believe, be properly branded with that type of abhorrent conceptualism in sociology, ethics or politics. There is, after all, a defensible definition and practice of capitalism—one that is manifestly more conducive to the common good than any replacement heretofore attempted. I see no value in destructive criticism of such capitalism unless we first find something better to put in its place.

Nor can I subscribe to the statement that "St. Thomas justifies the institution of private property, not by the dictates of natural law, but by the consideration of consequences in the light of experience." (p. 147). St. Thomas argued, as Dr. Wu himself shows on the same page, that "it is lawful for one man to possess property; indeed *it is necessary for human living*. . ." (p. 147; emphasis added.) Surely, whatever is "necessary for human living" is a dictate (whether primary or secondary does not matter) of the Natural Law. Thus, St. Thomas does indeed justify the institution of private property by the dictates of the Natural Law. These are the secondary dictates of the Natural Law on which he relies: that *each man is more careful in looking after what is his own than what is common to many*; that

*human affairs are conducted in a more orderly fashion when each man is charged with taking care of some particular thing himself; and that a more peaceful state is preserved when each man is contented with what is his own.* Private property is one of those external conditions needful to citizens for the development of their faculties and the fulfillment of their duties in every sphere of life, material, intellectual and religious. (p. 147). Of course, it is one thing to say that the Natural Law justifies the institution of private property. It is quite another thing to say what are the limits to a person's possessions beyond which the Natural Law does not justify ownership of property.

"Law is made for man, not man for the law. So ultimately the end of law can be nothing short of the end of man. Now what is the end of man? As St. Thomas views it, it is threefold: the practice of virtues, friendship between man and man, and the enjoyment of God." (p. 149).

Certainly the practice of virtues as the law of man's nature makes plain is facilitated and human friendship is aided by the institution of private property. Alms-giving, for example, presupposes private ownership. It is small virtue to give away other people's property.

The remaining portions of the book constitute "Part Two". This part deals with the juridical Wisdom of Christ and with the Christian influences on the Common Law. In this sense, "Part Two" is a further development and perfection of "Part One" (p. 276). Here I find some of the most beautiful and inspiring passages of the whole book. They point to the deep, philosophical insight and religious inspiration and motivation of Dr. Wu. He gathers from the New Testament, and especially from the Gospels, seventeen or eighteen instances where Christ's religious doctrine is also unchallengeable jurisprudence. For example, our Lord's encounter with a doctor of the law, as described in the 12th chapter of the Gospel according to St. Mark, culminates in two comments: one by the doctor of the law and the other by Jesus. The doctor of the law said:

"Truly, Master, Thou has answered well; there is but one God and no other beside Him; and to love Him with the love of the whole heart and the whole understanding and the whole soul and the whole strength and to love one's neighbor as oneself, is a greater thing than all burnt offerings and sacrifices."

Our Lord's comment was brief: "Thou art not far from the kingdom of God."

Dr. Wu's appraisal of this conversation is a gem of interpretation and accommodation:

"To my mind, this discourse laid the cornerstone of the philosophy of law, of the natural law which is of particular application to the human world. It was no accident that such an important teaching on law should have been delivered to a lawyer. It may be regarded as Christ's special bequest to the profession of law, both for its own benefit and in trust for others." (p. 159).

In a chapter entitled "The Judge of Judges", Wu takes his cue from Bracton:

"It is not an unprofitable thing for judges and lawyers to be reminded of the eschatological teachings of Christianity, so that they may think of their accountability at the last judgment." (p. 163).

Two points in the author's chapter entitled "The Fountainhead of Legal Wisdom" deserve reference. He says wisely that "the end of the law is love, and no measure is set to the end, only to the means." (p. 173). A careless sentence added to this leaves an unintended and wrong impression: "In many matters, the law has to choose the lesser evil." (p. 173). The fact is that it is never valid for the law or any lawmaker to *choose evil*, whether great or lesser. What the author really means is that

the law apparently may be aimed at a particular good to which an evil is unavoidably and unintentionally attached. In many cases one must aim at goods which, against intention, entail some incidental evils. In such case, we ought to aim at the good which entails the lesser evil. A treatment of the principle of double effect would have improved the book in this connection. My second comment is to affirm my appreciation for the following splendid paragraph:

"Christ does not enter into the courtroom as the Lawgiver whose words are legally binding on the judges. No, His kingdom does not belong to this world. The common-law judges have quoted His words just as the judges of ancient China would quote the words of Confucius. But just as it is impossible to understand the old Chinese jurisprudence without a knowledge of Confucianism, so it is impossible to grasp the spirit of the common law without taking account of the permeating influence of Christianity." (p. 174).

The chapter entitled "Letter and Spirit" ought to be required reading not only for judges and lawyers but for all government officials who are charged with the administration of laws. The same evaluation applies to the chapter entitled "The Hierarchy of Values".

Throughout the book there are many able and trenchant criticisms of positivism. Perhaps the chapter entitled "Natural Law and Positive Law" does the most effective work in shattering the learned pretensions of this pervasive "*ism*".

"Positivism began with the denial of the natural law, and has ended by creating strange gods, such as the totalitarian state, class dictatorship, the Fuehrer, and, the subtlest of all, scientism or worship of facts." (p. 190).

The chapters entitled "Law and Equity", "The Alpha and the Omega", "The Logic of the Logos" and "Nature and Grace" are all magnificently Christian and profoundly philosophical and relevant in their development of two important theses. The first is that unless the jurist remembers "that justice is the sole purpose of law and love is the fulfillment of justice, he may be a master of legal technicalities but he does not really know the law." (p. 228).

The second point is the relevance of Christian Faith to law as proved "empirically by the history of jurisprudence". (p. 222 ff). In this connection the author compares the jurisprudence of non-Christian nations with the jurisprudence of Christian nations, and finds that the quality of the latter is superior. He develops this point by citing six respects in which Christian jurisprudence is superior to non-Christian jurisprudence:

1. ". . . there is a far greater respect for the dignity of man as man" (p. 222) in the Christian tradition, than for example in the Chinese and other non-Christian cultures.

2. Christian jurisprudence personalizes and inwardizes responsibility by its emphasis on the teaching that intention fixes the character of an act.

3. One of the most remarkable influences of Christianity on the attitude of judges puts the political sovereign in his proper place. Even the sovereign is subject to law.

4. According to Christian jurisprudence, there may be no respect of persons; and before the law all persons are entitled to equal respect.

5. "Starting with the Fatherhood of God and the brotherhood of men, the Christian jurists of all ages have with one voice denounced tyranny, and succeeded in bridling the powers of the political sovereign." (p. 224).

6. Christian jurisprudence emphasizes that "we must obey God rather than men".

There is, after all, only one way to be as convinced of the merit of this book as I am: you must read it.

GODFREY P. SCHMIDT†

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† Assistant Professor of Law, Fordham University School of Law.