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Book Reviews

BOOK REVIEWS

THE SUPREME COURT FROM TAFT TO WARREN. By Alpheus Thomas Mason. Louisiana State University Press, Baton Rouge: 1958. Pp. 250. $4.95.

From the prolific and competent pen of Professor Mason, we receive another interesting book on the subject of constitutional law. The list of his accomplishments in the field is extensive:

Brandeis and the Modern State, 1933; *The Brandeis Way,* 1938; *Bureaucracy Convicts Itself,* 1941; *Brandeis: A Free Man's Life,* 1946; *Free Government in the Making,* 1949; *The Supreme Court: Vehicle of Revealed Truth or Power Group,* 1953; *American Constitutional Law (with William M. Beaney),* 1954; *Security Through Freedom,* 1955; *Harlan Fiske Stone: Pillar of the Law,* 1956.

Of this list I have had the pleasure of reviewing three: the Brandeis biography (1946); the case book on American Constitutional Law (1954); and the Stone biography (1956). *The Supreme Court from Taft to Warren* is worthy of the tradition of scholarship and industry established by Professor Mason. His style is always inviting. He never lets scholarship become so ponderous as to overburden his sentences and his readers.

I recognize here a number of characteristics which I have come to associate with Professor Mason. Indeed, he seems to exhibit them rather faithfully whenever he addresses himself to constitutional law. There is the same, sometimes amusing and sometimes provoking, tendency to classify judges and lawyers as "liberal" and "conservative." Mason's favorites on the Bench are almost always "progressive." His whipping boys are "reactionaries." Of course, we often have no escape from using this type of classification in making or implying or taking for granted judgments concerning the social problems of our day. This is true even though we readily perceive the inadequacy of our terminology and the merely approximate meaning signified. That is not what I object to. We are compelled to use words which are inefficient to convey precise meanings when no better words are available. What puzzles me, however, is that Professor Mason seems to assume, without proof and by way of prejudice, that to be "reactionary" is always to be wrong. What is so right or sanctified about this action that its reaction should inevitably be evil? Do not liberals react to conservatives?

In the debates and discussions of our time, three kinds of words are often employed. The first kind is a label which, as soon as you read it, you realize is intended to have a pejorative meaning: "reactionary," "conservative," "isolationists." The second category of words is always put to some use which the writer, it is plain, commends: "liberal," "middle-of-the-road," "progressive." The third genus comprises words of neutral connotation. Smug assumptions might be served, but the intellectual pursuit of truth is often obscured, by a procedure that constantly leaves fundamental principles to be taken for granted, because they hide behind mere emotive slogans devoid of explication.

The author illustrates a second idiosyncrasy in statements like the following: "Yet the myth persists that the Justices are but mouthpieces of the law and may themselves will nothing."

"*Marbury v. Madison* is notable not only because it established the doctrine of judicial review but also because John Marshall, in asserting this power, set forth the notion that the judicial process is essentially an exercise in mechanics."

"Nevertheless, the miraculous mechanical theory of the judicial process still has its defenders."

Who are these defenders? Where are the noteworthy people among whom the myth persists that Justices are but "mouthpieces of the law" (this is obviously intended to be derogatory)? How can anyone seriously allow that Marshall plumps for the notion that the "judicial process is essentially an exercise in mechanics"? Such statements and any other like them appear to be vast oversimplifications of a difficult problem.

Marshall had a constitution to construe. In his simplicity, he thought that when a constitutional problem was presented he ought to go, in the first place, to the text of the Constitution, rather than to a book on sociology or economics or politics or even ethics. He had a healthy respect for the meanings of the words used by the Founding Fathers. As well as anybody he knew that words do not always faithfully portray intention. He even knew that clearly expressed rules have a way of becoming outmoded in the long sweep of history. However, he was naive enough to think that he ought first to search the Constitution itself, although written in 1789, for its meaning even though such a procedure offends modernist pretentions. Then, if he needed more, he could refer to the intention of the Constitutional Convention as implicit in the words of the Constitution. Beyond that he could even go to history for guidance with the purpose of seeking out the evils to be remedied by the Constitution.

Doubtlessly, his library was not as large as our modern law libraries. It was probably devoid of books of sociology and anthropology and even economics. Perhaps, there is a "mechanical" aspect about taking the text of the Constitution and laying it alongside a pleading or a brief in order to measure controversy by a constitutional rule. This, surely, is not enough to show that Marshall entertained the notion "that the judicial process is essentially an exercise in mechanics." In mechanics every reaction is equal to every action. Not even those judges whom Professor Mason would accuse of being reactionary would respond in the same way to a given constitutional problem. There are provisions of the Constitution which could be, as it were, "mechanically" applied, because they employ a bit of the basic language of mechanics, namely, mathematics. When, for example, the Constitution provided that each state is entitled to two senators it meant neither more nor less. When it set up arithmetic measures (e.g., art. II, section 1 [3]), it meant something approaching mathematical accuracy. Such provisions of the Constitution and their interpretations will never involve the courts in any great difficulty nor raise any significant problems. But a phrase like "due process of law," precisely because it is so noncommittal and vaguely general, requires far more of a judge than "an exercise in mechanics." Marshall knew and enacted this as well as Professor Mason.

In this connection Professor Mason quotes with approval some words written by Justice Frankfurter in 1949: "The words of the constitution [are] so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the constitution but from reading life . . . ." All I can say is that some of the Supreme Court decisions neglect the Constitution enough to give you this impression! The sentence just quoted from Mason's book is, on its face and in the context of history and of constitutional commentary, vastly overgeneralized and vague in meaning. Some of the words of the Constitution are restricted by intrinsic meaning. If our language is so loose that it has no intrinsic meaning, then we can "read life" all we want; yet as soon as we start to write about life (rather than the Constitution), we can, on this hypothesis, attribute no intrinsic meaning to it. Moreover, history and tradition do restrict the meaning of broad words. Due process, for example, has much ascertainable meaning given it by history and tradi-

tion. Equal protection of laws has a restrictive meaning by virtue of prior decisions. Of course, if the over-generalized statement by Justice Frankfurter as quoted above is sound doctrine, then, indeed, the individual Justice on the Supreme Court is as free as the anarchist to gather meaning not from the Constitution, but from life. The point is that the Constitution, like every other writing, may be, and often is, ambiguous. But are the lessons to be read from life by different people always clear and univocal? I cannot see how clear vision of truth and the ministry of a practicably certain law can be aided by placing above the Constitution the rule that you ought to gather meaning not from reading the Constitution but from reading life. I don't know why it would be necessary to read the Constitution if such a canon deserved the importance the author seems to give it. Apparently Professor Mason gives it importance because of the Constitution's ambiguity: "It is on the rocks of the Constitution's ambiguity, permitting even compelling the translation of judicial preference into law, that the mechanical theory breaks down."

The mechanical theory of jurisprudence was broken down the day it was first announced. I have never met a reputable lawyer, judge or scholar who was its advocate. But, even if I took the writer's illustrations of the mechanical theory in this book, the theory that you should settle constitutional problems by gathering meaning, not from reading the Constitution, but from reading life is itself more devastatingly demolished on the rocks of the Constitution's ambiguity.

Marshall and the Founding Fathers knew that no group of men, then or now or in the future, will ever be wise or omniscient enough to write a constitution that requires no correction or amendment through the ages. The important thing is that they gave us a constitution which for all of its frailties, limitations, and ambiguities, has a more ascertainable meaning than anything which can be derived from "reading life." It has also given us a freer and better way of life than is available under most governments. If what the Founding Fathers wrote or intended is today inadequate in particulars, the right way to handle the resulting problem is to amend the Constitution rather than to give judges a roving commission to "read life" and to enshrine their pet readings in authoritative constitutional commentary.

Everybody knows that judges often do legislate and sometimes must. What I deprecate, and what I think makes for an intolerable type of judicial legislation is to have longstanding judicial precedents, which have roots deep in the theory and practice of our country, suddenly overturned by a bare majority of the Court because that majority is applying some favorite sociological theory or is relying on some economic predilection or is casting about for some insight into "social advantage" as to which a legislature is better qualified to pass judgment than a few judges.

Political prejudice should have more reasonable boundaries than I can perceive in such a sentence as this: "Harding entered the White House on a landslide vote, a record seven-million majority, and within a year Taft himself was able to interpose the Constitution as a 'bulwark' to protect property." What is wrong about interposing the Constitution as a bulwark to protect property? All through history from the time of Thucydides, demagogues who imperilled property rights shortly thereafter endangered also personal liberty. Hillaire Belloc, a man of remarkable historical insight and a great historian, wrote "The Servile State" for the purpose of showing that when property is not protected by government neither is the person. In any case property rights are really personal rights. I realize that much depends on how you define "property." I realize, too, that people deserve more respect than property. But I think it is also clear that the Constitution was intended by the Founding Fathers to be a bulwark for the protection of not only the person but also property. Indeed, I think that property in some of its forms deserves more protection than it

is being given today by liberal judges who make a fetish out of an almost anarchic freedom, especially freedom of speech. In this respect, I thoroughly agree with Walter Bens in his book *Freedom, Virtue and the First Amendment.* I do not see much "social advantage" or much intelligent "reading of life" in a constitutional gloss which permits Justices of the Supreme Court to palaver learnedly about the right of some pornographer or Communist to enjoy the freest speech permitted by any government today, while, at the same time, they permit gangster union leaders to submit hundreds of thousands of decent American workers to virtual dictatorship. Almost inevitably the union constitution involved has absolutely no vestige of a bill of rights and provides no procedures to vindicate free speech. Indeed, if this condition continues without regulation for the next twenty-five years, as it has for the past twenty-five years, the threat of a labor-gangster fascism will become an oppressive actuality. In my opinion, one of the weapons by which workers can be cudgeled into submission is compulsory unionism wielded as a weapon of aggression by corrupt labor leaders and their gangster friends working to perpetuate intra-union oligarchies. It seems rather empty to talk about the constitutional right to wag the tongue in free speech while you do not recognize a constitutional right to engage in a vocation or calling without the permission of labor leaders whose power of purse is unlimited, whose political power is all but unlimited, and whose responsibility and conscience are rarely in evidence.

For this reason I do not see Professor Mason's "continuous problem" as he does: "Our system faces no theoretical dilemma but a single continuous problem: how to apply to ever changing conditions the never changing principles of freedom." If conditions change and the principles of freedom do not change, then the real constitutional problem is to put into the Constitution by amendment or by fair and reasonable interpretation of the present Constitution, "the never changing principles of freedom." When this is done, the right course will be one of extreme reaction to any change of these "never changing principles of freedom" or of the Constitution which embodies them. Certainly, I cannot conceive that the right answer is to keep changing the constitutional principles or commentary when judges rather than legislators are the principal authors of such changes.

Above all I cannot understand how, as the author suggests, the cure can lie in the recognition of the Court's actual policy-making function. I do not even see how the cure could come from making the judges "keep up with the country": "to Chief Justice Warren's Court 'stability' evidently means keeping up with the country—indeed with the world—not blindly or ambiguously adhering to outmoded precedent." Of course, I do not recommend blindly or ambiguously adhering to anything. But once you have a Constitution that is worth the paper it is written on it ought to be adhered to faithfully and intelligently. It is far, far better to construe it than to conduct a series of judicial experiments aimed at keeping up with the country. This would be especially true if we did or could include in the Constitution a few of the "never changing principles of freedom" to which Chief Justice Earl Warren and Professor Mason refer with approval.

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CASES ON CRIMINAL LAW AND ITS ENFORCEMENT. By Livingston Hall and Sheldon Glueck, 2d ed. West Publishing Co., St. Paul: 1958. Pp. 699. $11.00.

"The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern."[1]

Expressing the concern of which Blackstone spoke so well, Professors Hall and Glueck[2] have brought forth a second edition[3] of their casebook on Criminal Law and its Enforcement. This casebook is designed to cover a four hour course in its titled subject. The authors, therefore, include, in the latter part of the book, cases dealing with basic problems in the law of evidence as well as decisions raising constitutional issues. The problems of wiretapping, self-incrimination, confessions, searches and seizures are considered. There are cases dealing with the various steps in a criminal proceeding as well as decisions covering the sentencing powers and practices of courts. Much of this material would necessarily have to encroach upon the subject matter of courses other than criminal law. Whether such overlapping is desirable in view of the ever expanding law school curriculum is doubted. This reviewer conducts a two hour course in criminal law. Its enforcement I think is better left to the various police agencies and better taught in institutions whose function is to prepare those who aspire to positions with such agencies.

Taken as a collection of cases to be utilized in a two hour course on criminal law, this casebook is more than adequate. It will be necessary however to "tip-toe" through the pages if one wishes to discuss the law of crimes and not fringe problems such as the treatment of criminals which also is, in my opinion, better placed in some curriculum other than that of a school of law.

The major felonies are dealt with excellently. Side by side with the old familiar cases stand newer decisions which complement and add to the body of the criminal law.[4] *Commonwealth v. Webster*[5] again points the way toward an understanding of the law of murder, and the inclusion of *Commonwealth v. Redline*[6] brings the subject up-to-date. The authors have also included sections of the English Homicide Act of 1957[7] which indicates one view of modern legislators on the problem. Sections of the fourth draft of the Model Penal Code and the Wisconsin Penal Code enacted in 1955 are also included. These can serve as the basis of a profitable comparison on the various viewpoints taken by the respective codifiers.

In the chapter dealing with the law of theft the authors once more point out the hopelessness of it all. The intricacies of the crimes of common law larceny, cheats, embezzlement and false pretenses are clearly delineated. Good discipline these!

1. 4 Blackstone, Commentaries *2 (1769) cited in the frontispiece of the work reviewed.

2. Livingston Hall is a Professor of Law and Vice Dean, and Sheldon Glueck is a Roscoe Pound Professor of Law at Harvard University.

3. Perhaps one should more accurately say it is their third edition. See Hall and Glueck, Cases and Materials on Criminal Law (West Publishing Co. 1940); Hall and Glueck, Cases on Criminal Law and Its Enforcement (West Publishing Co. 1951).

4. The authors should appreciate this sentiment. They have insisted for eighteen years that "the law is like a coral reef." See Hall and Glueck, Cases on Criminal Law, p. 47 supra; Hall and Glueck, Cases on Criminal Law and Its Enforcement (1951), p. 2 supra.

5. 59 Mass. (5 Cush.) 295 (1850).

6. 391 Pa. 486, 137 A.2d 1472 (1958).

7. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11.

Morissette v. United States[8] is a profitable addition to this section. Most of the commonplace crimes are treated as they were in previous editions. *Commonwealth v. Schultz*[9] is a welcome newcomer to the chapter on burglary and *Regina v. Davenport*[10] has been included in the chapter on theft. This is, in my opinion, a particularly good teaching case.

The section entitled "Insanity"[11] brings together McNaghten[12] and Durham.[13] The authors have happily refrained from a blanket endorsement of the "no rule" of the latter case and for this original prudence they are to be commended. The inclusion of the recommendations found in the Report of the Royal Commission on Capital Punishment and the view expressed in the Model Penal Code draft will surely facilitate classroom discussion of this vital and current problem.

Despite some simian sorties into the realm of philosophy the book is a valuable teaching tool. I do not take seriously the authors' statement, "The law draws its life juices from custom and public opinion." (p. 16.) This is for them, I suppose, the "sound and fury." Unless they are in earnest. If so, I would suppose they should now be very busy keeping negro children out of Central High School in Little Rock in order to keep up with the "custom" and "public opinion." In a footnote to the quoted text the authors use the term "moral culpability." They also note that what they term "retributive justice" is still alive and, at least it seems to them, surprisingly so. If 'custom' and 'public opinion' ever replace objective morality as the norm of civilized conduct then we might better close our courts and revert to wager of law or trial by combat. The authors' views on this subject do not seriously impair the value of the book but these asides should not go unnoticed. I hope too that upon reflection the authors will repent the following: "Since euthanasia occurs where the defendant directly administers or actuates the deadly force, it is more nearly analogous to assistance in suicide. . . . It can be strongly argued that such assumption of risk, like consent should be a mitigating factor." (p. 76). I have always understood consent to a crime is a void act. Assumption of the risk is a tenet alien to criminal law. Murder is still, I believe, the deliberate taking of a life. So is euthanasia. At least I hope it is.

The above thoughts on collateral matters aside, we now have a new edition of a good casebook on criminal law. It will be informative and useful in the teaching of criminal law.

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TRAFFIC VICTIMS. TORT LAW AND INSURANCE. By Leon Green. Northwestern University Press. Evanston: 1958. Pp. 127. $4.00.

Professor Green "seeks to demonstrate the obsolescence and futility of common-law jury trials and liability insurance as a remedy for traffic casualties, and advocates compulsory comprehensive loss insurance as a substitute." (p. 5). Originally presented in the form of lectures delivered at the Northwestern University School of Law,

8. 342 U.S. 246 (1952).

9. 168 Pa. Super. 435, 79 A.2d 109, cert. denied, 342 U.S. 842 (1951).

10. 1 All E.R. 602 (1954).

11. I am pleased to see the word still exists for it has been said: "In medicine the term usually has no meaning." Wertham, The Show of Violence 15, 86 (1949), cited as a footnote to Sauer v. United States, 241 F.2d 640, 648 (9th Cir.), cert. denied, 354 U.S. 949 (1957).

12. McNaghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

13. 214 F.2d 862 (D.C. Cir. 1954).

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this somewhat revolutionary theory is advanced by the author in clear, staccato language.

The reader is reminded of Professor Green's earlier article[1] where in the same forceful style he implied the need for regulatory controls to prevent personal losses from automobile injuries. Perhaps one might say that his most recent effort is an offshoot of his earlier ideas as developed over the past generation. A summarization and attempt to simplify the development of our complex negligence law are difficult tasks. However, the author has done an admirable job, pointing out the milestones as signposts leading our society to an inevitable result.

The rapid maturing of negligence law from its infancy in the nineteenth century is explained in terms of scientific discoveries, mechanical inventions, and new processes for exploiting natural resources. Negligence law finds its origin in the attempt to free infant enterprise from the burdens of tort liability imposed by the strict morality of earlier law.

The twentieth century developments reflect a reaction to change in our social order. Where property rights once held sway, pre-eminence is now given to the interests of the individual. The changes, though gradual, were marked by detailed instances. The provisions for death and survival actions, the liabilities imposed on landowners adjacent to highways for hazards imposed on travelers are but landmarks. The landowner, seemingly safe against liability, saw his immunity pass gradually through the doctrine of "attractive nuisance" and a judicial device raising some persons to the level of licencees or implied invitees. Carriers are held to an exacting degree of care for injuries to persons on their tracks. Violations of police regulations are considered prima facie evidence of negligence or negligence per se. The doctrine of foreseeability has had far-reaching consequences through wide judicial extension. The immunities afforded hospitals and municipalities have been slowly disappearing as a result of legislative and judicial action. With this extension of liability there has been a corresponding expansion of risk and increased evaluation in money damages over the whole area of tort law.

Professor Green points out that the highway has subjected negligence to its severest test, and he feels that our present law cannot withstand the strains of the highway and sky-way of tomorrow. A revolution is in the making, transforming the law into something more practical than we can yet perceive.

Liability insurance is yet another force that has wrought significant changes in the practical effects of negligence law. How many are the claims it has removed from the judicial arena! It has also had a marked effect on jury verdicts since most informed people realize that the "actual" defendant is a solvent insurance carrier. Financial responsibility statutes have contributed to this development since today all states have adopted such legislation in one form or another.

The motor vehicle has unquestionably made the most indelible impact on the law. Yet, the author contends, the courts seem to stumble along wholly incapable of providing remedies for the ever mounting toll of traffic casualties.

Judge Marx presents the picture graphically:

"One dead every 15 minutes. One injured every 22 seconds. Every year the injured and dead equal the population of St. Louis. Four years' delay in New York. Five years' delay in Chicago. Delay everywhere. Hospitals crowded with automobile victims. No improvement in the whole miserable system in thirty years. In that period—the radio, television, the atom—all new. The new has displaced the old—

1. Green, One Hundred Years of Tort Law. 3 Law: A Century of Progress 44-56 (1937).

but we lawyers still cling with petrified thoughts to the dead hand at the archaic liability system—devised for the dead past." (p. 85).

How does Professor Green propose to alleviate this chaotic condition? He suggests compulsory comprehensive loss insurance providing substantial coverage for all traffic losses as a remedy. This insurance would entirely supplant the law of negligence in motor vehicle casualty cases and would be an incident to the licensing of motor vehicles. The imposition of penal sanctions would form the basis of compliance. Administrative details including methods of presenting claims, hearing procedures, and judicial supervision are outlined. It is interesting to note that losses are to be measured by present rules of damages but *excluding* loss for pain and suffering. The success of the proposal lies in its judicial administration. Since the only issue is the extent of damages, the cases would be referred to masters, selected and supervised by the court. Procedures would be judicially enforced and a prompt disposition of claims is anticipated.

Professor Green distinguishes his proposal from the present system utilized in Workmen's Compensation matters. He considers the classification of injuries with predetermined price tags farcical.

Those who disagree with the author's thesis may disregard the entire proposal by discounting the revolutionary development in tort law as a mere outgrowth of our legal system. But even opponents of the measure cannot disregard the economic and social pressures exerted on the practical application of negligence law. The opponents will contend that the public should not be precluded from the ancient and traditional safeguards afforded in our courts of law. But we cannot disregard the cold facts of calendar delay, nor the feeling of many that defenses against acts of negligence are mere mythical concepts to be taught to law students. These problems daily loom larger, and a voice raised to solve them is not lightly to be dismissed.

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