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Book Reviews

BOOK REVIEWS

YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY. By Catherine Drinker Bowen. Boston: Little, Brown and Company. An Atlantic Monthly Press Book. 1944. Pp. xx, 475. $3.00.

Oliver Wendell Holmes, Jr. has been such a figure in the legal world, and this book has received such extensive acclaim from the general public, that despite its lack of emphasis on legal lore, and abundance of personalities, it deserves notice in a journal of this kind. Mrs. Bowen has previously written of musicians; she brings to the present task well-trained powers of investigation and of painstaking scholarship, together with imagination, feeling and, as was to be expected, a sympathy and admiration for Holmes which almost amount to hero-worship.

A large section of the book deals with Holmes' forbears, beginning in 1800 with his grandfather, the Reverend Abiel Holmes, and describing the career of his famous literary father, the "Autocrat of the Breakfast Table," in considerable detail. Holmes is not born until p. 81, and we read over a hundred pages more of vivid and minute description of his Harvard College and Civil War days before finally seeing him into law school on p. 198. This is not said by way of criticism, but to indicate the character of the book. Notice the title. It is not meant to be a professional analysis of Holmes' meaning to the law or to jurisprudence. The author has probably left it to the official biographer of Holmes, Professor Howe, to supply us with such an analysis. Besides, the political and economic significance of Holmes' work received lengthy treatment at the hands of Max Lerner in another book gotten out by the same publisher not long ago: *The Mind and Faith of Justice Holmes.*

I cannot agree with the complaints of some reviewers of the book that the semi-fictional method, in which Mrs. Bowen imagines the conversations of the characters, and sees what is going on in their minds, detracts from the essential accuracy, or is a sort of impertinence. *Quis novit consilia Dei?* they seem to ask. Should a Philadelphian probe the privacy of Yankee Olympians? But the book is admittedly an interpretation. And one who has studied Holmes' life and times in the contemporary records both public and private as carefully as Mrs. Bowen has done, is entitled to give us her interpretation for what it is worth. I think it is worth a great deal and that its value is enhanced rather than diminished because the author has approached her subject with sympathy, not with a mud-rake.

My criticism of the book is its failure to evaluate Holmes as a philosopher of law and life. It makes all the difference in the world (both to law and life) whether you believe in God, the author of both, and in spiritual realities, or whether your view is contracted to matter and motion and nothing else. Holmes had matter and motion as the only ultimates in his universe. As a consequence of it he defended the theory that might makes right and that rights are completely imaginary in any other explanation. He rejected all absolutes and believed in no morality except that which is based ultimately on sheer blind likes and dislikes. The last word he had to say on German atrocities in World War I was this: "We don't *like* it and shall kill you if we can." He could not call anything absolutely immoral or unjust. His philosophy was alarmingly totalitarian. These are important elements in his mental make-up and should have been discussed or "interpreted" in any biography of Holmes. It is symptomatic of modern secularist thinking that considerations of this

kind are either ignored or dismissed with the epithet "metaphysics." But the metaphysics of Hitler and Stalin have turned out to have some very physical implications. Holmes is their next-of-kin, philosophically speaking.

This book, with the above qualification, is recommended reading for all who are interested in the American and New England scenes of the last one hundred years, and who want to read about these scenes in a well-written, accurate, and engaging book.

JOHN C. FORD, S.J.†

A WORLD TO RECONSTRUCT. By Guido Gonella. Milwaukee: Bruce. 1944. Pp. xxx, 335. $3.50.

This is a very important book for our times. Published under the auspices of the Bishop's Committee on the Pope's Peace Points, it is a commentary on the Christmas messages of Pope Pius XII for the years 1939, 1940, 1941, 1942 and 1943. Dr. Guido Gonella, an authority on international law, during the year 1942 published, in the Vatican City daily, *L'Observatore Romano,* a series of articles under the title "Presuppositions of an International Order." These articles were later published in book form and were translated by the canonist, Rev. T. Lincoln Bouscaren, S.J. The book constitutes a valuable supplement to the previously published *Principles for Peace,* which comprises excerpts, on the subject of international relations, taken from the declarations of the Sovereign Pontiffs from Pope Leo XIII to the presently reigning Pontiff.

Without being utopian, the book outlines a rational scheme of international organization and relations which, by contrast with what has obtained since the first World War, emphasizes how superficial in many respects is the civilization of our times, how primitive have been our international *mores* and how close to savagery is that system of secret diplomacy, disrespect for treaty obligation and untrammelled sovereignty which has pushed modern man to the brink on which he now stands.

Reading this book gives one the experience of contact with a learned and forceful personality whose objectivity, as he threads his devious way through a multitude of controversial questions, is positively amazing. His grip on the subject is so firm and his insights are at times so profound that one is left wondering which is more to be admired, the commentator himself or the pontifical master whose sentences he elucidates. To the tangled elements of western man's scheming diplomacy he brings the prescriptions of justice, charity and supernatural religion.

The Papal Peace Points are portrayed as a constructive and intelligent framework, appealingly rational but almost utterly untried by a world that seems ready and willing to try practically everything else, to its ruin. The contrast between this plan and the present chaos leaves one in a state of horrific amazement at the malice, duplicity and selfishness of men. Here is high-lighted, especially, the futility of those men who scoff at justice and charity as impractical and insubstantial. What could have been more fatuously impractical and more elusively insubstantial than the hundreds of international treaties, accords and pacts, couched in pompous language and signed with such flourishes by the big-wigs of the nations during the 20 years suc-

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ceeding 1919? What reality did the "realist" give them or us? These "realists" were the veridical builders of houses of cards. It is precisely their world that has degenerated into barbarism. Turning out the lights of humanity and culture all over the world, they have made right out of might. They were the fashioners of Versailles, Locarno, the Pact of Paris and dozens of other grandiose arrangements. They were the people above all others who sought to perpetuate the *status quo* of inequities and wrongs.

Too much of the talking and thinking on problems of peace and international relations is in terms of shibboleths: the "four freedoms", "collective security", "international democracy", etc. It is unfortunate that those who deal primarily with principles (whose source is in logic, law and the power of the spirit) often do not concern themselves with applications. On the other hand practical politicians are too often so absorbed in prudential decisions that they forget principles. Gonella's book is the enlightening and refreshing product of a mind capable of tracing applications down to their roots in principles.

In the first place, Gonella is persuaded that "laws cannot be reformed without a reform of morals".[1] Especially in the field of international law does it become apparent that law rests upon a foundation of morality or it has no foundation; except possibly the shifting shoals of expediency. If human enactments depend in the last analysis upon the natural law, peace (as the Augustinian "tranquility of order") ultimately depends upon man's conquest of moral evil.

Incidentally, St. Augustine's eightieth sermon contains language showing how old this thought is: "Bad times, troublesome times, this is what men say. Let their lives be good, and the times will be good. We are the times; we make the times what we are. . . . what is this evil world? For the sky and the earth and the waters and the things that are in them, the fishes and the birds and the trees, are not evil. All these are good; it is evil men who make this evil world."

For "peace . . . is not a beatitude to be found in tired and colorless inertia, but progressive emancipation from the slavery of evil".[2] Despite the malice and chicanery of men who have succeeded in cramming this unfinished century so full of war and destruction, the author believes that "no obstacle can resist the sincere will of man for peace".[3]

But that sincere will implies many things hardly congenial to the passions and emotions of men today. It requires a Christian victory over hate, which, as a motivation, is not only illogical but immoral; not only destructive but suicidal. Sincerity in international relations requires the kind of good faith, trust and fidelity which the crisis of our times has all but banished. It requires that men recognize the illusions of that narrow and short-ranged utilitarian spirit which lusts for immediate advantage to the detriment of the ultimate rights, purposes and destiny of men. There are "embarrassments which may be occasioned by the quest of the useful when dissociated from the quest of the right. Morality is sacrificed for the sake of a good bargain; and in the end it turns out that one has not even done good business."[4]

Justice must come before utility. But in the long run what is just is genuinely

1. P. 3.
2. P. 171.
3. P. 195.
4. P. 38.

useful; that is, in that perspective which respects the intervention of a Divine Spirit in history. The welfare of the State is not the supreme norm. Rather is justice the *suprema lex* of the State. *Pereat mundus sed fiat justitia.*

Perhaps the wretchedness of man is best illustrated by his credulity in the face of the myth of force. True, it is not common today to hear people repeating Bismark's "Macht vor Recht" as worthy doctrine. But it is rather common for men to *act* as if they believed it even today. So much of what goes under the name of international relations in this twentieth century is nothing but the "will to power" . . . the "interest of the stronger" of which Thrasimachus spoke in Plato's dialogues.

Finally, modern men must realize that national egoism is as ugly as personal egoism. The solidarity of the people of the world is not a fable or an idle dream. It is one of the strongest roots of the natural law.

An invaluable feature of this book is the detailed and practical manner of its treatment of such difficult problems as the protection of minorities, the equitable international distribution of wealth and economic cooperation between peoples and nations.

Closely following Pope Pius XII, the author calls for the elimination of all recourse to "total" war. In this connection the author's definitions and judgment find an excellent supplement in a brilliant and challenging article by Father Ford, the Jesuit moralist, appearing in the current issue of *Theological Studies* under the title "The Morality of Obliteration Bombing."

Particularly instructive are the pages which Gonella devotes to the reasons for, and prospects of, disarmament and to plans for armament limitation.

But lawyers and judges who are not too severely affected by the virus of legal positivism will particularly welcome the author's analysis of treaty obligations and of the failures of treaty revision. His study of the crisis of our treaty system will revive painful memories. "How can one expect treaties to be respected when in the prevailing juridical science of our time, neither the more widely accepted political doctrines nor international practice place the foundation of treaties upon an imperative of a moral character."[5]

Gonella gives an incisive if brief criticism of juridical positivism. He complains that the positivists confine themselves to stating and illustrating positive norms. They attempt to explain law without going outside the law. Such theory in effect equates legal right to simple manifestation of the will of the state. Gonella refers to this as "juridical fetishism".

"There is a juridical fetishism which tries to vindicate the autonomy of the juridical world by breaking all connection between law and morals. It is a purely technical system, which regards morality as an intrusion in the field of the positive provisions of treaties, which are held to be just, not because they have justice in them but merely because they are in fact positive provisions."[6]

Thus legal positivists mistake the simple fact of the existence of norms for the foundation of its binding force. They consider law merely as description, being blind to its role as prescription. They confound the "positive character of norms with their obligatory character, whereas the *ratio obligandi* can have none but a moral foundation."[7]

5. P. 199.
6. P. 199.
7. P. 203.

At some future time, when men have grown more sane and civilized they will look back on Pius XII and his commentator Gonella as men born out of their time. They will salute them in their tombs across the broken bridges of the years as we might salute the author of the letter to Philemon—who, unheeded, in the ages of slavery pleaded that human persons are not mere means or tools.

Meanwhile one can perhaps only take little steps gradually to effect the dual disarmament which a more livable world implies.

"To establish disarmament in the minds of individuals and in public opinion—that is the task to which all men are called. All those who at heart are devoted to justice are delegates and plenipotentiaries in this permanent disarmament conference, which expresses itself, not in empty international discussions, but in the modest and hidden labor of whoever treads the little round of daily duties and dedicates his efforts to educating consciences, to enlightening minds, to recalling men to the dictates of heart and reason.

"It is not enough to take from the States the arms which they possess and hold in their hands. It is necessary to take away the reasons which the peoples have for armaments, to take away their desire for armaments, the habit and the passion of armaments."[8]

Excision of these reasons from the diseased mass of vice and irrationality that weighs like an incubus on our times is difficult surgery. But it must be done if we are to avoid cynicism and despair.

Pope Pius XII and Gonella point the way.

GODFREY P. SCHMIDT†

THE PARDONING POWER OF THE PRESIDENT. By W. H. Humbert, Washington, D. C.: American Council on Public Affairs, 1941. pp. 142. $2.50.

This small volume is the first and only thorough-going study that has been made of the President's pardoning power. The author, a member of the teaching staff of Hollins College, Virginia, tells us that the study was begun under the supervision of Dr. W. W. Willoughby, former chairman of the Department of Political Science of Johns Hopkins University, who writes a graceful foreword, but that it was not completed until after his retirement.

The subject is considered under five principal heads, dealing respectively with (1) the pardoning power in England and the American Colonies, (2) definitions and distinctions, (3) constitutional and legal aspects (two chapters embracing more than one third of the book), (4) the pardoning process, and (5) administrative aspects. A survey of these topics is followed by a short chapter in which the author states his conclusions, and offers some constructive suggestions.

Although the Constitution authorizes the President to exercise clemency in only two forms—that is, "to grant reprieves and pardons"—the courts have construed the grant as covering the entire field of executive clemency as exercised by the kings of England. Not only does the President grant full pardons and reprieves, but he also

8. P. 172.

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grants conditional pardons, commutations, and remission of fines and forfeitures. The courts have also upheld his right to grant amnesties to classes of individuals, as was done after the Civil War—a form of pardon usually granted before conviction to large groups of people. The only restrictions on the President's pardoning power, are (1) in cases of impeachment and (2) in civil contempts of court or of the legislature—the former by express constitutional restriction, the latter by an immemorial rule of the common law. The right to pardon criminal contempts was sustained by the Supreme Court in the case of Ex parte *Grossman,* in an able opinion by Chief Justice Taft.[1]

The author tells us that though there have never been the scandals connected with the President's exercise of the pardoning that have occurred in some of our states, there have been abuses that have called forth criticisms both from Congress and from private individuals. For example, in 1882, Henry Cabot Lodge published an article covering a study of naval courts-martial for 17 years. He found that 60 per cent of the sentences imposed in such cases were set aside, remitted, or commuted; that responsibility for most of this action rested on the President; and that influence and political pressure was a determining factor in a great many of the cases. The author also deprecates the granting of clemency upon the recommendation of the trial judge or of the prosecuting attorney. He calls attention to the fact that the Federal probation and parole systems have developed a staff of trained workers that are assembling detailed information about all Federal prisoners. These newer forms of treatment of prisoners should greatly reduce the need for the exercise of executive clemency, and the carefully compiled case histories should furnish a sound basis for its exercise when such action may be found to be necessary.

The book is well printed and the proof reading leaves little to be desired. Altogether it is a worth-while piece of work and will not have to be done again.

CHARLES S. POTTS†

MILITARY LAW FOR THE COMPANY COMMANDER. By Julian J. Appleton. Washington: National Law Book Company. 1944. pp. v, 141. $2.50.

There are several books and manuals, headed by the official "Manual for Courts-Martial", which deal with the jurisdiction, organization and conduct of Courts-Martial or with the powers and duties of trial judge advocates who prosecute the cases coming before the Special and General Courts-Martial. Very little writing, however, has been done on that sector of military law which is administered by the company, battery or detachment commander, who, as General Shekerjian says in his foreword to this book, "probably more than any other one man in our military establishment, is the 'foster parent' of the enlisted man. It is of the utmost importance therefore, that he be understanding in his outlook, broad in his vision, and fair yet firm in his decisions." When the soldier commits an infraction of the military law it is almost always the company commander who must determine what action is appropriate to enforce good discipline, maintain morale and secure justice. This book is written as a guide to such action.

1. 267 U. S. 87 (1925).

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In the case of minor offenses the company commander may himself not only institute but also carry out the appropriate action without recourse to a court-martial proceeding. Part I of this book explains the powers of the commander in this respect much more carefully and completely than I have seen it covered elsewhere. In fact the matter of "company punishment" has been touched on very lightly, if at all, in most of the books on military law and its enforcement and in this part of his book Mr. Appleton has filled a void in the literature of the subject.

An offense may be of such a character as to require bringing the offender before a court-martial in which event the duty of preparing and preferring the formal charges will usually devolve upon the company commander. Part II of the book discusses the matter of arrest or confinement of offenders against whom it has been determined to prefer charges, the importance of selecting the right Article of War under which to lay the charges, gives numerous instances of offenses which may be tried under the "catch-all" Article 96 and explains the technique of drafting the charge sheet.

Part III contains the text or a statement of the substance of most of the Articles of War which define military crimes and offenses followed in the case of each of the more important ones with an analysis and commentary designed to make clear the elements of the offense. In his commentary the author includes interpretations promulgated by the Judge Advocate General and concrete illustrations of the application of the Article. He also furnishes the commander with a form of specification of the offense framed in concise and accurate language requiring only the filling in of names, times and places to complete it. Particularly helpful should be the forms of specifications which may be laid under the famous Article 96, of which the author provides fifty different examples under appropriate catch-lines running from "Allowing Prisoner to Do Unauthorized Act" to "Wrongfully Taking and Using".

In the Appendix is printed the text of the 104th Article of War on the Disciplinary Powers of Commanding Officers, a check list of the steps to be taken in administering company punishment and forms of record thereof, a specimen completed charge sheet and the Table of Maximum Punishments. An adequate index is supplied.

Mr. Appleton is a former Editor-in-Chief of the FORDHAM LAW REVIEW, is a member of the New York Bar and is Assistant to the Staff Judge Advocate at Camp Sibert, Alabama. His text is well supported by citations to the Digest of Opinions and to the Bulletins of the Judge Advocate General and to Winthrop's Military Law and Precedents as well as to the official Manual for Courts-Martial and it appears to be authoritative. This book should prove to be a welcome aid to that much-harried officer, the company commander, who is the keystone of our military forces.

GEORGE W. BACON†

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BOOK NOTES

LABOR LAWYER. By Louis Waldman. New York: E. P. Dutton and Co. 1944. Pp. 394. $3.50.

Labor Lawyer by Louis Waldman is a readable and at times engrossing book. Its title, however, is somewhat misleading. One would hardly get a good picture of Labor Law, as practiced today, from its pages. Party politics—some Republican and some Democratic, but mostly right and left wing Socialist—is the focus of the author's attention despite the several chapters like "My First Labor Case," "Sons of Eli Join the Labor Movement," and "The Hatters Fight an Injunction."

One of the most rewarding sequences in the book describes again the ousting of the Socialist members of the New York State Assembly of 1920. After reading Waldman's balanced and tempered account of that disgraceful episode, it is difficult to disagree with the judgment of Charles Evans Hughes who characterized the Legislative conduct in this case as an "act of incredible folly" and a "flagrant disregard of the fundamental principles of the American Institutions." Lawyers and politicians who do not remember the incident would do well to read Waldman's brief history of it. It will help bring us to the wholesome realization that even modern states are always as near to Machiavelli as polished steel is to rust. The chapters about espionage in the Caribbean and about Krivitsky's death would make gripping reading in a collection of good detective stories.

Throughout the book Mr. Waldman has scattered provocative and sage little generalizations from his experience. For example: "Radical politics, because with many it is also a religion, can be and sometimes is a pretty messy thing." "We cannot escape the end of totalitarianism if we accept any of its means, openly or covertly." ". . . when society, yielding to mass hysteria, sacrifices freedom for regimentation, it may achieve its temporary wants, but it also gets much not bargained for."

Waldman makes one point that shows very painfully how the passage of time (possibly the accumulation of wisdom) alters the connotation of words like "radical" or "socialistic." The author speaks of Socialist social security plans "back in 1918," when such ideas as old age, unemployment and health insurance were about as "radical" as workman's compensation insurance once seemed in this country. He adds: "Nearly all of the worthwhile social legislation of the New Deal in this country is to be found in the aged and yellow documents published by Socialists in former years." Of course there is a great deal more in those yellow documents which would not be quite as palatable as the "worthwhile" social legislation of the New Deal (and opinions differ bitterly even on that reference).

I do not think that the book is important for the ages. But it throws revealing light on a corner of American life that lawyers know too little about.

G. P. S.

AIRPORTS AND THE COURTS. By Charles S. Rhyne. Washington, D. C.: National Institute of Municipal Law Offices. 1944. Pp. viii, 222. $5.00.

The title of this book is misleading in so far as it contains much more than the title indicates. It is an exhaustive compilation of court decisions, citations of stat-

utes and references to other legal literature concerning not only the development of airport judicature but many other matters having to do with airports and aviation in general. However, the book begins with a discussion of the initial problem which will arise in the building of an airport. The first chapter entitled "Airport Acquisition" states the procedure and laws governing the acquisition of the land used for airports, their qualification as "Public Utilities" and describes "Public Purpose" which makes them public utilities according to the sense of the early decisions on that subject. The following two chapters are entitled "Condemnation of Property for Airport Purposes" and "Airport Leases." They discuss the right to use the power of eminent domain by cities, public agencies and airline companies in order to acquire real property for airport purposes and amplify the governing principle; under which the power of eminent domain may be exercised. The foregoing chapters also deal with leases of municipally owned airports to private persons or corporations. Chapter IV explains the comparatively simple regulations which govern the use of airports. Chapter V explains the taxation of airports which of course takes place only as far as privately owned airports are concerned.

The following three chapters entitled, "Damage Claims Against Airport Owners and Operators," "Space Rights of Aviators and Land Owners," "Airport Approach Protection—Airport Zoning" are as one would expect, the most interesting parts of the book. The author has collected a large number of decisions—in all about 500—to show the trend of the law in one of its infant branches. He not only considers airport legislation but covers a broad field of questions connected with aviation in general. Showing the problem which arose with regard to the air space rights of land owners, the author develops the present-day situation by examining most of the important decisions from 1586[1] until August, 1944. It is very interesting to compare the first "air space" cases, which had no connection with aviation, with those cases which arose with the development of modern air-traffic. The writer demonstrates how the old rules, such as *"cujus est solum ejus est usque ad coelum et ad inferos,"* have been breached by the development of aviation; also how, on the other hand, restrictions were necessarily imposed where aviation threatened to become a nuisance to property owners nearby. The difficulties the courts had with these cases were removed in many states by proper statutes, most of them in accordance with the "Uniform State Laws for Aeronautics."[2]

The five theories of air space rights are explained and their applicability discussed. The oldest theory gave the landowner all the air space above his property without limit in extent. The next one subjected the owner's right to an "easement" or "privilege" of flight in the public. The third so-called theory grants to the land owner the air space only up to such height as the legislation has deemed fair and makes flying under that height a trespass. The author analyzing this statutory rule comes to the conclusion that these height regulations are in reality safety rules which are not intended to alter substantive air space rights. The fourth theory concedes to the land owner the air space up as far as it is possible for him to take effective

1. Bury v. Pope, 1 Cro. Eliz. 118, 78 Eng. Rep. R. 375 (1586).

2. Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont and Wisconsin.

possession and denies any rights beyond this zone. The difficulty which the author perceives in this doctrine is the uncertainty as to what constitutes the "effective possession zone." The fifth theory, which has been advanced by the Circuit Court of Appeals for the Sixth Circuit[3] recognizes that the land owner has a right to the air space he actually occupies and that he can only object to such uses of air space not occupied by him as does actual damage to his property. This theory sometimes referred to as the "nuisance theory" and classified by the author as the "no-damage" or "no-ownership" theory, seems to satisfy all rights and persons entitled to protection and would seem to discourage suits which have no other purpose than to annoy aviators and airport owners. It represents a practical solution of a problem not envisaged when ancient theories pertaining to rights in air space were first evolved.

The author is in the position to explain a development which has taken place before our very eyes, so to speak, in a comparatively short period of time, a development which is far from completed. Further developments of aviation—think of the use of helicopters within the city limits!—will bring about situations requiring new legislation and undoubtedly some changes of old rules.

This volume of 220 pages is written in a manner which enables lawyers and laymen equally to find what they are looking for and an extensive index of 32 pages is certainly very helpful. The book is written in an easily understandable style and covers the field of judicature and legislation up to August, 1944. In the future it may be used as a starting point for the survey of further legal developments in this fascinating subject.

3. Swetland v. Curtiss Airports Corp., 41 F. (2d) 929 (N. D. Ohio 1930) *modified* 55 F. (2d) 201 (C. C. A. 6th, 1932).