

REVIEWS

SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO. Edited by Margaret E. Hall. With a Foreword by Edwin W. Patterson. New York: Fallon Law Book Company, 1947. Pp. xxiv, 456. \$5.00.

HERE under a single cover are the extra-judicial writings of our great philosopher-judge. For the most part this book is made up of well-known materials, including the famous lectures on the judicial process and the witty and gracious talks on law, literature, opinion writing, the new jurisprudence, the "game of the law and its prizes," and the "comradeship of the bar." But there are some new materials of interest: lecture notes from Professor Nicholas Murray Butler's psychology class; a student essay on *The Moral Element in Matthew Arnold*, suggesting one shaping source for the Justice's beautiful and lucid prose; and a Columbia Commencement Oration on *The Altruist in Politics*. The last, delivered in 1889, was a vigorous condemnation "alike of communism and of socialism that they thwart the instinct of expansion" or of individual energy and human personality for the "blind, mechanical power of the State" and suggests some intriguing comparisons between these early views and the Justice's later constitutional opinions. Chief Judge Lehman, a close personal friend, contributes a warm and appreciative memorial. And Professor Patterson, fittingly the first Cardozo Professor of Jurisprudence at Columbia, has a foreword which is an admirable short introduction to Cardozo's juristic philosophy.¹

As a collection of selected writings this volume leaves little to be desired. Set out in clear and attractive type, with a satisfactory index and an admirable bibliography of writings both by and about the Justice—the latter in number and caliber strikingly attesting his philosophical and judicial eminence—this is a book to serve as an evening companion, as well as a permanent authority of legal reference. I must confess to a slight nostalgia for the delightful little books containing the original essays. Those seemed so distinctively in keeping with their gentle and modest author, but, nevertheless, bore testimony to their notable material success in the notations of a thirteenth printing for *The Nature of the Judicial Process* and an eighth for *The Growth of the Law*. Also—and I realize how purely personal is this objection—I miss the footnotes at the foot of the page and dislike to have to flush them from their hiding places in the interstices between chapters. Of course, I appreciate the shamefaced approach to footnoting shared generally by nonlegal editors and publishers. But here, as always, Cardozo was restrained and modest; and, as the original editions show, his concise citations were not such as to deface the printed page. Yet these are wholly in-

1. More fully developed in his longer monograph, *Cardozo's Philosophy of Law*, 88 U. OF PA. L. REV. 71, 156 (1939).

significant complaints; the book deserves and will surely have a wide distribution.

In re-reading the essays on the judicial process, I am impressed with the freshness and vitality of his approach and how modern it actually is. Notwithstanding law's stock in trade of hoary antiquities in the shape of both precedents and texts, much of judicial writing, particularly of judicial philosophy, is quite ephemeral. A judge's philosophy often does not survive the particular events which gave it birth and shaped its form. We may well recall the cynic's view that longevity is the one essential attribute for judicial greatness. But with occasional exceptions the very temporary quality of judicial thinking has its uses. The dead hand of the law is heavy enough as it is; our recurring constitutional crises have borne witness to that fact. One of the surprising facts of contemporary jurisprudence is the amazing recrudescence of interest in Holmes, not only as hero—where his fame has long been secure—but as villain, the representative of law as only crude force, the seducer of the law schools, which, in turn, betrayed the Court.² How the old Roman's eyes would have sparkled at that aspect of posthumous fame! But while Cardozo cannot aspire to quite that kind of lasting regard, his own claim to permanent recognition is well buttressed.

It is true that Cardozo, in his brief career on the highest court, consciously followed the Holmes tradition in helping to free welfare legislation from the shackles of constitutionalism. Here his function was to be a follower. His own original contributions were elsewhere, first, as a great common-law judge, and, second, as a unique expositor of the ways of judges. He came to the work of the Court of Appeals in New York by designation of the Governor in 1914 after only a month's service in the trial court. This quick recognition of his outstanding qualities was soon justified through the high quality of his appellate work. A decision at once scholarly and pathbreaking in 1917 on pre-existing duty as consideration for a contract won an approving review from Professor Corbin, who recommended his appointment as Storrs Lecturer at Yale. As Professor Corbin has written, this invitation he "hesitatingly accepted," but the lectures as orally delivered in 1921 "were a triumph," and as subsequently printed "have become a classic."³ After a

2. See, e.g., Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A.J. 569 (1945); Gannon, *The Moral Law*, 14 FORD. L. REV. 1 (1945), 17 N. Y. ST. BAR BULL. 49 (1945), 63 REP. N.Y. ST. BAR ASS'N 383 (1945); Kennedy, *Portrait of the New Supreme Court*, 13 FORD. L. REV. 1 (1944), 14 *id.* at 8 (1945). Compare my address, *Is Law Disappearing?* at West Virginia University, June, 1946, to be reprinted in 50 W. VA. L. Q.—(1947).

3. This bit of history appears in Corbin, *Mr. Justice Cardozo and the Law of Contracts*, one of the notable essays in the joint tribute of three universities in January, 1939. 39 COL. L. REV. 56, 64, 52 HARV. L. REV. 408, 416, 48 YALE L. J. 426, 434. The case was *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807 (1917), reviewed in Corbin, *Does A Pre-existing Duty Defeat Consideration?*—*Recent Noteworthy Decisions*, 27 YALE L. J. 362 (1918). For the contemporary reaction to the lectures, see also my Cardozo Lecture, *State Law in the Federal Courts: The Brooding Omnipresence of Eric v. Tompkins*, 55 YALE L. J. 267 (1946).

quarter of a century *The Nature of the Judicial Process* still remains as the best analysis we have of the judge at work.

It is hard for us now to realize just how "daring"⁴ was the task Cardozo so successfully undertook, for the custom of confessions by judges had not then become general. Previously there had been no attempt by an American judge to develop a detailed and consistent philosophy of the process of judicial adjudication. Cardozo's statement came before the days of the judicial "hunch," indeed of "gastronomical jurisprudence" or what he himself has called "the cardiac promptings of the moment, the visceral reactions of one judge or another."⁵ But both in what he says as to the freedom of judicial action and as to the restraints which circumscribe a judge, his views are an unusual combination of balance and restraint, with originality and freedom of judicial action. His later lectures, those on *The Growth of the Law*, at Yale, and on *The Paradoxes of Legal Science*, at Columbia, supplement his first development of the subject, but hardly match the simple but frank exposition of the judicial way of life to be found in the earlier lectures.

This is not the place for, nor, in view of what has already been written, is there need of, another reevaluation of the lectures. But I desire to refer to one matter Cardozo always emphasized, which has particular pertinence and interest in the light of contemporary views. What I have chosen to stress are not his contributions to freedom of judicial decision, but the limitations on that freedom which he continuously asserted. My choice is itself a tribute to the rapidity with which the climate of juristic thought changes. When the original lectures were given, interest centered in the last of his four methods of judicial decision, that of sociology, or, as he stated it, with the directive force of the process exerted along "the lines of justice, morals and social welfare, the *mores* of the day."⁶ That was the exciting new development of those days. Justice Cardozo himself manfully carried this approach from the cloisters of the classroom into the sanctuary of judicial decision itself. Indeed his third lecture was boldly entitled *The Judge As A Legislator*, while his fourth even quoted the profanations of Theodore Roosevelt that "the chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority."⁷ But time moves on; and now I am at pains to point out not the exuberance of, but rather the restraints incorporated into, his analysis.

It will be recalled that his other methods were those of philosophy, *i.e.*, analogy; of evolution, *i.e.*, historical development; and of tradition, *i.e.*, the customs of the community. These were not sharply delimited. As Professor Patterson has so well pointed out, their lines tended to blur and intermingle. Then, too, the descriptive titles are not altogether helpful; thus one might

4. The adjective is Judge Burch's in his review in 31 YALE L. J. 677 (1922).

5. In his address on *Jurisprudence* before the New York State Bar Association in 1932, p. 15 of this edition.

6. P. 117 herein; pp. 30, 31, of THE NATURE OF THE JUDICIAL PROCESS.

7. Pp. 179, 180, herein; pp. 170, 171, of THE NATURE OF THE JUDICIAL PROCESS.

not immediately recognize the analysis of precedents as the method of "philosophy." Nor were the four methods real co-ordinates, resorted to in equal parts or in strict alternation by the judge. Moreover, although the purpose is to describe how the judge himself approaches the task of decision, the analysis is often that of the philosopher describing what has taken place in the juristic mind. It is obvious, however, that he intended to keep his analysis fluid and tentative; and his last lecture properly stresses the "subconscious element" in the process. I agree with Professor Patterson that "one can quarrel with Cardozo's terminology and one can be baffled by his diffuseness in detail but one can see in the large what he was trying to get at."⁸

Hence over and over we find Cardozo stressing the recurring and humdrum nature of much of the judge's activities. Only rarely does a truly great case come along to justify real exercise of the judicial wings. In a later lecture he goes so far as to say that "nine-tenths, perhaps more, of the cases that come before a court are predetermined . . . their fate preëstablished by inevitable laws that follow them from birth to death."⁹ This figure is deemed too high by Professor Patterson. But I think the fault is in a bit of hyperbole in statement and that he was still intending to emphasize the process of judgment, not the potential result to the individual litigant. In his first lectures he stated his thought more completely. Here he said that of the cases in his (appellate) court, "a majority, I think, could not, with semblance of reason, be decided in any way but one. . . . In another and considerable percentage, the rule of law is certain, and the application [through a maze of facts] alone doubtful." While these may often "provoke difference of opinion among judges," "jurisprudence remains untouched, however, regardless of the outcome." Only in a comparatively small number of cases does the creative element in the judicial process find its "opportunity and power," "where a decision one way or the other will count for the future" or "advance or retard, sometimes much, sometimes little, the development of the law."¹⁰

I am quite sure that this in general is a fair picture of the work of appellate courts and that, if anything, the Justice understates the number of truly original cases. Of course, a judge by study and thought and by careful choice of expression may lift a case out of the merely dull and casual run; but even if he makes it a thing of professional joy or beauty, it is still a lawyer's guide, rather than an original expression of community mores. Perhaps it is better so. Otherwise in some of our courts decision would have to be long postponed while the judges tried to reconcile their views of public policy! It was a quite special constitutional problem which brought forth the Brandeis brief; whether or not it may again become necessary, its use is not as a divining rod for the ordinary case. As for the trial court, the proportion of the

8. Patterson, *supra* note 1, at 165.

9. Pp. 212, 213, herein; p. 60 of *THE GROWTH OF THE LAW*.

10. P. 177 herein; pp. 164, 165, of *THE NATURE OF THE JUDICIAL PROCESS*.

humdrum is substantially greater. There of course the problem of ascertaining the facts and reconciling them with the assumed principles is more immediately pressing—and perhaps often more exciting. But it does not admit of more, or even of as much, of the creative element to which Cardozo had reference.

This leads me to the first of Cardozo's methods and what he has to say about it. He puts first the rule of analogy, but says that in doing so he does not rate it as the most important, that, on the contrary, it is often sacrificed to others, but comes first because it has a certain presumption in its favor. "Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize."¹¹ This puts it exactly. True, the revulsion from the undue worship of precedents in the past was quite sound and desirable. Indeed even now a judge too often tends to conceal his real decision by making an abstraction of a mere rule of procedure or otherwise assuming the existence of some completely binding authority. Such evasions of individual judicial responsibility in adjudication may well be condemned and criticized whenever they appear.¹² But as a *method* of adjudication, we still start off, if indeed we do not end, with a lawyerlike analysis and reconciliation of the authorities.

Now, after all these years, this may seem like quite an anticlimax. Perhaps it is; but to avoid being misunderstood, I shall restate just what I have in mind. I definitely am not saying that these precedents must be examined because they will lead mechanically or even "inevitably" to a decision for one party or another. As we have seen, Cardozo did not mean that; in his survey there was a considerable group of cases where the judges might dispute as to the actual result. I say only that these other precedents give us in the main the stuff from which our decisions are wrought. True, there are a considerable number of cases where analysis—if not manipulation—of the facts takes the leading role in the process; while in others statutory interpretation, involving modern techniques of balancing bits of legislative history, holds sway. But even here the thinking of other judges, stimulated by other lawyers, or by law professors or other text writers in their critical case reviews, is likely to have a prominent part.

I hope it is clear that I do not urge that this should be the over-all situation. As a matter of fact, during many years of teaching, I looked for and thought I observed signs of a broadening of the stuff of decisions. And I think a lack of means, time, and even of interest has prevented developments which might have been, or may still be, of great potential value.¹³ I am

11. Note 6 *supra*.

12. See the discussion of "procedural particularism" in CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 69-71 (2d ed. 1947).

13. Thus note that most promising attempt at cultivation of the area common to jurisprudence and psychology, ROBINSON, *LAW AND THE LAWYERS* (1935) *passim*, and par-

merely trying to describe the process as I find it. In my judicial experience, two reactions are more vivid than the rest. One is the willingness of so many counsel to go before the courts, even appellate courts, with so little preparation and so great trust in the judges to do what we have been led by precept to regard as the prime task of the lawyers. And the other is how, for all of us on the bench, whatever our prior background—professorial or professional alike—a case, however drab, takes on life in the light of what other courts have thought about the same or similar problems. However it may be in the juridical millenium, at the present time the study of precedents, far from making justice mechanical, gives it what breadth, depth, and sophistication of approach it now has. As proof I suggest a comparison of a case where a judge talks only in terms of his own more or less vague concepts of justice in the abstract, and one where the result is reached only after a careful survey of the prevalent thinking, legal and nonlegal, so far as he can find it, upon the matters in issue.

All this is hardly new. I stress it only for the purpose of pointing a moral or two. One might concern the preparation of trials and appeals by counsel; but perhaps a judge should not venture into fields so much the prerogative of the bar. Moreover, some experience leads me to doubt the value of judicial admonition in the premises. But I am bold enough to venture some suggestions involving the law schools and legal education in general.

First is the conclusion that the job of the schools, in the climate of actual professional activity, is being done much better than the present chorus of criticism would indicate. It remains true that the best work in the trial and appellate courts comes from the product of the modern law school. Much is made of the lack of experience of these men, the failure of the schools to attempt more legal clinics, their neglect to bring their students into the courts—in short their lack of attention or even due reverence to the journeymen's tricks of the trade. Such suggestions, urged as practical, seem to me in the highest degree impractical; as has been well said, we should need to enter our sons at five years of age in a reorganization course to watch a complete proceeding! I believe that any judge would say from experience that a client's fate is safer with a youngster who has successfully surmounted the severe testing of the good schools than an oldster whose experience has taught him little beyond the obvious. Naturally better than either is the lawyer who combines capacity and training with experience. That combina-

ticularly at c. 14, unfortunately cut short by the death of its stimulating author. Among a wealth of fruitful suggestions compare this, p. 168: "There needs to be added to the play of ideas the play of personality upon personality, of judge upon judge. The psychological principles of leadership, of jealousy, of positive and negative suggestibility must ultimately be taken into account if we are to gain an adequate understanding of the judicial process." This statement also carried this interesting footnote: "Even such a liberal as Professor Felix Frankfurter may draw back timidly before the thought that tact, good humor, *camaraderie* may be a potent force within the celestial chamber of the court. See FRANKFURTER, MR. JUSTICE HOLMES, 1931, at 46."

tion, however, tends to be found less and less in the courtroom as our economy has developed. I had the explanation recently when I asked one able former student why he did not appear more frequently in our court. His answer was, "To tell the truth, I can't afford it. My time is too valuable in my office to waste it in going before you fellows." Alas that the richest rewards of our profession are not to be achieved in the courtroom; but wherever they are, even occasionally in public life, there will be found, successful and competent, the man who has gone through this supposedly esoteric training.

But a succeeding thought is that that very success carries its own responsibilities and incentives for increased effort for the schools. It is obvious that if judges and lawyers are ever to get out of their respective ruts, it is the law schools which will provide the inspiration and the motive power. Beyond the fertilizing force of the views of other courts, which I have referred to above, is the stimulus of the legal texts and reviews, now increasingly recognized in the opinions. It is not long before some new view by a law teacher finds lodgment in an opinion; and not unusually a whole current of legal authority is reversed upon the persuasion of a single law review article. Further, the law I am discussing, and which was Cardozo's immediate interest, is judge's law. That in all likelihood will occupy less and less of the law teacher's field. Other processes, legislative, administrative, those of world assemblies and courts, are more and more within his province. Let us have more of soul-searchings by the professors; while their accomplishments are greater than they now appear to believe, their intellectual qualms and strivings will sooner or later enrich the judicial process. So I can do no better than emulate Cardozo in his plaudits for the schools. For he was among the first in his decisions to show a complete awareness of the impact of scholarly thinking upon the problems which came before his court. And his lectures explicitly and implicitly bear tribute to the persuasive and pervasive force of the writing emanating from the law schools. It is small wonder that he became almost at once the darling of the schools, which urged his appointment to the highest court a full decade before the event actually occurred!

Of course no reference, however fleeting, to Cardozo's writings can properly be made without mention of the beauty and force of his prose style. Had he not been able to express himself in "glowing, sententious prose," to use Professor Patterson's apt expression, much of the force of his message would have been lost. I need not attempt to gild the lily, but I will refer to one attribute which I have seen little mentioned, his touches of delicate wit and humor, so unlike a judge. This often appeared in his many expressions of modest self-deprecation. Thus at the close of one address he says, "Like Socrates and other bores, I have earned the draft of hemlock if you choose to pass the cup."¹⁴ On another occasion, when he had been chosen for the honor of a dinner and resulting address, he expressed his puzzlement why

14. P. 97.

at that particular stage of his life's journey he should have been selected and thought of the explanation given by Lord Salisbury, as English premier, for appointing Mr. Alfred Austin poet laureate in succession to Lord Tennyson: "I don't think anybody else applied for the post." Then he went on to disclaim even that modicum of fitness shown by Mr. Austin.¹⁵ At times this could be coupled with a fine sense of irony. What more complete demolition of a majority outburst likening "with denunciatory fervor" an SEC investigation to the Star Chamber of the Stuarts could be found than his classic response, "Historians may find hyperbole in the sanguinary simile."¹⁶

One more suggestion and I am done. A standard criticism of modern realists is their supposed repudiation of all moral values and their refusal to acknowledge the force of ethical principles and the higher law. We need not stop here to comment upon the interesting dialectical inversion whereby a movement most prominently identified with warmhearted support of welfare legislation, *i.e.*, increased aid and sustenance for the poor and the unfortunate, should be found thus wanting in moral qualities. We may note, however, that at least as to Cardozo, who both "preached" and "practiced" the same doctrine "in a modest way,"¹⁷ this charge cannot be maintained. For he continuously stressed, in his opinions and in his lectures, the shaping force of the moral values of life.¹⁸ His addresses contain some of the most felicitous expression of a lofty morality to be found in any professional writing. The first address of this book, entitled *Values, or The Choice of Tycho Brahe*, tells poetically of a scholar's choice of service and sacrifice in place of fame and position.¹⁹ I need not stress this; all who had the rare privilege of knowing him attested to his high sense of devotion and dedication. His sincerity was patent. An impulse to quote is here strong; I shall limit myself to a single one. This was his reaction to the "fitness and beauty and impressiveness" of the grand jurors' oath going back to the day of the Saxon kings: "Like the tones of a mighty bell, these echoing notes of adjuration bring back our straying thoughts to sanctity and service. I cannot listen to them without a thrill. Here . . . imperishably preserved amid the grime and dust of centuries, the word has been proclaimed, to steady us when we

15. P. 99.

16. *Jones v. Securities Commission*, 298 U. S. 1, 33 (1936).

17. Cardozo, *op. cit. supra* note 5, at 13.

18. Thus see his fourth and fifth lectures—"The Function and the Ends of Law"—in *THE GROWTH OF THE LAW*, and several of his lectures in *THE PARADOXES OF LEGAL SCIENCE*, *viz.*, "The Meaning of Justice—The Science of Values," "The Individual and Society," "Liberty and Government," also discussion by Professor Patterson, *supra* note 1. For his judicial decisions, see the careful analyses by various writers in the memorial number of the *Columbia and Harvard Law Reviews* and the *Yale Law Journal* cited note 3 *supra*; and see also SHIENTAG, *MOULDERS OF LEGAL THOUGHT* 1-98 (1943); LEVY, *CARDOZO AND FRONTIERS OF LEGAL THINKING* (1938).

19. This, the Commencement Address at the Jewish Institute of Religion (1931), we are told, was requested by hundreds of men in the Armed Forces during World War II.

seem to falter, to strengthen us when we seem to weaken, to tell us that with all the failings and backslidings, with all the fears and all the prejudice, the spirit is still pure."²⁰

CHARLES E. CLARK †

PATTERNS OF UNION-MANAGEMENT RELATIONS. By Frederick H. Harbison and Robert Dubin. Chicago: Science Research Associates, 1947. Pp. 221. \$3.75.

THE recent growth of centers devoted to research in labor relations should be viewed as a Good Thing: the alluring prospect of an integrated social science glows, like the Grail, ahead.¹ Anthropologists, economists, psychologists and sociologists have gathered together to gain knowledge of the interaction of human beings and human institutions within an industrial framework. And their quest is worthy: they examine a segment of society whose daily decisions affect the whole community; they explore an enduring relation which exists no matter in whose hands the ownership of tools.

Their program entails an initial act of faith. Like all who seek a science of society, they must assume that they deal with material composed of a finite number of variables, that the human mind is capable of manipulating an enormous, reticulated set of factors, that adequate machinery for unearthing knowledge of those factors exists, and that the content of each factor remains fairly stable during the awesomely lengthy and tedious accretion of knowledge. These are large assumptions and their adoption costs more than the craven. But refusal to adopt them means giving up the battle—and, indeed, real proof of their invalidity can come only after the assumptions are made and the adventure attempted.²

The search itself raises the further problem of selectivity: faced with the close-knit fabric of going institutions one must decide what to study. Here

20. Address to the graduating class of St. John's University Law School in 1928, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231 (1939); p. 95 herein.

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1. And more than prospective is the immediate practical value derived from forums in which labor and management leaders can gain understanding of the others' viewpoint.

2. The live practical issue is how verifiable social data is to be gathered with a minimum expenditure of time and personnel. To date we seem to have progressed little further than the questionnaire and the interview: the data presented is doubly subjective, being conditioned by its sources as well as by the investigator. And formation of a theory correlating subjective reaction with pure phenomena seems futile, for it cannot be validated until the phenomena can be observed. It is, therefore, in the field of techniques that developments must come. Until then, the social scientist works with feeble tools which may perhaps be barely efficient in terms of time expenditure but which raise doubts as to the assumption of "adequate machinery"; and until then an unverifiable assumption of objective-subjective correlation must be made.

subjective judgment limits the field of inquiry and to that extent, predetermines results; but there is consolation in that the reasoned hunch of irrelevancy is a part of the touchstone—natural science; and, in any event, the prudent investigator expands his scope to err on the side of caution. Moreover, the danger is lessened by concurrent studies, each deriving from different hunches and each, therefore, contributing otherwise omitted facts to the conglomerate.

Professors Harbison and Dubin, ranking officers of the Industrial Relations Center of the University of Chicago, chose to examine labor relations in the General Motors and Studebaker corporations and have published their findings as "only a modest first step" "to a more precise understanding of the nature and consequences of labor relations throughout the country as a whole and in the mass production industries in particular."³

The authors' modesty is not unduly self-deprecatory.

The information gathered is a disappointment, both as to breadth and type. True, the scope of inquiry is at bottom a matter of hunch. But it is still shocking to find, without reasoned explanation, complete lack of data about individual worker satisfactions, and only offhand reference⁴ to the economics of the firm and the sociology of the firm's workers and managers.⁵

And the lack of range is not the result of a decision to cultivate intensively; the authors have put high gloss on a balloon. Where institutional analysis of management and union is looked for, one finds a description of skeletal structure; where dissection of key personalities is sought, one finds quotations from speeches; where a mutually reactive relation is to be examined, one finds intuitive conclusions. The data presented is all too much like that found in a magazine article based on industrious use of newspaper files. And, as a result, little durable information is added to the stockpile. Professor Harbison has elsewhere said: "there is a great need for case studies of different types of labor-management relationships in which the principal social, psychological, political, and economic factors which determine each individual relationship are carefully analyzed."⁶ The need exists unabated.

For lagniappe, the authors have also provided a set of conclusions, the chief of which is that labor relations in a "power center"⁷ like General Motors are likely to be less healthy than in a small "pattern-following" firm like Studebaker. This may or may not be true: but it can hardly be logically derived from a study restricting itself to one of each type. And there is in-

3. P. 12.

4. Here Prof. Dubin's Studebaker study does not sin so much as his colleague's examination of General Motors.

5. Matters, for instance, like community composition and the role of management and union, sources and media of community opinion, income levels, incidence of unemployment, accidents, old age, etc.

6. 37 *AM. ECON. REV.* (Supp.) 375, 382 (1947).

7. A firm which through size and custom molds working conditions for the entire industry.

consistency in the authors' reasoning: their thesis is that the pattern-followers have a much easier task of adjustment because major economic issues are for them already decided;⁸ yet they state that the "fundamental conflict" in General Motors is not over economic issues, but rather the "sharply differing concepts and beliefs on what collective bargaining should include. . . ."⁹ They generalize further that (apparently whether pattern-followers or not) in "mass production industries constructive relationships are likely to be most common in medium-sized and small concerns."¹⁰ Against this, one may put the statement of two acute steelworker leaders: "We have weighed our experiences with small firms as against big ones to see if there are any basic differences. Our conclusion is that there are not."¹¹ Again here the authors may be right, but they are gainsaying experience with intuition, not proof.

The lesson is that meticulous fact-gathering cannot be supplanted by an inadequately selected and explored sample used to prove an *a priori* theory.¹² The danger is that other research centers may emulate in the rush to publish. And the pity is that two capable men have wasted precious time.

ARTHUR MERMIN †

PRESIDENTIAL GOVERNMENT IN THE UNITED STATES. By C. Perry Patterson. Chapel Hill: The University of North Carolina Press, 1947. Pp. 301.

As THE half way point in the twentieth century draws near, the United States draws farther and farther away from the kind of nation which existed during the last two decades of the eighteenth century. It is vastly different in boundary and area, in economy and social organization, in mores and morality. And it has a vastly different Constitution. The political and legal history of the nation has been marked by a constant process of readjustment in governmental organization. The old theories remain, but their manifestation in practice bears little resemblance to what went on when the Founding Fathers started the great experiment. A new age with its new problems has brought forth a new government.

8. "Outside the power centers company and union bargain with each other within the limits of economic patterns. . . . For this reason constructive union-management relations are likely to be found in small or medium sized companies." P. 211.

9. P. 98.

10. P. 220.

11. GOLDEN AND RUTTENBERG, *THE DYNAMICS OF INDUSTRIAL DEMOCRACY* 82 n.1 (1942).

12. This is not to suggest that "facts" per se have any worth or can even be gathered without some sort of working hypothesis. On this issue, the quarrel with the authors, in addition to their failure to "prove" their theory, is that they involve themselves in a pure value hypothesis—"constructive union-management relations"—at a time when an adequate theory of how and why men and institutions behave is still lacking.

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Of the writing of books about this phenomenon, there appears to be no end.

One of the latest is an odd combination of erudite scholarship, wise-cracks, overstatement, startling generalization, dogmatism, naiveté and sophistication by an experienced teacher who is concerned about the relationship of the American presidency to the Congress and, to a lesser degree, of the Supreme Court to both the Congress and the presidency.

The author appears to take an almost childish delight in exaggeration. For example, in commenting on the New Deal Court: "Dual Federalism was abolished. The states were truly conquered provinces. Separation of powers was obsolete. . . . The positive theory of the state had been accepted. Whether it would be fascism or communism or a mixture of both with a little individualism merely tolerated . . . was no longer a judicial question but theoretically a congressional and actually a presidential matter. The President was now over the Congress, over the bureaucracy, and over the judiciary."¹ Again, the assertion that Justice Holmes believed "that the Constitution was not a limitation upon the court."² And further: "For more than 150 years the Supreme Court has been trying to discover what the Constitution means, and according to its own records it has made a dismal failure."³ Still again: "The President then as a political executive may not only renominate and continue himself in office, but in the role of a prime minister he may propose the measures involved in his legislative policy and force them into law."⁴

The author's fondness for the categorical superlative is also much in evidence, as witness: "Uncle Joe Cannon . . . the most powerful speaker the country ever had."⁵ "Woodrow Wilson was the most severe critic of congressional government that the country has produced."⁶ "This [period of great political influence of the Speaker, 1869-1911] was the nearest approach to the development of responsibility in government within the Congress that is found in our history."⁷ "This historical tendency [increasing powers of the president] has been the most revolutionary and destructive process known to political organization."⁸ "There has never been a President who more completely controlled the Congress than Jefferson."⁹ "This development [growth of administrative agencies] has created the most serious problem that our democracy has ever faced. . . ." ¹⁰ "The most revolutionary

1. P. 236.

2. P. 223.

3. P. 273.

4. P. 116 and see p. 133.

5. P. 134.

6. *Ibid.*

7. P. 106.

8. P. 46.

9. P. 110.

10. P. 150.

change that has been made in the American system since its establishment has been the growth of the powers of the national executive." ¹¹

As might be suspected from these random quotations, the author is worried about what he regards as the breakdown of the system of checks and balances, the development of presidential supremacy and the consequent government by a man instead of the law. As Wilson observed, the Constitution is not a mere lawyer's document; it is the vehicle of a nation's life. The author thinks that if the Constitution is not a lawyer's document, then it has ceased to be a fundamental law. This appears to be a logical deduction if we assume the orthodox distinction between law and politics; and such a distinction is one of the inarticulate major premises of Professor Patterson's book. He believes that the Constitution has *a* meaning. When the Supreme Court reverses a prior decision, it indicates that it does not know what the Constitution means or that it thinks the document can "mean anything or nothing." ¹² So too, the niceties of judicial "distinctions," the manipulation of the various social and economic criteria in arriving at judgments and, indeed, most of the techniques which characterize the judicial process in our public law are all regarded as aspects of "the tragic side of the history of the court." ¹³ The heart of the "tragedy," of course, is that the Court has scuttled the Constitution by abdicating the power over Congress which Marshall won for it. This is largely the result of the president's political influence over the Court through the power of appointment. The president, through patronage, his control over the bureaucracy, and his role as political executive has gained control over the Congress. He is thus supreme and our government finds itself following the world trend. "Executive supremacy in fact and in process is now the chief characteristic of modern governments whether totalitarian or traditionally democratic." ¹⁴

Although recognizing the basic causes of this phenomenon in the expanding functions of the modern state, the enormous growth of administrative agencies, the change from laissez-faire to a planned economy and the emergence of the United States as a world leader in international affairs, Professor Patterson regards it as "unthinkable that this great nation should trust its fate to an untrained bureaucracy whose legal existence rests upon presidential decrees and whose discretion is subject to the power of absolute dismissal by the President." ¹⁵

For all Professor Patterson's florid journalism, viewing these tendencies with alarm and occasional distortion, he is dealing with a fundamental problem with insight. "The history of tyranny," as he says ¹⁶ "is primarily a record of executive despotism which has generally taken place at the expense

11. P. 245.

12. P. 27.

13. P. 26.

14. P. 46

15. P. 280.

16. P. 39.

of legislative and judicial agencies. . . ." It is also true that "the relation between the executive and legislative cries to heaven for readjustment."¹⁷ Although it might be argued that the American presidency suffers from too little rather than too great power, the truth appears to be that a particular president can be about as strong as his leadership warrants or as impotent as it permits. The rule has been the mediocre or weak chief executive who accepted the limitations of the office. The strong, when the occasion required, usually found a way.

But it is in the role of political rather than administrative executive that the office of president has been the controlling factor in the destiny of the nation under a strong incumbent. The relative irresponsibility of the president in this role is the source of danger. Professor Patterson's proposed solution is a modified cabinet form of government in which a cabinet composed of members of Congress would take over the functions of political executive, leaving to the presidency the "constitutional" function of administrative head of the Government. As to just how this would work, the author is inconveniently vague. He thinks the advantages of the system, among others, would include the unification of legislative policy and the administration of foreign affairs as well as effective supervision over the administrative divisions of the government. Nevertheless, we are assured that the "proposal would not endanger the President's powers. . . . There is not the slightest possibility as long as the President is popularly elected that he would become the figurehead that the English king is. . . ." ¹⁸ We are told that the president's veto power would still be available. The author admits, however, that it would rarely be used for the obvious reason that, ordinarily, to exercise the power would be tantamount to the president's joining the opposition. Where the Congress is controlled by the party opposed to the president, of course, he is already in the opposition, and where one House of Congress is controlled by one party, the other House by the opposition, the resulting "coalition" cabinet would obviously make a veto à futile gesture.¹⁹ It is, therefore, not apparent that the presidency would not become a figure-head in the hands of a weak man.

On the other hand, it is by no means clear that the proposal, which the author himself describes as "only a change in legislative procedure," would effectively curb the powers of a strong president. One may suspect that the existence of such legislative machinery in 1933 would in no way have affected the vigor of Roosevelt's leadership or the extent to which he would have used his office to secure the adoption of his policies. It may be suggested, therefore, that the author's scheme would probably leave the situation very much as it is now and that the presidency would continue as a vehicle for a weak president to let Congress run the country or a strong president to run

17. P. 239.

18. P. 271.

19. This is recognized by the author who concedes that the veto would tend to become another "constitutional fiction like the electoral college." See p. 264.

it himself. This does not mean that, through closer relationship, joint policy consideration between the executive and legislative branches of the government would not result in a more unified legislative program and a reduction of friction between the two branches.²⁰

Other questions may be raised. Supervision of administration by Congress beyond that now exercised by the appropriations committees is probably something that will not and should not be realized. There is no reason to suppose that a representative, merely because he has been elected repeatedly from a single Congressional district and thus has obtained the needed seniority to become a committee chairman and cabinet officer,²¹ would be a more competent or responsible supervisor than a department head selected by a popularly elected president. Supervision by Congress might be one thing, but supervision by a single member of the congressional bureaucracy is quite another and it is the latter that we would surely get under the modified cabinet system proposed.

Because a proposed remedy may be inadequate does not mean that one is not needed. The increasingly complex problems of government under the impact, first of the great depression and, then, of the great war, throw the spotlight on the deficiencies of our scheme of government. The rash of discussion and proposed solutions over the past decade bears witness to the importance of improving the machinery for policy unification and effective administration.²² The organization and control of the bureaucracy, the problem of personnel and the relationship of the president to the Congress present problems which will require the making of many proposals before workable ones are found. *Presidential Government in the United States* makes a stimulating, if sometimes irritating contribution to this process.

FOWLER HARPER †

CASES AND MATERIALS ON CIVIL PROCEDURE. By Paul R. Hays. Brooklyn: The Foundation Press, Inc., 1947. Pp. 1058. \$8.00.

PROCEDURE courses, with the exception of evidence, seem like Alice to be in some danger of hitting their chins on their feet. Curriculum pressures from new areas clamoring for recognition or from old areas grown bigger have developed a tendency to crowd procedure into dwarfish proportions. Symptomatic is the rash of one-volume collections of cases and materials

20. Cf. the suggestion for a Joint Executive-Legislative Cabinet in FINLETTER, *CAN REPRESENTATIVE GOVERNMENT DO THE JOB?* (1945).

21. See pp. 267-8.

22. To mention but a few, in addition to the book under review: LASKI, *THE AMERICAN PRESIDENCY 1940*; HAZLITT, *A NEW CONSTITUTION NOW* (1942); FINLETTER, *CAN REPRESENTATIVE GOVERNMENT DO THE JOB?* (1945); FLYNN, *MEET YOUR CONGRESS* (1944).

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designed to guide the wayfarer from the time he enters the litigation forest with a summons until he emerges at the other side on appeal, omitting the admission and exclusion of evidence.

Since Professor Hays has not included by way of introduction any explanation of his omissions and inclusions, this reviewer is forced to draw from the general plan and scheme of the book his own conclusions as to the views of the editor which find expression. Among those which I draw are the following: 1. The case method of instruction is wasteful and ineffective. 2. Pleading has become unimportant. 3. Jurisdiction should not be handled as a procedural problem.

1. *The case method of instruction.* The designation "cases and materials" is an accurate one, as the book consists roughly one-half of cases and one-half of such other materials as rules, statutes, reports of advisory committees, law review articles, and some original writing by the editor. In the 1058 pages of the book approximately 160 cases appear, as compared for example with Clark's *Cases on Pleading and Procedure* which in 60 fewer pages contains about 50 per cent more cases. Undoubtedly non-case materials in a sense afford more compact and economical coverage of subject matter, but the question arises whether such massive doses are effective. Despite Judge Frank's characterization of Langdell as a neurotic bookworm,¹ the case method of instruction has represented a substantial advance over previous systems which dealt out learning in large and undigestible masses. Presumably all are by now agreed that what is to be taught is the solution of legal problems, rather than "the law", and legal problems do not exist without factual settings. By supplying some of this essential background, the case method as a teaching system has made it possible to discuss problems rather than abstractions. True, the facts supplied are somewhat desiccated and by the winnowing process of appellate court opinion writing are removed at least one step from the reality of the trial court, but in any event they are facts of a sort. The stage is set for the particular problem dealt with in the case, and a convenient basis is furnished for those further "supposes" which seem to be essential to good classroom discussion.² Wasteful this may be, but perhaps comparable to the temporary scaffold which surrounds a building under construction.

For the same reasons which lead courts to abhor advisory opinions, the editor presumably does not intend to allow classroom discussions of the

1. Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303 (1947).

2. *Id.* at 1313. Judge Frank says this is like training horticulturists through the study of cut flowers, but I believe that is some improvement over merely telling them about cut flowers. The Judge is a popularizer in reverse,—his specialty is in making easy things look difficult. With his customary knack of devoting many pages to demolishing arguments which no one advances anyway, the Judge concludes that contemporary legal training is too far removed from the realities of the law office and the court room. This conclusion will astonish no one. He advocates a closer acquaintance with the facts of life, but I am unable to find in his verbal shrubbery any suggestion more concrete than the proposal of an occasional chaperoned tour through the bordellos of the law, viz., court rooms

non-case materials to proceed on too abstract a plane. The doubt in my mind is whether the discussion of such materials can proceed on any plane at all, unless placed before students as problems in some manner. While the editor leaves unanswered the question of how the materials are to be utilized, it seems apparent that problems to be solved in terms of the materials would have to be assigned in advance. I doubt the adequacy of the non-case materials for this excellent method. After all, texts and articles are based primarily on reported cases, whether "right" ones or "wrong" ones, and a somewhat more realistic approach is to send the students back to the sources, which is where they will go in practice. The valuable materials which Professor Hays has included supplement, rather than supplant, the cases. They deserve preservation and accessibility to students beyond the confines of the reviews and suggest the desirability of a selection of readings in procedure akin to those which have been published in other fields.³ If this view of the case method of teaching seems conservative, then it is meant to be so in the sense of conserving what has proved to be of value in the past and has not yet been demonstrated to be without value for the present.

2. *The unimportance of pleading.* Nowhere in the book is the editor's platform of economy more apparent than in the portions on pleading, where 59 pages deal with complaints, 22 with defensive pleadings, and 24 with amendments, a total of 105 pages. By way of contrast, 107 pages are devoted to *res judicata*. If with pleading we consider, as properly should be done, the related procedures for discovery, pretrial and summary judgment, 134 more pages are added, bringing the total to 239. The cases number 27, including *Hickman v. Taylor* in both the Circuit Court of Appeals⁴ and the Supreme Court of the United States.⁵

This brief treatment accorded pleading is, in my opinion, unfortunate. The relationship between substantive and adjective law is demonstrated more effectively by pleading than by any other subject with the possible exception of jury instructions. The student's first assignment in drafting a pleading reveals substantive rules in a new and different light. He is confronted with the realities, or something closely akin to them, of bringing to life the things in the books. He begins to acquire some appreciation of how a lawyer approaches a problem.

and law offices. He must concede that law is a body of knowledge of sorts and should be approached with some more orderly plan of attack than is apparent in mere observation of what a judge or lawyer fortuitously chances to be engaged upon at the moment. For a man so prolific in literary output that he is able to push Bartlett to one side and quote only from himself, the Judge demonstrates an amazing distrust of what is in books. My own observation is that the reaction of the beginning lawyer is one of surprise at how intellectual an occupation practicing law really is.

3. HARVARD LAW REVIEW ASS'N, *SELECTED ESSAYS OF THE LAW OF TORTS* (1924); ASS'N OF AMERICAN LAW SCHOOLS, *SELECTED READINGS ON THE LAW OF CONTRACTS* (1931); ASS'N OF AMERICAN LAW SCHOOLS, *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1938).

4. 153 F.2d 212 (C.C.A. 3d 1945).

5. 329 U.S. 495 (1947).

In some quarters it has become the fashion to depreciate the utility of pleadings as a practical administrative instrument. Regardless of the merits of that argument, the hard fact remains that pleadings still constitute the framework of reference for the admission of evidence, the instruction of juries, the return of verdicts, and the entry of judgments and decrees. A carefully prepared set of pleadings is the cornerstone of a carefully tried case. The stagnant technicalities which developed in common-law pleading and the dilatory practices which are still possible under more modern systems have left a bad taste, but they are highly instructive. Are we to conclude that bad things are not to be studied? The elimination of pleading as a law school subject means the discarding of the central core of several hundred years of administrative experience. In Stringfellow Barr's phrase, we are omitting the minutes of the previous meeting. I would not hold the meeting over again, but that does not preclude a reasonable acquaintance with the business which was transacted. Any other course means merely the training of more rut-followers, and the fact that the ruts may be new ones laid out by the federal rules, which are emphasized throughout the book, makes them none the less ruts. Evaluation without perspective becomes impossible. A student trained from this book would, for example, be unlikely to detect in federal rule 12(g) a tendency to return to the common-law hierarchy of defensive pleadings and the junking of a hundred years' effort to eliminate purely technical distinctions between pleas in abatement and pleas in bar.

Very much on the credit side of the ledger is the generous amount of space devoted to discovery, pretrial and summary judgment practice. These valuable tools of the practitioner have too commonly received casual treatment or none at all. Professor Hays has provided a useful approach to the available methods of cutting through the dead wood which may accumulate at the pleading level of litigation.

3. *Jurisdiction not a procedural problem.* In one of the few direct hints dropped as to his plan of organization, Professor Hays states that jurisdiction is dealt with more fully in the course on conflicts and "no attempt is made to cover it here."⁶ This has the advantage of shortening the book. It seems to overlook, however, the point that for every question of jurisdiction raised in a conflicts background at least a hundred arise in a domestic setting. Lacking the counterpoint of jurisdiction, venue becomes a mere problem of geography, and the troublesome and recurring necessity of distinguishing what is venue and what is jurisdictional disappears.

In like manner jurisdiction of the person becomes the more or less mechanical problem of "Service of Summons" and tends to reduce itself to the question of whether the defendant should be able to set the courts at naught by hiding behind the cow-shed when he sees the sheriff turn into the driveway. *Pennoyer v. Neff*⁷ and all its important and interesting grandchildren are

6. P. 1.

7. 95 U.S. 714 (1877).

substantially forgotten. Similarly lost from view is the problem of basing jurisdiction of a foreign corporation upon the test whether it is present in the state.

Whether Professor Hays chopped the body to bits because his colleagues made him do it, or whether he acted of his own free will, we do not know. In either event, disagreement with certain of his basic assumptions does not preclude appreciation of the able performance represented by the book. The suggestion of new attacks on old problems, the posing of new problems, and the challenge to conventional teaching methods are refreshing and possess vitality. Yet the conviction remains that lawyers must be skilled in setting the judicial machine in motion and in exerting a measure of control over the route it follows, and the desired objective cannot be gained by relegating procedure to secondary rank.

EDWARD W. CLEARY †

MAX WEBER: THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION.

Translated by A. M. Henderson and Talcott Parsons. New York: Oxford University Press, 1947. Pp. x, 436. \$6.00.

MAX WEBER'S *Wirtschaft und Gesellschaft* is a fragmentary, incomplete, yet nevertheless magnificently informed and penetrating study of the sociological and institutional foundations of modern society. The first part of that work is its methodological introduction, which contains, so far as he stated it systematically at all, the theoretic basis upon which Weber's comprehensive *verstehende Soziologie* was erected. But it is, at the same time, the introduction to his enormously ambitious attempt to understand the social structure and dynamics of Western society, and as such, theoretical analysis is throughout conditioned and illumined by application to the broad empirical problems of historical structure and change in which he was particularly absorbed. These first pages of his extraordinary book, therefore, reflect to a degree not easily matched in any other single work, a fusion of Weber's two major scientific interests, the one dominant, the other instrumental, nor does either appear to better general advantage elsewhere. It is this section of *Wirtschaft und Gesellschaft* that Talcott Parsons, whose name has been connected with Weber studies for twenty years and more, now has added to the growing *corpus* of Weber's writings in English. Though there are misplaced emphases and an occasional misunderstanding, the translation is as faithful as is possible in the case of a work abounding in complicated and technically difficult phrasing, but certainly all minor blemishes in form are more than overshadowed by the acute and felicitous selection of subject matter. No better conception of Weber's systematic treatment of the complex and baffling problems he set himself to solve can be gained

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from any other of his works available in English. Indeed, it would be difficult to choose among his writings taken as a whole another that within equal compass supplies so admirable a view. Without doubt, Professor Parsons, who also contributes a valuable introduction, has placed English-speaking scholarship deeply in his debt.

Capitalism, in the sense in which Weber meant it, must be regarded not as a form of economic organization alone, but as the total unique pattern assumed by Western society. This, examined at any particular moment, is not merely an inevitable stage in the evolutionary life-cycle of a civilization, but a development in every fundamental respect explainable by specific combinations of circumstances. For Weber, social structures are inherently unstable and the maintenance of a given state always precarious. Specific tensions and strains tend to transform in the direction of new or recurrent structural types, with accompanying far-reaching social and cultural consequences. Thus, the long movement toward the breakdown of traditionalized, particularistic, privileged groups, and toward the treatment of social class by birth and other privileged statuses as irrelevant to status in the system of authority, valuable as these may be in other respects, lead unavoidably to a relatively levelled, undifferentiated mass upon which political support is based. The democratic principle of appeal to such an electorate, rather than to one composed of groups with fixed and differentiated status, opens the way to the emergence of a leader with wide personal appeal, often at a necessarily low level. The demagogic party leader, once he has become genuinely charismatic, can readily become a dictator, with a consequent fundamental transformation in the character of the authority system. In such circumstances, Weber remarked, the plebiscite or direct appeal comes readily to hand as a major symbol of democratic legitimation, and would tend to be effective regardless of its actual genuineness as an expression of the popular will. Though Weber died when Hitler was no more than a recently demobilized and dissatisfied corporal, he clearly saw that a large-scale charismatic movement in reaction against modern liberal institutions, but with certain democratic elements, was a very real possibility, and he went far to predict the political pattern the Nazi movement in fact took.

But it would be entirely out of character to regard Weber as a prophet of the future. No one realized better than he the futility of predicting detailed events long in advance. His object, rather, was to lay bare the distinctive features of our economy through comparative perspective and then to analyze the balance of forces and the inherent transformational impulses conducive to alteration in structure. It is in this sphere that he excels and here that his insights are most profound. Lawyers, particularly, will be interested in his analysis of the pattern of impersonal, rational-legal authority, one of the fundamental characteristics of modern society. The principal freedoms which we have come to value so highly and the relative immunity from discrimination on such grounds as birth or ethnic or class status are dependent upon it. Though not yet completely realized in practice, the particular status

and quality of an individual are in theory irrelevant for the purpose of judicature, just as they are, in another context, for appointment to bureaucratic office, where technical competence tends to be controlling. Rationalized abstraction of part of the human individual from the concrete whole has made particularistic discrimination less prominent in our society and tends to lead to the elimination of compulsory traditional status in the interests of a high degree of social mobility on the basis of ability. But the progressive emancipation of the individual from the dependence of every act and interest on his total status, a process by no means limited to the examples cited, is based upon what is, in a sense, an unreal abstraction and a purely rational construct, to be maintained only by continual discipline. Weber indicates its relative instability and its tendency to break down, either directly or through the intermediate influence of a large-scale charismatic movement, into a less abstract and rationalized treatment of the individual as multisided and complete—in total status form. Its transformation is aided, under such circumstances, by strains inherent in the structure itself which protects by rational-legal norms, completely and impersonally, individuals whose qualities and status may not in fact be irrelevant to the continuance of the institution.

Weber's comprehensive attempt to grasp the dynamic elements of a great civilization, the appearance of these in many diverse institutions, their instabilities and tendencies to change, is unique in the history of social studies. His work remains incomplete, perhaps necessarily so, but the reader will find no dogmatic over-simplification of the immense complexity of the problems involved nor can he fail to come away with a heightened understanding of the interdependent institutions of modern society.

S. E. THORNE †

THE PROCESS AND ORGANIZATION OF GOVERNMENT PLANNING. By John D. Millet. New York: Columbia University Press, 1947. Pp. 187. \$2.50.

PROFESSOR MILLET has given us a valuable book, based upon his experiences in government planning and on relevant literature, and marked by careful and lively thought concerning terms, organization, procedure and personalities. Like the earlier book by Robert A. Walker¹ it should be required reading for all serious students of administration; both books speak well for the scholarship of the younger generation of students of public administration who are evaluating the immense and confusing experience of government in the last forty years.

The argument is focussed upon a definition of planning as an operational process. The author rightly believes that carelessness and ambiguity in the

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1. THE PLANNING FUNCTION IN URBAN GOVERNMENT (1941).

use of the word "planning" has been and is costly and dangerous because of the increase of important functions placed upon government and the resulting necessity for the best possible execution of the policies adopted to administer them. While the content is largely limited to the national government of the United States, the principles set forth—like the similar ones of Walker for urban government—have application to government generally. The author has had the courage to indicate the influence of personalities in the determination of the scope, methods and results of activities labelled "planning", and to state (without straining to be "smart") his views of the proper scope, organization and procedure. He does this by first distinguishing policy from planning whereby operations to carry out policy can be more wisely prepared and guided.

There follow chapters entitled "Who Plans" and "Central Planning" in which the staff nature of planning is emphasized—within the framework of operations and subject to the authority of those with power of decision. The dangers of using the planning process for "Selling the Plans" are discussed in the chapter of that title. In the chapter "Organization for Central Planning" Millet discusses experience with economic representation and research agencies, the National Resources Planning Board and the Office of War Mobilization and Reconversion and returns again to the Council of Economic Advisors, indicating the way in which a failure to clarify purposes, authority and procedure prevents necessary planning from being done. The importance of the better organization of the Presidency, and the inadequacy for operational planning of the agencies cited are effectively argued. "Planning leadership, then, in the last analysis must always depend upon the personality of the chief executive."² There is no extended treatment of the way in which the Presidency should be organized; on this question the unpublished study of OWMR and the Executive Office of the President by H. M. Somers is penetrating and constructive and should be made available.

The final chapter presents the author's conclusions in brief and general terms. The following passages summarize the argument, and indicate some of its implications:

"Planning is the very essence of administrative management. All governmental activity implies purpose, in varying degrees of exactness. The progress realized in the performance of any job depends in large measure upon the care given to advance preparation. The minimum amount of wastefulness is insured when these preparations have been made in detail. Accomplishment can best be measured in terms of a defined goal, and of the effort required in realizing it. Planning as an administrative technique does not threaten our democratic liberties, or we would have long since ceased to be a democracy.

"Planning is only the process by which we determine objectives, define our immediate needs, and design a course of action with a corresponding

2. P. 163.

scheduling of effort. No one wants to halt this process for any accepted governmental activities. There may be those who would eliminate or curtail some of the work presently performed by government, but this is an entirely different issue.

"National planning today simply means careful management in reviewing and timing government activity as a whole. . . . National planning is synonymous with Presidential management."³

While Millet stresses operational planning as true planning, the definition of planning given in the second paragraph above points to other applications of the term which the reviewer would include in the planning process. The formulation of policy by parties and legislatures similarly calls for careful preparation with the procedures and safeguards of staff work, as recent studies of Congressional organization reveal. Again, the collection and appraisal of the experience of administering policy with a view to formulating from that experience revisions in policy to be submitted to the authoritative policy-makers is another part of the process of government to which the term planning may properly be applied. The detailed application to any given area—a farm, municipality, watershed or commodity region, for example—of the administration of the policies of several units of government calls for the planning process. Apparently these would all fit within Millet's definitions, yet the emphasis, which characterizes much of his argument, upon operation planning following from the already agreed policy may lead him to reject this view. The National Resources Planning Board's connection with "Long-Range Work and Relief Policies" might therefore be considered as a proper task for a staff reporting to a national party convention charged with adopting a national platform; and not a proper activity for operational planning in view of the existence of the Social Security Board, in the first place, and the role of the President in policy formulation generally. (Although it may be noted that the vaguely discerned function of party leadership which the Presidency inevitably possesses does call for some institutional provisions for party policy formulation that Millet ignores in his stressing of the role of the Presidency in management).

But we are asking Mr. Millet to write another book, whereas our present purpose is to indicate the virtues of this one. He has conveyed to the reader his sense of the importance and urgency of careful thinking and responsible action, and has advanced our means of understanding our government.

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3. Pp. 179-80.

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