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Book Reviews

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BOOK REVIEWS

JUSTICE IN JERUSALEM. By Gideon Hausner. New York: Harper & Row. 1966. Pp. xii, 528. $12.50.

The world is in debt, and will remain so for all time, to Gideon Hausner, author of *Justice in Jerusalem,* the most important book, so far as I am concerned, since *Les Miserables* by the immortal Victor Hugo. Gideon Hausner is a lawyer and his book deals with a courtroom trial, but it is more than the story of forensic conflict. It is a dramatic, heart-searing account of the most vast crime in history — the cold-blood murder of 6,000,000 unarmed, innocent, helpless men, women, and children. How could such an earth-shaking event occur in the twentieth century? What had happened to our civilization? Where were the guardians of the law, the protectors of human life, the guardsmen of human dignity? Unless someone answers these questions, unless there is a key to this mystery of the tramping of the grapes of life into the poison of hatred, persecution, and slaughter, the vaunted progress of man through the centuries is a myth, as well as a snare and a delusion.

Mr. Hausner answers the questions I have put, and in doing so, frightens, enlightens, enthrals, and at last, offers comfort that the brotherhood of man does not need to be a mere figure of speech, an empty dream, an academic Utopia, but can attain reality, provided the lessons of the Eichmann trial are taken to heart by mankind.

This is to be a review of *Justice in Jerusalem,* but it is not a conventional review because Mr. Hausner's book is not conventional and will find no conventional shelf in the library of the human spirit. Another reason this review is not conventional is that the reviewer is somewhat involved in the story the book unfolds. I was a witness at the Eichmann trial. I speak, therefore, with some personal knowledge of my own, and I speak with some feeling, because I believe that the people of the world, and particularly those of the Western nations, are in a degree responsible for the holocaust which could have been averted had Hitler been curbed, as it was our duty to curb him in 1936, when he made known his plans to plunge the world into an ocean of blood.

Begin with the picture of a Nazi official loading a thousand small children onto a ship. He then boards a gunboat and tows the ship out to sea, fires a cannon into its hull, and watches it slowly sink as the tots scream for rescue, their hands outstretched for help, and their voices, one by one, being smothered by the engulfing waters, until at last all one can see, after the foam and bubbles of the plunging ship have disappeared, are a few girls' bonnets and boys' caps floating about as if looking for the fair heads they had once covered with all the hopes and promises of girlhood and boyhood.

Let us now consider that the person who performed the loading, accomplished the towing, fired the cannon, and watched the infants tumbling into their watery graves has been taken into custody and is brought to trial for what he has done. How would the prosecutor of that murderer of a thousand children comport himself in the courtroom, especially if he were a man of deep

feeling? How could he keep his passions under control; how could he prevent his reprobation for so unspeakably cruel a deed from exploding into incoherent vituperation, especially if the prosecutor were of the same ethnic and religious families as the children who had been murdered for those reasons alone?

These are the queries which entered my consciousness in the spring of 1961 as I read of the preparations being made in Jerusalem for the trial of Adolf Eichmann, the loader, tow-er, and the destroyer of the infant-laden craft. The only difference between the hypothetical maritime episode I have described and the actual Nazi malefaction is the difference between 1,000 and 1,000,000, for at least one sixth of the 6,000,000 who perished in the holocaust, which was planned, supervised, and, to a great extent, executed by Eichmann, had not reached adulthood. The only difference between the sinking of a vessel with little boys and girls running with agonizing helplessness to the smashed lifeboats and the actual mass infanticide perpetrated by the Nazis was that the mass drowning was an act of tender sympathy in comparison to the methods actually employed by Eichmann in sending to their unmarked graves 1,000,000 of God's children. Slow starvation; flogging; exposure to ice, snow, and freezing temperature; shooting after long marches to the firing grounds; strangulation; gassing and hanging — these were only some of the methods of killing directed by Adolf Eichmann.

What kind of a man would be, or should be, the prosecutor of such a brain-staggering crime? In order to achieve an intellectual result commensurate with the moral vindication of murder 6,000,000 times repeated, he would have to be almost a superman; he would have to be a giant of intellect, a lion of courage, and a dynamo of never-ceasing energy. He would have to have a mind capable of grasping 100,000 details derived from human testimony and countless documents; and because Eichmann's crimes were committed in 18 different countries over a period of at least a decade, he would have to be the master of continental geography and encyclopedic history. This mountain of evidence would have to be analyzed, classified, co-ordinated, and tagged, and not for the leisurely study of historians writing years after the events; this classification had to be pigeonholed in the brain of the prosecutor for instantaneous recall in the courtroom at a trial that could be compared to battling with a tiger, for Adolf Eichmann was shrewd, resourceful, and capable of inventing and fabricating on the spot as easily as a panther leaps from a mountain crag at the throat of his prey.

Justice in Jeruslem describes how this mastery was accomplished, how the multitudinous details were stored in Hausner's brain cells, while his heart wept for his martyred countrymen, among whom were several of his own kinsmen. But tears must not dim the vision of scientific prosecution, and they did not, as we now know from the transcript of the Eichmann trial.

It is our good fortune that, like Winston Churchill, Mr. Hausner is as capable a writer as he is a doer. His written words illumine the landscape of narrative as lightning lifts mountains and valleys into dramatic relief. And so, we live through every feature of the monumental preparation for the Eichmann trial, the fiercely contested trial itself, and then, the sentencing and aftermath.

We see and feel the stupendous problems which confronted the Israeli tribunal at the very outset of the Eichmann affair.

Much of the intelligentsia of the world found serious fault with Israel's assumption of jurisdiction over Eichmann; the periodicals of the day ran with torrents of fiery castigation of the young nation. Oscar Handlin, Professor of History at Harvard University, set the tone for the bitter invective to be hurled against Israel, when he said:

> The way in which the Eichmann affair has unfolded provides substantial grounds for the fear that justice will be the least of the ends at which the trial will aim. The mode of the Nazi's capture, the claims of wide Israeli jurisdiction and the violence to well-established principles indicate that other than juridical considerations will be preeminent in the Jerusalem courtroom . . . . Whatever the crimes of which Eichmann may be guilty, they were not committed within territory over which that government was sovereign at the time; indeed that state was not yet in existence when the crimes were alleged to have occurred.[1]

This bombastic fusillade was typical of the fire emerging from the muskets of other college professors, newspaper editors, and TV-Radio commentators who could not see the primeval rotten forest of uncontained vileness for the gnarled trees of stiff-necked sticklerism. They could not see, or did not want to see, that here was a crime of unprecedented monstrousness, and that if it went unredressed it would be an invitation to other international butchers to repeat the crime; for no one can truly believe that the cleaver of racial, religious, political, and ethnic persecution has been put permanently away.

It was Hausner's responsibility to reply to all the critics, for although he spoke in the Beit Ha'am, he was really speaking to the world, whose eyes were focused on Jerusalem. Hundreds of newspaper reporters and magazine writers attended the trial. Every word spoken in the courtroom and every gesture made was recorded permanently by video tape and motion picture film. On the floor, Dr. Robert Servatius, attorney for Eichmann, spoke for the global detractors, echoing their animadversions and damning appraisal of Israel.

Hausner's reply was electrifyingly brilliant and hit the target on every critical front. He examined and discussed all the authorities presented by the defense; he cited cases, textbook writers, and international law treatises; he analyzed decisions, taking up both the majority and minority opinions. Roman law, English law, American law, French law, and the law of all other leading nations came under his keenly penetrating review; and when he had finished, not a pebble of authority was left that supported the extravaganzas of Oscar Handlin and the even more extravagant charges projected by Dr. Servatius.

In answer to the proposition that Eichmann's crimes were not committed on Israel's soil, Mr. Hausner reminded the tribunal — and the world jury — that the State of Israel succeeded, as a nation, to Palestine, and whatever injury was inflicted on the Jewish community was a wound that lacerated Palestine as well. To say that Eichmann was not amenable to Israeli law because Israel was not yet a state in 1939-1945 would be to argue that a man who

1 American Council for Judaism, Winter Issue 1961, pp. 1-2.

committed murder in the colony of Pennsylvania on July 3, 1776, could not be prosecuted by the State of Pennsylvania on July 5, 1776. Obviously, a new state inherits the sovereign power and responsibilities of the state it succeeds.

In answer to the charge of "kidnapping" levelled at Israel for taking Eichmann out of Argentina and transporting him to Israel, Hausner quoted United States Supreme Court decisions, as well as decisions from England and other countries, which have held that the manner in which a person is brought to trial in a court having jurisdiction over the offense can in no way affect the legality of the trial. In this respect it might be well to recall that when Pancho Villa crossed the Rio Grande and invaded American territory, killing American citizens and destroying American property, the United States did not ask for Villa's extradition but sent a punitive expedition into Mexico under General Pershing to seize Villa and bring him back to the United States for trial.

With regard to trying Eichmann in Israel, it must be noted that if Eichmann had killed 6,000,000 Americans in 18 different countries and those countries had refused or were unable to prosecute Eichmann, the United States would not only have been justified, but it would have had the duty, which it undoubtedly would have zestfully fulfilled, to attempt to capture Eichmann and to take him to the United States for trial under the authority of article I, section 8, subsection 10 of the Constitution of the United States.

At the time of the first Nuremberg trial, Senator Robert H. Taft declared that the United States had stained its record by participating in a prosecution for acts that were not crimes when committed. In other words, Senator Taft charged the United States with ex post factoism. Dr. Servatius repeated this argument in Jerusalem. Mr. Hausner reduced it to battered tinsel with the simple statement that, basically, Eichmann was being tried for murder. And was there ever a time that murder was not a crime?

The Israeli tribunal took jurisdiction of the Eichmann crime, and today no respected authority in international law would question that the Israeli jurisdiction over Eichmann followed the norms of the recognized international code. Indeed, West Germany, which had been one of Israel's bitterest critics, accepted the Jerusalem trial of Eichmann as a precedent and itself initiated a number of trials against SS officials who had killed Jews outside the territorial domains of West Germany.

When all the questions of jurisdiction had been resolved, Gideon Hausner advanced to the center of the legal arena with the flaming sword of justice drawn from the scabbard of formal law. Here was a prosecution, the like of which had never been experienced before. Was the prosecutor to treat the case coldly and with words of metallic detachment? Not Gideon Hausner — and the world thanks him for feeling deeply and speaking accordingly. A people had been massacred; 6,000,000 human beings had been butchered for a Nazi holiday. Was this not the occasion for thunderbolts, if ever there would be? Hausner strode forth with the thunderbolts ready. He would soon show what the trial of Adolf Eichmann was. It would be a modified Day of Judgment. And so, the words erupted from his lips:

> "As I stand here before you, Judges of Israel, to lead the prosecution of Adolf Eichmann, I do not stand alone. With me, in this place and at this hour, stand six million accusers. But they cannot rise to their feet and point an accusing finger toward the man who sits in the glass dock and cry: 'I accuse.' For their ashes were piled up in the hills of Auschwitz and in the fields of Treblinka, or washed away by the rivers of Poland; their graves are scattered over the length and breadth of Europe. Their blood cries out, but their voices are not heard. Therefore it falls to me to be their spokesman and to unfold in their name the awesome indictment."[2]

He spoke for three hours. The courtroom became a stage on which was re-enacted, through the magic of his words, the unparalleled tragedy of the martyred 6,000,000. For the first few minutes of Mr. Hausner's address, the courtroom could have been a graveyard with headstones stretching out into infinitude, so silent were the judges, the other lawyers, and the 700 onlookers crowded into the space reserved for the audience. Then an occasional sob was heard as the orator reproduced the pathetic scenes in the ghettos and the concentration camps; and then, as he proceeded to a description of the captive men, women, and children being denuded and marched into the gas chambers, as he told of the screaming infants being thrown into flaming ovens, and of the other unspeakable atrocities of the Nazi inferno, the courtroom became a churning sea of piteous emotion. The next day, Mr. Hausner spoke for five more hours and then on the third day he began to apply flesh and muscle to the skeleton of the indictment. He presented evidence for 56 days. Much of that soul-wrenching evidence is recited in the book.

What was Eichmann's defense? He said that he was acting under superior orders, that he exercised no initiative, and that he was not much more than a train dispatcher arranging schedules for the multitudes that were being shipped to distant places. He knew that the transportees were going to be killed, but that this was not his responsibility for he was only a lieutenant colonel. He obeyed orders, he said.

Under questioning by Mr. Hausner, I testified to my conversations with Goering, von Ribbentrop, Hans Frank, and others of the Nazi hierarchy, in which they revealed that Adolf Eichmann was far from a mere cog in the Nazi machine. He was the engineer; he supervised the murder mills, the gas wagons, and the Einsatzgruppen firing squads. I testified also on the subject of superior orders, stating that from my judicial experience in the Nuremberg trials it was clear that the supposed inviolability of superior orders that were obviously criminal was a myth because one could easily avoid any assignment of killing civilians by merely asking to be sent to the military front. The SS killers, however, including Eichmann, did not relish that kind of a transfer because at the front, when they shot, the other side shot back. Eichmann preferred to remain in his office swiveling in blood not his own.

If the Notre Dame *Lawyer* had not placed a limit on the length of my review of Gideon Hausner's book, I fear I might go on for hundreds of pages talking about this work that should be in every library, every schoolroom, and indeed in every home, because no one can profess to be educated without know-

2 HAUSNER, JUSTICE IN JERUSALEM 323-24 (1966).

ing of the most vast crime of the ages, how it came about, how its designer planned and executed the unutterable offense and how at last he was brought to justice.

In his closing speech to the Israeli tribunal, Mr. Hausner asked that the ultimate penalty be imposed on the convicted defendant:

> "By the enormity of his crime Eichmann has excluded himself from the society of human beings . . . he has shaken off moral restraints, and has given gratification to the basest instincts, against which civilized man has safeguarded himself by a wall of moral bans and injunctions. . . . Even a murderer is still, in spite of the horror of his crime, within the pale of human society. But he who sins against humanity undermines the very existence of society. Such a creature has denied himself the right to walk among human beings, and human society is enjoined to spew him out. . . .
>
> "We are not dealing here with something that is dead and buried; we are not taking scrap metal out of the storehouse of history. Not one of the survivors will ever be the same as he was before; nor will human society again be able to be what it was, before these untouchables came and sent millions to their deaths. . . .
>
> "I pray the court to award the wicked man facing it the penalty that a human and civilized agency is capable of meting out. I know full well that there is no possibility of giving him even a minute fraction of the penalty appropriate to his deeds. Even if he were killed a thousand times, even if he died anew each day, even then there would be no atonement for the suffering he caused to a single child. . . ."[3]

Eichmann was hanged, his body cremated, and the ashes thrown to the winds. This did not end the tragedy. It did not atone for the unpardonable crime, but it helped to re-establish faith in a world of law.

What Martha Gellhorn, a well-known American writer and humanist, said of the Eichmann trial could be said of Gideon Hausner's book:

> The trial was essential, to every human being now alive, and to all who follow us . . . for the scene of the crime was a whole continent, the victims were a whole nation, the methodical savages who committed the crimes were as clever as they were evil, ingenious, brilliant organizers, addicts to paperwork. This is the best record we and our descendants will ever have; and we owe the state of Israel an immeasurable debt for providing it. No one who tries to understand our times, now or in the future, can overlook this documentation of a way of life and death which will stain our century forever. No one will see the complete dimensions of twentieth-century-men — and that includes all of us, I insist — without studying the Eichmann trial.[4]

*Michael A. Musmanno**

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3 *Id.* at 429.

4 Gellhorn, *Eichmann and the Private Conscience,* Atlantic Monthly, Feb. 1962, p. 52 at 53.

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THE GOOD SAMARITAN AND THE LAW. Edited by James M. Ratcliffe. Garden City: Anchor Books, Doubleday & Co. 1966. Pp. 300. $1.45.

Two thousand years ago a Jewish lawyer demanded a definition of the term "neighbor." This makes him, I suppose, an analytical jurist. Whether the tale of the Samaritan answered his perplexities we cannot say. But he would surely have been astonished had he been informed that there were two answers to his question, one if he was asking as a lawyer, another if he was asking as a layman. To him, neighbor was neighbor and duty, duty. Perhaps this ancient lawyer's tale has a moral for law and lawyers today.[1]

It should not astonish a lawyer, nor an Oxford don for that matter, that "neighbor" and "duty" are relative and relational to circumstance and purpose. Mrs. Palsgraf's loss demonstrated the latter, and the late Edmond Cahn succinctly put the former when he pointed out that

> at any given time, we have to acknowledge at least three moral standards by which we pass judgment: they are (1) the standard we require, (2) the standard we desire, and (3) the standard we revere. The *first* we generally enforce by group punishment for infractions, and the *second* we usually seek to bring about by preaching and praising the *third*. Since we so often use the third — what might be called "saintly" or "heroic" morality — for purposes of exhorting others and gratifying our own emotional mysticism, we may take it for granted that this standard does not have much practical reference — that is, unless some genuine "saint" or moral "hero" happens to come into view.[2]

The central problem posed by *The Good Samaritan and the Law* is the extent to which Cahn's second standard — the standard we desire — has been, and can be, reinforced by civil and criminal sanctions. Coerced compliance with the third standard is advocated by only one of the book's contributors. This contributor, Professor W. M. Rudolph, would seem to require housewives to feed starving beggars, professional donors to give blood transfusions, Christian Scientists to bring medical help, and licensed pilots to make emergency flights. Failure to do so would render one civilly liable for the victim's harm or loss that might have been averted by a rescue.[3] Presumably, Professor Rudolph would require Lord Macaulay's fictional doctor to make that trip from Calcutta to Meerut.[4] The other contributors to this timely volume, and the laws and statutes they cite, would impose a more limited duty to rescue than that proposed by Professor Rudolph.

Some fifteen distinguished scholars are contributors to this collection of essays, most of the papers having been delivered at a University of Chicago conference, dealing with the Good Samaritan problem, which was held shortly after the Kitty Genovese murder. In addition to the papers presented at the conference, the book includes Dean Ames' classic article on "Law and Morals,"

1 Honoré, *Law, Morals and Rescue,* in THE GOOD SAMARITAN AND THE LAW 242 (Ratcliffe ed. 1966).
2 CAHN, THE MORAL DECISION 40-41 (1955).
3 Rudolph, *The Duty to Act: A Proposed Rule,* in THE GOOD SAMARITAN AND THE LAW 243 (Ratcliffe ed. 1966).
4 IV MACAULAY, THE MISCELLANEOUS WORKS 252 (Whitehall ed.).

which introduces the reader to the extremely individualistic common law context of the problem,[5] and Professor Charles O. Gregory's delineation of the more recent developments in the law of torts.[6] Of special value to the comparativist are the articles contributed by Professors Tunc[7] and Rudzinski,[8] who summarize those European statutes and decisions that impose a duty to intervene in order to save others from imminent peril. Hans Zeisel contributes a public opinion poll of dubious value and concludes that it makes no difference in personal behavior whether or not a Good Samaritan law exists.[9] Of academic interest is the attempt of two senior law students from the University of Chicago to draft a model Good Samaritan Act.[10]

Except for Professor Rudolph, most of the contributors seem to accept Jeremy Bentham's rule, reitereated by Dean Ames, that there should be a duty to intervene in order to save another from impending death or serious bodily injury, when such may be done with little or no inconvenience. There is, however, disagreement as to the efficacy of legal sanctions as determinants of human behavior. Arthur L. Goodhart is quoted as saying that "the only people who will offer their services to others in distress do not have to be required to do so; and those who will not do it voluntarily pay no attention to official sanctions."[11] Professor Tunc, speaking from the experience of an observer of French law in action, takes the contrary position. He feels that the law can help awaken public opinion as to the requirements of justice and even as to the requirements of ethics, and concludes that the French law "acts as an incentive to everybody to behave like the Good Samaritan."[12]

The arguments over whether or not law ways can change folkways, and whether or not an unenforced or unenforceable law has reprobative value that is sufficient justification for the law's existence, have not been resolved by the several authors. In fact, those perennial arguments never have been satisfactorily concluded and continue to arise in various contexts, the position taken depending largely upon the spokesman's moral commitments regarding the particular issue. The real and ideal are frequently at odds, at least in the eyes of the beholder. Those who hold fervent moral convictions regarding adultery, homosexuality, abortion, obscenity, alcoholism, drug addiction, gambling, prostitution, and perhaps Good Samaritanship may not be perturbed by the law's inefficacy or desuetude. They may point to a relatively efficacious implementation into law of such moral obligations as those regarding usury, exploitative contracts, child labor, sweatshops, workmen's compensation, and fair employment regulations. To the realist, however, the moral activist must produce empirical evidence as

5 Ames, *Law and Morals,* in THE GOOD SAMARITAN AND THE LAW 1 (Ratcliffe ed. 1966).
6 Gregory, *The Good Samaritan and the Bad: The Anglo-American Law,* in *id.* at 23.
7 Tunc, *The Volunteer and the Good Samaritan,* in *id.* at 43.
8 Rudzinski, *The Duty to Rescue: A Comparative Analysis,* in *id.* at 91.
9 Zeisel, *An International Experiment on the Effects of a Good Samaritan Law,* in *id.* at 209.
10 Miller & Zimmerman, *The Good Samaritan Act of 1966: A Proposal,* in *id.* at 279. The students' draft is of special interest because in addition to the central problem of whether or not (and under what circumstances) there is a duty to act, the proposal also deals with problems as to the compensation of the injured Good Samaritan, intervention to prevent the commission of crimes, and injuries to third persons.
11 Gregory, *op. cit. supra* note 6, at 31.
12 Tunc, *op. cit. supra* note 7, at 62.

to why sin should be made criminal or tortious, for the realist's premise is that in a democratic society the sanction of legal control ought not to be used unless there is a clear consensus to support its enforcement. Recently, Professor H. L. A. Hart[13] and Lord Devlin[14] have had a great deal to say on this argument and at the moment the Hart felt premises are gaining acceptance.[15]

The essay by Dr. Freedman, a psychiatrist, may afford some comfort in dealing with the vexing Good Samaritan problem. In discussing the causes for unresponsiveness to cries for help, he singles out, as primary factors, fear, anxiety, lack of perception, and finally the absence of personal involvement, and says that apathy and indifference are the least likely primary psychic vectors in response to the Good Samaritan situation.[16] Joseph Gusfield, a sociologist, is reassuring when he says that "indifference is the other side of privacy,"[17] but is disturbing when he points out that the concentration of ethnic groups in our cities breeds mistrust and fear of violence from other groups. Finally, a philosophic justification for the status quo of the common law is offered by Professor Fingarette who says:

> the other side of the coin: whether my soul is saved or not is none of the state's business. Let Caesar regulate his own affairs: keeping the public order and the public well-being. My soul is *my* affair. This was Jesus' teaching; it is also central to our own political tradition.[18]

The essays and material presented in *The Good Samaritan and the Law* are of jurisprudential and practical significance. This could be a valuable and workable book for a course in Introduction to Law, Legislation, or Jurisprudence. For nonlawyers, including students of philosophy, sociology, and political science, there is a wealth of material that has relevancy to the problems of law as a means of social control and the choice that may be made between alternative sanctions. But for the average reader there remains unanswered the questions posed by Professor Honoré:

> Should the law, with its mechanisms of inducement, rewards, and compensation, be used to encourage what the shared morality treats as laudable and discouraged what it reprobates? Should the law . . . go further and, by the use of threats and penalties, "enforce" morality?[19]

Answers to these questions must be postponed until we respond to the basic question. Most of us have never resolved the problem of am I (and to what extent) my brother's keeper? When the bell tolls, some of us turn deaf ears, others respond, and still others merely contemplate the passage of time.

13 HART, LAW, LIBERTY AND MORALITY (1963), 55 J. CRIM. L., C. & P.S. 393 (1964).
14 DEVLIN, THE ENFORCEMENT OF MORALS (1959).
15 Although the *Wolfenden Report* did not gain immediate acceptance, it appears to have prevailed, and Parliament presently is considering legislation to remove criminal sanctions against homosexual behavior between consenting adults in private. The recent report of the Law Commission also indicates that nonfault grounds probably will be added to the Matrimonial Causes law.
16 Freedman, *No Response to the Cry for Help,* THE GOOD SAMARITAN AND THE LAW 171 (Ratcliffe ed. 1966).
17 Gusfield, *Social Sources of Levites and Samaritans,* in *id.* at 183, 191.
18 Fingarette, *Some Moral Aspects of Good Samaritanship,* in *id.* at 213, 218.
19 Honoré, *op cit. supra* note 1, at 242.

It is my belief that although Good Samaritanship is to be encouraged, since the law to be functional must embody only a minimum ethic, only egregious examples of wanton indifference should be subject to the law's clumsy sanctions.

*Henry H. Foster, Jr.**

SEARCH & SEIZURE AND THE SUPREME COURT — A STUDY IN CONSTITUTIONAL INTERPRETATION. By Jacob W. Landynski.* Baltimore: The Johns Hopkins Press. 1966. Pp. 286, x. $8.50.

This book is the first in the 84th series (1966) of "The Johns Hopkins University Studies in Historical and Political Science" which is under the direction of the Departments of History, Political Economy, and Political Science. The author is an Associate Professor of Political Science in the Graduate Faculty of the New School for Social Research in New York City.

The author has done a remarkable job in limiting the length of his text to 270 pages, because as he states:

> Unlike some other areas of constitutional law, where precedents may acquire sanctity from old age, if from little else, many search and seizure problems are of fairly recent origin and not precedent-bound. Such precedents as do exist are frequently ambiguous and tend to age quickly. Opinions are befogged by a rhetoric that obscures basic judicial assumptions, and the justices responsible for the decisions may later disagree on what they meant in earlier decisions and may give differing reasons for their arrival at the same result. The result is that, taken collectively, the cases discussed . . . resemble a battle of constitutional conflict rather than a chapter of constitutional law.[1]

The subtitle of the book is "A Study in Constitutional Interpretation." This history of the decisions of the United States Supreme Court on the fourth amendment suggests, at least inferentially, that the word "interpretation" should probably be replaced by the word "creation." For example, in Professor Landynski's discussion of the exclusionary rule (the rule that authorizes the defendant to require the suppression of evidence seized during an illegal search), the following appears:

> One thing is certain: the exclusionary rule is the most creative single act of the Supreme Court in this area of constitutional law. The Court's interpretation of the Fourth Amendment revolves around the exclusionary rule. . . . Without the exclusionary rule, the illegality of the search would be immaterial to the admission of the evidence, and the judicial *development* of the Fourth Amendment as we know it would have proved impossible.[2]

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1 LANDYNSKI, SEARCH & SEIZURE AND THE SUPREME COURT 143 (1966) [hereinafter cited as LANDYNSKI].

2 LANDYNSKI 86.

To me this statement represents in effect an admission that most of the clamor and demand for enforcement of the fourth amendment has come from criminals. Nothing in the book indicates that very many innocent parties have had their fourth amendment rights infringed; or if they have, that they have been sufficiently inconvenienced or concerned to seek protection or vindication of those rights either from the courts, the state legislatures, or the Congress.

In considering the origin and significance of the fourth amendment, it is said in the first chapter:

> [T]he Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.[3]

The author points out that the historical reason for the adoption of the fourth amendment was to prevent the exercise of the broad search and seizure powers that had been used by the English both to suppress freedom of the press[4] and to enforce unpopular tax and revenue laws.[5]

The second chapter deals effectively with the 1886 case of *Boyd v. United States,*[6] the first major case in which the United States Supreme Court endeavored to interpret the fourth amendment. It is stated that the court's majority opinion assigns "the wrong reason for the right decision — in holding the forced production of the papers to be an unreasonable search rather than an incrimination [within the meaning of the fifth amendment], and then requiring exclusion of the evidence,"[7] and that, in doing so, "the Court was, in effect, discarding the common-law rule of the admissibility and requiring exclusion of the fruits of illegal searches from *all* criminal trials."[8] The author also comments: "Some of the criticism has resulted from the fact that the *Boyd* decision served to protect proven smugglers . . . though, ironically, it was . . . the unrestrained search for smuggled goods that brought the Fourth Amendment into being."[9]

The third chapter deals with the "Federal Exclusionary Rule," which originated with the 1914 case of *Weeks v. United States,*[10] a case involving the illegal use of the mails to transmit lottery tickets. It is interesting to note that the subsequent cases (at least until 1964) that are described as applying the exclusionary rule in order to enforce the fourth amendment provisions relate to such matters as violations of the prohibition laws,[11] gambling,[12] possession of obscene literature,[13] possession of wiretapping

3 *Id.* at 19.
4 *Id.* at 20-21.
5 *Id.* at 25.
6 116 U.S. 616 (1886).
7 LANDYNSKI 60.
8 *Ibid.*
9 *Id.* at 57.
10 232 U.S. 383 (1914).
11 Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 28 (1927).
12 Irvine v. California, 347 U.S. 128 (1954).
13 Mapp v. Ohio, 367 U.S. 643 (1961).

apparatus,[14] narcotics law violations,[15] conspiracy to defraud the Government,[16] and counterfeiting.[17] In my opinion, if application of the exclusionary rule had been confined to cases involving such nonviolent crimes, and not extended to cases involving robbery, burglary, murder, rape, and other crimes of violence that pose a greater threat to public security, there would have been little incentive for opposing the rule.[18] However, the Supreme Court did not indicate any intention to so confine the rule, and recent decisions have not so confined it.[19]

The chapter on "Constitutional Searches Without Warrant" emphasizes how far the Supreme Court has gone in recognizing the validity and expanding the scope of searches incident to lawful arrests.[20] As the author points out, however, there has not yet been a significant amount of guidance as to what constitutes an arrest and when it is lawful.[21]

A substantial portion of the book details the steps taken by the court from 1949, when it held that the due process clause of the fourteenth amendment made the search and seizure provisions of the fourth amendment applicable to the states,[22] until 1961, when its decision in *Mapp*[23] imposed the exclusionary rule upon the states. As to the Supreme Court's long delay, from 1961 until 1965, in answering the question whether the *Mapp* decision should be given retroactive effect, Professor Landynski astutely observes:

> The long delay may have been strategic; it can perhaps be explained by a desire on the part of the Court not to foreclose a retroactive interpretation by such state courts as might choose to follow this course, coupled with its own intention not to require a retroactive ruling.[24]

There is an interesting chapter describing the decisions of the Supreme Court on the currently controversial topic of "Eavesdropping and the Constitution." This chapter clearly indicates the author's belief that in this area the Supreme Court has not gone far enough in applying the exclusionary rule.

Also included is a provocative chapter on "Administrative Invasion of Privacy." This chapter discusses *Frank v. Maryland*[25] and *Ohio ex rel. Eaton v. Price*[26] and concludes with the following observation:

> As matters now stand, the criminal whose home has been searched without a warrant may have the evidence excluded. The law-abiding householder faces a prison sentence or fine when he refuses to permit his

14 Elkins v. United States, 364 U.S. 206 (1960).
15 Ker v. California, 374 U.S. 23 (1963); Jones v. United States, 362 U.S. 257 (1960); Rea v. United States, 350 U.S. 214 (1956); Rochin v. California, 342 U.S. 165 (1952); United States v. Jeffers, 342 U.S. 48 (1951).
16 Gouled v. United States, 255 U.S. 298 (1921).
17 Lustig v. United States, 338 U.S. 74 (1949).
18 LANDYNSKI 191 n.89.
19 Stoner v. California, 376 U.S. 483 (1964); Preston v. United States, 376 U.S. 364 (1964).
20 Later in the book it is suggested that the court may have gone too far in doing this. LANDYNSKI 197.
21 *Id.* at 97-99, 169-70, 179-80.
22 Wolf v. Colorado, 338 U.S. 25 (1949).
23 Mapp v. Ohio, 367 U.S. 643 (1961).
24 LANDYNSKI 172.
25 359 U.S. 360 (1959).
26 364 U.S. 263 (1960).

> privacy to be invaded. It seems contradictory to construe the Fourth Amendment in such a manner as to make it a protection for the criminal suspect who misuses his privacy to shield the evidence of his guilt, and not for the honest citizen who values privacy for its own sake.[27]

For those, like myself, who disagree with the imposition of the exclusionary rule on the states, this represents an argument against such imposition. On the other hand, for those who favor the exclusionary rule and its imposition on the states, as the author of this book apparently does, this is an argument against the decisions of the Supreme Court in *Frank v. Maryland* and *Ohio ex rel. Eaton v. Price.*

Both those who argue in favor of, and those who argue against, the exclusionary rule as a means of protecting fourth amendment rights frequently base their arguments on emotional appeals. The author is no exception. Thus he states:

> The law officer . . . embodies in his person the community's dedication to law and order. When he sins, the law loses its moral grandeur. . . . When the community itself, through the agency of its law officers, disregards the law, the moral superstructure is undermined.[28]

The author fails to recognize that application of the exclusionary rule will frequently undermine public confidence in the law. I believe that the general public shares Dean Wigmore's view[29] that it is difficult, if not impossible, to grasp any rational basis for the exclusionary rule. It can be a contempt of court[30] and a criminal offense[31] for an individual intentionally to suppress or prevent use of evidence of a defendant's crime. Yet, the exclusionary rule requires a court to suppress reliable evidence of a defendant's guilt. How can the public not fail to lose confidence in such an administration of justice?

I was especially interested in determining whether this book would indicate any historical basis for using the exclusionary rule to protect fourth amendment rights. The book makes it absolutely clear that there is none.

The book did not satisfy my curiosity as to how far the so-called "fruit of the poisonous tree" doctrine has been or will be carried. It assumes that "not only the illegally seized evidence itself . . . is inadmissible" but that "equally inadmissible is other evidence obtained through leads provided by the illegal search."[32] What decisions there have been apparently do not provide much valuable guidance as to how far this doctrine will be carried.[33]

Presumably because the decisions of the Supreme Court have not yet given any notable amount of guidance, the book fails to cast much light upon the troublesome question of when a warrant may be ineffective to justify a search.[34]

Another reason for my interest in reading this book was to determine

27 LANDYNSKI 261-62.
28 *Id.* at 270.
29 8 WIGMORE ON EVIDENCE §§ 2183, 2184 (3d ed. 1940).
30 See Hale v. State, 55 Ohio St. 210, 45 N.E. 199 (1896).
31 See Neal v. United States, 102 F.2d 643 (8th Cir. 1939).
32 LANDYNSKI 208.
33 Annot. 50 A.L.R.2d 569 (1956).
34 LANDYNSKI 194-95.

whether any other civilized jurisdiction has a rule excluding or suppressing evidence obtained in an illegal search. Some information on this appears in one of the book's footnotes[35] where reference is made to a pertinent periodical article,[36] and the author states that "of the various jurisdictions surveyed, only France appears to have a general rule for the exclusion of illegally seized evidence, though some countries compromise by excluding when the violation is of a grave character, as, for instance, when brutality is involved," [e.g., coerced confessions are excluded]. A reading of the reference does not indicate the origin of the French rule. I believe that other nations' general nonrecognition of the rule excluding illegally seized evidence should raise a serious question as to whether there is any rational basis for the rule.

The only rational, as well as primary, basis suggested is that criminal sanctions and civil liability had failed to deter officers from illegal searches and that, therefore, imposition of the exclusionary rule was the only effective means of protecting fourth amendment rights.[37] There is, as the author recognizes, "no conclusive evidence . . . available"[38] to support the factual premise for such a conclusion. His outline of what evidence there is[39] is not especially convincing, particularly in the light of recent reports on law enforcement in the District of Columbia.

In recognizing that "other approaches have been suggested as alternatives to exclusion of the seized evidence,"[40] it is stated:

> Professor Foote has advocated statutes which provide for minimum liquidated damages without regard to the character of the plaintiff.[41] A California state bar committee recommended that the officer's employer — whether the state, county, or a city — be held liable for damages. This proposal, said Dean Barrett, "gives promise of providing a more adequate solution than the exclusionary rule at a smaller social cost"[42] especially since, unlike the exclusionary rule, the remedy would be available to the innocent as well as the guilty.[43]

The author has apparently tried to be impartial in evaluating the Supreme Court's creation of the exclusionary rule and its application of the rule, including its imposition upon the states. However, one is left with the general impression that the author is in agreement with this use of the exclusionary rule.[44]

35 *Id.* at 127, n.49.
36 *The Exclusionary Rule Under Foreign Law,* 52 J. CRIM. L., C. & P.S. 271 (1961).
37 LANDYNSKI 187.
38 *Id.* at 188.
39 *Id.* at 188-89.
40 *Id.* at 187.
41 Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493, 494 (1955).
42 Barrett, *Exclusion of Evidence Obtained by Illegal Searches — A Comment on People v. Cahan,* 43 CALIF. L. REV. 565, 595 (1955).
43 *Id.* at 187. Further proposals may be found in Packer, *Who Can Police the Police?,* New York Review of Books, Sept. 8, 1966, p. 14; and Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution,* 50 A.B.A.J. 815, 818-19 (1964). The latter article further suggests that Congress might provide an adequate alternative to the exclusionary rule since § 5 of the fourteenth amendment states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The significance of this argument becomes clear when one considers that the fourteenth amendment is the only basis ever suggested for applying the fourth amendment to the states.
44 LANDYNSKI 47, 61, 76, 84, 192, 197, 207.

The author, then, has reported very well what the Supreme Court has done in requiring application of the exclusionary rule and its reasons for doing so; but he has not questioned whether the Court should have acted as it has and thus whether the law should be as it is now following the *Elkins*,[45] *Mapp*,[46] *Stoner*[47] and *Preston*[48] decisions. Perhaps he has not raised such a question because he recognizes, as all of us probably should, the futility of doing so.

*Kingsley A. Taft**

UNSAFE AT ANY SPEED — THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE. By Ralph Nader. New York: Grossman Publishers. 1965. Pp. xi, 365. $5.95.

SAFETY LAST — AN INDICTMENT OF THE AUTO INDUSTRY. By Jeffrey O'Connell and Arthur Myers. New York: Random House. 1966. Pp. vi, 226. $4.95.

As indicated by the authors of *Safety Last*, 47,700 Americans lost their lives in automobile accidents in 1964.[1] This was a 9% rise over 1963. In the preface to *Unsafe at Any Speed* it was predicted that the figure of 51,000 would be reached in 1965.[2] As reported by the National Safety Council, the 1965 figure was in fact 49,000, which was 3% over 1964. The National Safety Council also reported an estimated 1,800,000 disabling injuries in 1965. For the first eleven months of 1966, the Safety Council shows 47,680 traffic accident deaths — an increase of 8% for the same period in 1965. As further evidence of the magnitude of the problem, it is asserted in *Safety Last* that "according to a responsible estimate, one now has a fifty-fifty chance of being hurt or killed in a traffic crash during a lifetime."[3] The economic losses, including such items as property damage, medical and hospital expenses, lost wages, and insurance overhead costs were estimated in 1964 as 8.3 billion dollars, and if to this are added the indirect costs, Nader suggests the total cost to be about 2% of the gross national product.[4]

This situation poses two major social problems for our free society. The first is accident prevention, and the second is the development of a sound national system for allocating losses from accidents that do occur. Nader points out quite correctly that most of the talents and energies of experts of various kinds, including lawyers, engineers, and public officials, have been devoted to the second problem, i.e., that of allocating losses after accidents occur rather than preventing accidents and injuries from accidents.

45 Elkins v. United States, 364 U.S. 206 (1960).
46 Mapp v. Ohio, 367 U.S. 643 (1961).
47 Stoner v. California, 376 U.S. 483 (1964).
48 Preston v. United States, 376 U.S. 364 (1964).

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1 O'CONNELL & MYERS, SAFETY LAST 40 (1966).
2 *Preface* to NADER, UNSAFE AT ANY SPEED at vii (1965).
3 O'CONNELL & MYERS, *op. cit. supra* note 1, at 40.
4 NADER, *op. cit. supra* note 2, at viii.

Many acts and conditions can constitute factual causes for accidents. It is never accurate to say that a particular act of one of the drivers, or the design of some part of a vehicle, or some condition of the highway was the sole factual cause for an accident or an injury from an accident. But, in identifying various causes for accidents, and in seeking solutions to the problems of allocating losses and preventing traffic accidents on the highway, one's attention is naturally directed to (1) the driver, (2) the vehicle, and (3) the highway.

Both personal injury suits and governmental regulation have tended to concentrate on the driver as the legally responsible cause for traffic accidents, and the thesis of both the Nader and the O'Connell-Myers books is that the unsafe practices in the design of automobiles have been too much ignored. The ignoring of the unsafe design practices has resulted in large part because of an unholy alliance between the automobile industry and the various agencies, public and private, that can be said to constitute the safety establishment. In support of this charge the authors state that: (1) accident investigation is oriented toward the detection of malfeasance of the driver[5] even though often this so-called malfeasance or fault may merely consist of such factors as honest errors of judgment, inadvertence, and a natural human weakness to take chances, which factors, it can be argued, should have been taken into account and guarded against in the design of the vehicle; (2) the National Safety Council attributes 90% of the traffic accidents that occur to *improper driving*[6] when no doubt other concurrent causes could be listed as being legally responsible. Because there *are* often multiple causes for a particular accident, the National Safety Council's figure is misleading. Realistically, it could as easily be said that about the same percentage of accidents and injuries from accidents was attributable to either the condition of the highway or vehicular design. It is important that the causes be accurately identified if a correct decision is to be made as to what steps are to be taken in preventing accidents and allocating losses.

Whereas accident prevention sometimes influences the development of legal doctrines for shifting losses arising out of accidents, other factors often have more compelling influence. The primary issue in a personal injury suit is that of deciding who ought to bear the loss now that it has occurred, rather than what measures society should take to prevent such occurrences. Without doubt, more and more attention is being given to alternatives to the existing plans for the allocation of losses from traffic accidents, and various plans for compensating victims of traffic accidents are being proposed and discussed, including a plan in part devised by Jeffrey O'Connell, one of the authors of *Safety Last*.[7] It is not inappropriate to consider the maker of the automobile as an entity for the assumption of some of the losses, especially in view of his risk-distributing capacity to all of the purchasers of his automobiles. Substantially prior to the publication of both of these books, judge-made law had been altered in somewhat revolutionary ways in order to allocate to the makers of products more of the losses of those who are victimized by the use of the products. No doubt the efforts of the authors of these two books have already given

5 *Id.* at 238.
6 *Id.* at 239.
7 KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

impetus to this development, and the effect will continue for some time. We can expect the legislative and judicial branches to give increasing attention to the vehicle as a responsible cause for traffic injuries and fatalities, and hopefully, accident investigators will be better trained and directed in identifying not only driver misconduct, but also vehicular causes for injuries.

The spotlight of publicity on the automobile's unsafe design features has resulted in the passage of safety legislation by Congress. Because of the nature of the problem, it is to governmental regulation, and particularly to federal regulation, that we must turn if any significant impact is to be made on the incidence of injuries from accidents generally, and from traffic accidents in particular. We have already experienced a good deal of governmental safety regulation — typified, for example, by the efforts of the Federal Food and Drug Administration to reduce the incidence of harm to those who are victimized by new drugs, both good and bad.

Both of these books are written as an indictment of a particular industry, and for several reasons I believe this can lead the reader to acquire a warped view of the problem. In the first place, unsafe practices are not unique to the automobile industry but are quite common to all industries because of the pressures of competition and because consumers, i.e., all of us, are more interested in a product's price, looks, and other considerations than we are in its safety features. The conduct of consumers in the use of cigarettes is an example. I do not believe that as a group those who are a part of the automobile industry are any different from the rest of us. This is not to say that their customs should not be evaluated and found wanting. But the principle "judge not, lest ye be judged" is worth remembering. Perhaps only in the way that the problem is depicted in these books can the public and the regulatory authorities be aroused. And so I believe that the authors have performed a significant public service in the exposures made, but in so doing I also feel that they have exaggerated the "misconduct" of the makers of automobiles; rather, they should have indicted us all. It is not absence of competition that has produced the unsafe car; it is rather a lack of a proper sense of values on the part of us all. As Nader states, the automobile is the major industrial art form in our society, and it is designed to appeal to the consumer's esthetic desires and not to his interest in safety.[8] This reasonably follows from the fact that the "reasonable or ordinary man" is more interested in the car's esthetic features than in its safety features. The maker's conduct is not, therefore, necessarily unreasonable or negligent. It does not follow that Congress should be unconcerned.

I quite agree with O'Connell and Myers that we cannot "dismiss comprehensive regulation in favor of personal injury suits as a means of encouraging design reform."[9] I also agree with their observation in the excellent chapter on the driver that the National Safety Council's "horrendous holiday death-toll" predictions are somewhat of a farce and indeed repulsive. The authors say that "to imagine that coercing or exhorting them to . . . [drive carefully] is the key to the traffic safety problem 'seems a little bit like trying to stop a typhoid epi-

8 NADER, *op. cit. supra* note 2, at 216.
9 O'CONNELL & MYERS, *op. cit. supra* note 1, at 35.

demic by urging each family to boil its own drinking water and not eat oysters.'"[10]

Both books devote considerable attention to design features that do not cause accidents but rather increase the possibility of incurring injuries and increasing the incidence of death when an accident does occur. This is the topic Nader deals with in the chapter on "The Second Collision: When man meets car."[11] Thus attention is drawn to the instrument panel, seat belts and other passenger restraints, the steering mechanism, convertibles, the X-frame, and the like, for the purpose of showing that accidents, attributable in part to other causes such as driver negligence, are often much more serious than they otherwise would have been, because of a design calculated to appeal to esthetic considerations rather than safety. Improper designs of this nature will inevitably result in a considerable amount of tort litigation, and the law at present is unsettled. In a fairly recent case it was held that a maker is not subject to any liability for an alleged design defect, even when negligence is established, unless the defect is a cause of the accident.[12] This I submit is unsound even though such a case often presents a difficult problem of ascertaining the amount of the injuries attributable to the defective design.

Both books are well worth thoughtful reading, and one or the other of these books should be read by everyone involved in these matters, but the conclusions and information contained in the books are so nearly alike that it is unnecessary to read both.

*Page Keeton**

10 *Id.* at 87. (Footnote omitted.)
11 NADER, *op. cit. supra* note 2, at 81.
12 Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).

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