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Book Reviews

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BOOK REVIEWS

MAN ON TRIAL. By Gerald Dickler. New York: Doubleday & Co. 1962. Pp. 452. \$5.95.

This is not just another law book on the art of trying lawsuits. It is an excursion into history by a distinguished New York City lawyer who draws upon his extensive reading to recapture for the general reader in a vividly popular style the stories of thirteen "trials" which have left an imprint on our civilization because of the bitter ideological conflicts revealed in them. Mr. Dickler has selected the trials of Socrates, Jesus, Joan of Arc, Galileo, Charles I, the Salem Witches, and, coming down to more modern times, he writes of the proceedings on the Impeachment of Andrew Johnson, the prosecutions of Captain Dreyfus, Professor Scopes, the Reichstag arsonists, the Moscow "defectors" of 1936-1938, and the Nazi War Criminals; the list is concluded with the Oppenheimer Hearing of 1954. The selection is "representative" rather than "comprehensive" and the author shares the "distress" of readers who may miss cases they deem of equal or of even greater significance. One thinks of Thomas More, the "Man For All Seasons," who invoked far more authentically than Socrates the last "absolute" of the Natural Law against the emerging absolutism of the modern State, of Mary Stuart whose plea "to the jurisdiction" was clearer than that of Charles I, of Aaron Burr whose acquittal delimited the American law of treason, of Alger Hiss whose tragedy reflected the dissolution of an ancient ethic. But the lot of the anthologist is not a happy one. He cannot please all of his readers all of the time. He must settle for holding their interest in the selections he has made. This, Mr. Dickler certainly succeeds in doing.

Man on Trial is obviously written for the general reader who is thus spared the irritation of learned footnotes and references to sources which the critical scholar would demand for some of the author's facile generalizations and sweeping conclusions. The books listed in the ten-page "bibliography"¹ are of unequal value; many of them would hardly rate as "primary source materials." It would seem that the "bibliography" is intended more as a "guide to further reading."

In treating each case Mr. Dickler first sketches the general historical background and summarizes the trial, interspersing his own comments and conclusions. He then appends some excerpts from the proceedings at the trial to suggest something of its flavor. The treatments of the selected cases vary in length. Thus there are nine pages on the trial of Jesus and eighty-nine on the Moscow "purge" trials of 1936-1938. As the author points out, the word "trial" is used in the book "in its dictionary meaning — the formal examination of an issue of fact with a view to its determination."² In many of the cases that determination was a foregone conclusion and the "trial" an elaborate formality. Even tyrants may be sticklers for the formalities. "Give 'em a quick trial and hang 'em" somehow seems to soothe the conscience of the lynching mob. In more recent times the "trial" is part of the "weaponry" of official propaganda, as the Moscow "purge" trials so convincingly demonstrate. One recalls the reminder given by Ivanov to Rubashov in Koestler's *Darkness at Noon*. Prisoners in "Category A" are handled "administratively," i.e., disposed of summarily after secret trial, while those in "Category P" are given "public trials" because their cases may "do some good" in such public spectacles. The trials in Mr. Dickler's book are not "old, forgotten, far-off things, and battles long ago." The underlying conflicts involved in them never die. They reappear in the shape of new issues in succeeding ages and mankind is never safe from at-

1 Text, 427-438.

2 Text, 8.

tempts to resolve them in a spirit of hate, fear and passion which cannot be disguised in the solemn theatrics of former trials. This is, at least, one of the common threads which unite so many of the cases presented in *Man on Trial*.

Mr. Dickler writes with ease and charm. He has strong convictions. He is not ashamed when his prejudices show. He can damn his "devils" and hallow his "heroes" adjectivally with equal skill. Thus, the co-manager of the Johnson Impeachment Trial is "swarthy, lynx-eyed Butler,"³ the man who "stalks" the "big game" of the AEC is "lynx-eyed, blue-jawed" McCarthy,⁴ and it is the "slack-jawed"⁵ who crowded Bryan's bible meetings,⁶ but the "lanky, tweed-clad figure" of Dr. Robert Oppenheimer confronts his enemies with "contemplative ice-blue eyes" and "soft deliberate speech."⁷

Limitations of space and the overwhelming pressure for condensation of thousands of pages may account for the author's occasionally broad historical generalizations which may raise some critical eyebrows. When one thinks of the multivolumned studies of the trial of Jesus from the standpoints of Jewish and Roman Law, or the volumes of documents and testimony in the Galileo case, for examples, the magnitude of Mr. Dickler's task of condensation may be appreciated. Still it is surprising to hear that there is "no historical foundation"⁸ for the release of Barabbas. Content to take as a solid historical foundation for his treatment of Socrates the Platonic *Apology*, the *Crito* and the *Phaedo*, to say nothing of the *Memorabilia* of Xenophon, the author draws the line at the Four Gospels as historical foundations for the Barabbas incident. Nevertheless, he does not hesitate to append to his brief discussion of the trial of Jesus excerpts from St. Mark's Gospel as a presumably reliable account of the trial.⁹ We are told that at the hearing before Pilate "the charge of blasphemy was not once mentioned."¹⁰ Yet in John 19.7 it is recorded that "The Jews answered him (Pilate), 'We have a law, and according to the law he must die, because he hath made himself Son of God.'" The "law" referred to is quite clearly Lev. 24.16 against blasphemy. The perils which confront condensations like those attempted in *Man on Trial* are aptly illustrated in the author's two-sentence conclusion of his treatment of the trial of Jesus: "The death of Jesus paved the way for the genius of Paul. In time, the Jesus of history, would be transformed into the Christ of faith, and His sufferings on the cross would become to countless millions a symbol of man's hope for salvation."¹¹

The author's account of the trials of the Nazi War Criminals at Nuremberg is a masterpiece of descriptive writing.¹² Before reaching the trials themselves, however, Mr. Dickler pays his brief respects to the still-debated question of their juridical basis. Whether his reply to those who contended that the London Charter was *ex post facto* legislation (a reply not particularly strengthened by the reference to Senator Taft as the man "who would rather be righteous than President") must be left to the reader.¹³

For Mr. Dickler the proceedings against Galileo constitute the "climax" of the "onslaught of organized religion against scientific progress."¹⁴ A more temperate

3 Text, 122.
 4 Text, 385.
 5 Text, 174.
 6 Text, 174.
 7 Text, 376.
 8 Text, 40.
 9 Text, 41.
 10 Text, 39.
 11 Text, 40.
 12 Text, 331-348.
 13 Text, 325-329.
 14 Text, 61.

statement appears in a learned study of the Galileo case recently published: "Myths and prejudiced accounts have raised it (the Galileo Condemnation) from the rather insignificant place which it deserves in the perspective of history, to a position of historical prominence."¹⁵ It is doubtful whether the author's *seven*-page presentation of the complicated case of Galileo, even when eked out by a meager *five* pages of short excerpts from the voluminous testimony, can be considered adequate for the general reader who must read as he runs.¹⁶ It is also regrettable that the author should persist in repeating even as a "legend of defiance" of which "mankind has need," the moth-eaten bit of apocrypha that at the moment of recantation Galileo muttered under his breath the celebrated "*E pur si muove.*"¹⁷

This reviewer was somewhat puzzled by the author's reference to the "Thomistic absolutes" of Commissioner Murray's opinion in the Oppenheimer Case.¹⁸ One wishes Mr. Dickler had made clear his use of the adjective. As for the "absolutes," it would seem that it was to "absolutes" that so many of the accused in the cases collected in *Man on Trial* were making their final appeals and that on the very bases of these "absolutes" the verdicts were reversed when at long last the conscience of mankind spoke through the Supreme Court of History.

The comments made above do not detract from the merits of Mr. Dickler's achievement in *Man on Trial*. Surely he will not be displeased if his work provokes many to go "back to the sources" for more complete verification of conclusions and generalizations inevitably made controversial by the demands of condensation and indeed by his very success in meeting them.

Edward F. Barrett

JURISPRUDENCE. By Karl Llewellyn. Chicago: The University of Chicago Press. 1962. Pp. 531. \$8.95.

The dominant impression created by this book is of Professor Karl Llewellyn's enthusiastic love of the law — any and all aspects of the law. He reveals a great interest in and affection for the practice of law, the administration of law, and the teaching of law; for law in the abstract and law in the concrete; for lawyers, judges, legislators, administrators, politicians, teachers, students; for any and all areas and persons involved in the life of the law.¹

The book is a selection of Llewellyn's writings over the years, mostly previously published law review articles. As the subtitle indicates the works selected are those relative to "Realism in Theory and Practice." No one has a better warrant to discuss legal realism than Llewellyn; he has been a part of the discussion from its inception. To him, legal realism is a method of careful analysis of the actual operation of law. It emphasizes the functional over the conceptual, how the law works in practice over how the rules read in the books, the Is rather than the Ought.²

I would suggest there is a close relation between Llewellyn's enthusiastic love of the law and his legal realism. For him, to see law accurately is to see it wholly. He is a born generalizer who, at the same time, sees in what he calls law-crafts — counselling, advocacy, judging, administering — various roles in performing "law-government" jobs. Concrete, down to earth, day to day legal operations fit into an over-all picture of law-government. This realistic perception of the supreme

15 Langford, O.P., Jerome, *The Condemnation of Galileo*, Reality, Vol. VIII, p. 65 (1960).

16 Text, 61-74.

17 Text, 68.

18 Text, 398.

1 Text, 382.

2 Text, 68-73.

significance of day to day law inspires his enthusiastic response. This breath of vision — law-government — is characteristic. Llewellyn does not confine his views of law and law teaching to the practice of law or to the judicial process but rather he emphasizes the total picture, including legislation, administration, politics, statesmanship — in his word law-government.

To inspire this kind of understanding is, of course, the goal of any teacher of law. His address, "The Study of Law As a Liberal Art" is a masterful statement of how law should be taught. He makes three points. First, "any man who proposes to *practice* a liberal art must be *technically competent*."³ He deplored the fact that no one in legal education was really interested in any question of the "*minimum* reliability of their *minimum* product." Second, legal education should concern itself with the meaning of the art, what the institution of law-government is for and what each of the law-crafts is for. Third, a spiritual thing, the drive and quest of the art for beauty and service — beauty in a job well done — service for client or cause or class or world. This too should be gained through sound legal education. These three goals are of equal importance. In fact, meaning, beauty, and service, to him are impossible, without technical competence.

Parenthetically we should here remark on Llewellyn's bombastic style of writing which parallels the bombastic way he spoke. In addition he employs a generous sprinkling of personally invented, usually hyphenated words such as law-government, law-jobs, us-ness, we-ness, they-ness, pure-law, contract-institution, and all-of-us-at-once. These are teaching devices to help put his point across and are consistent with his belief that a law teacher must be "from one to three quarters" a ham.⁴

The book is divided into four parts. However the first two, Realism and Institution, Rules and Craft comprise four-fifths of the book and convey its dominant themes. While Llewellyn relates the method of realism to all aspects of the law, he has a particular interest in the way appellate courts decide appeals. In the late 20's he questioned the orthodox position that the appellate process was one of logical deduction in which the judge finds and applies the proper rule of law to the facts of the case and draws the necessary conclusion. As is now well-known, his position was that much more discretion is exercised by the judge because there are almost always at least two contradictory rules of law which can logically fit the case and the facts of any case can always be stated in a number of different ways. The judge then has discretion in selecting the rule of law he thinks proper and the statement of facts he considers appropriate. When these views were forcefully stated in the late '20's and '30's a storm of jurisprudential controversy broke. Antirealists charged that this theory deprived law of any certainty or predictability and reduced it to the whim of the judge to be influenced by all kinds of things including what he had for breakfast.

The rather obvious response was that we should be interested in seeing how the process really works whether we like or not what we see and that it was the height of folly to ignore the realities of judicial decision making. I think it is fair to say that the then controversial position attributed to the realists has now been generally accepted.

Llewellyn extends to appellate advocacy that which is implicit in his description of appellate decision making. Since most appeals involve cases in which each side can present an argument buttressed by a logical legal theory and legal precedents — a technically perfect case — the advocate's job has only begun by developing this. He must go on and convince the court that justice and the right decision are on his side. So that advocacy is not concerned with rules alone or even mainly; justice too is an essential element of any effective argument.

Another particular interest of Llewellyn's concerns the style of decision making

3 Text, 380.

4 Text, 392.

by state and U. S. supreme courts. He discerns that there have been three style periods in the history of the United States. The first, our Grand Style or the Manner of Reason extended from the formation of the Union down to 1859. This was followed by the Formal Period down to about 1909. Since then American supreme court judges have been recapturing the Grand Style. The middle or Formal Period of judging was marked by the apparent automatic application of legal rules without questioning their wisdom or the justice of the result they dictated. Talk of underlying policy judgments was studiously suppressed. In the early and now returning Grand Style, policy is explicitly inquired into. Precedents are carefully regarded but are tested against "life-wisdom" and "sense." They are accepted and employed if they make for a decision consistent with sound value judgments in the relevant life-situation. They are reworked or discarded if they do not. In this way precedent or authority never get far out of kilter with justice. It is shaped to always effectuate a purpose which is wise and sound and should be so interpreted.

The last two parts of the book, *Controlling Behavior: How and Why?* and *Men*, do not integrate into the main themes of the book as well as the first two parts. In the part on controlling behavior the criminal law is explored in some detail as is group prejudice. As to the former it was indicated that there is a great need for precise factual data about crime and a need for a more parental and less arm's length approach if we are to make progress. As to group prejudice Llewellyn was skeptical of the chances of significantly remedying the problem by law. Rather he saw the need for the use of large racially integrated "We-Groups," such as schools or the armed services as the basis for more effective reduction of group prejudice.

The fourth part, *Men*, consisted of less than 30 pages and presented sketches of Hohfeld, Pound and two of Holmes. Each were idols, respectively as teacher, as jurispude, and as a legal institution in himself. While his sketches paying tribute to Holmes are the most dazzling, I found his treatment of Pound the most interesting. Charity is as rarely found in the intellectual world as in any other human habitat and when it is found it warms the heart. It is evident there is much in Pound's approach to law and in his 1959 five-volume set entitled *Jurisprudence* that Llewellyn disagrees with. And Llewellyn makes his disagreement plain. Yet he went out of his way to emphasize the great contributions and accomplishments of Pound over the years.

This was consistent with his general approach to much law work with which he disagreed. His enthusiasm for the law in general led him to see value in almost any kind of jurisprudential work even though sharply out of step with his approach. This is particularly true of Pound. Llewellyn's whole approach emphasized the importance of the concrete. Pound had little interest in this. Yet Llewellyn praised Pound for his encyclopediac knowledge of law-in-the-books and his perceptive writing about writing, two endeavors exemplifying what Llewellyn in another place calls the evil results of the "threat of the available."⁵ By the threat of the available Llewellyn means the almost inevitable tendency to study the most available material. In law this is the readily accessible material in the law library — cases, statutes, regulations and books in general. Second having once begun the study of the available, to lose all perspective and mistake the merely available for all there is. This is to ignore the law in action, in lower courts, in the community, as it affects people. It is to ignore data which is important but is hard to get. This charitable attitude toward Pound is all the more remarkable because in 1931 Pound, at the time America's one-man jurisprudence show, saw fit to criticize the new legal realism. Llewellyn's rejoinder then was firm and forceful but not harsh or personal.

This same attitude characterized his reaction to ridiculous charges that legal realists cared nothing for the Ought, for value judgments, or for justice. As this

5 Text, 82.

work makes perfectly clear,⁶ Llewellyn felt deeply that law must be subject to moral evaluation. As a matter of fact his view of appellate decision making gives a wider rather than narrower scope to the infiltration of value judgments into the law. And his observations that legal discretion must be directed to rightness and regularity (similar treatment of similar cases) reveal a fundamental grasp of the moral nature of law.⁷ For Llewellyn "Justice was a thing easier to feel than to think about."⁸ But it was of vital importance. His reaction to these false charges was to positively advance the merits of his position rather than to negatively indulge in slashing personal attacks on his detractors. This is the mark of a gentleman as well as a scholar.

Thomas Broden, Jr.

⁶ Text, 13, 22, 51, 55-56, 68, 69, 70, 73, 74, 78, 85, 86, 168, 193, 201, 360, 374, 454, 477, 480.

⁷ Text, 362.

⁸ Text, 338.

BOOKS RECEIVED

BIOGRAPHY

THE GENIUS OF LEMUEL SHAW. By Elizah Adlow.
Boston: Court Square Press, Inc., 1962. Pp. 388. \$5.00.

CRIMINAL LAW

NARCOTICS AND NARCOTIC ADDICTION. By David W. Maurer and Victor H. Vogel.
Springfield: Charles C. Thomas, 1962. Pp. 339. \$9.00.

INTERNATIONAL LAW

CUBA AND THE RULE OF LAW.
Geneva: International Commission of Jurists, 1962. Pp. 267. \$2.00.

INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION. By Richard B. Lillick and Gordon A. Christenson.
Syracuse: Syracuse University Press, 1962. Pp. 173. \$7.50.

SPAIN AND THE RULE OF LAW.
Geneva: International Commission of Jurists, 1962. Pp. 153, \$1.00.

THE CHALLENGE TO THE ALLIANCE FOR PROGRESS. By Stephen Raushenbush.
Washington: Public Affairs Institute, 1962. Pp. 89. \$1.00.

THE US AND THE UN — PARTNERS FOR PEACE. By Alexander Uhl.
Washington: Public Affairs Institute, 1962. Pp. 81. \$1.00.

JURISPRUDENCE

ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND. Edited by Ralph A. Newman.
Indianapolis: Bobbs-Merrill, 1962. Pp. 670. \$12.00.

FREEDOM OF ASSOCIATION. By Charles E. Rice.
New York: New York University Press, 1962. Pp. 202. \$6.00.