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BOOK REVIEWS

WILLIAM HOWARD TAFT: CHIEF JUSTICE. By *Alpheus Thomas Mason*.^{*}
Pp. 354. Simon and Schuster, New York, New York, 1964. \$6.50.

In this study of William Howard Taft as our tenth Chief Justice,¹ the author's main theme is the paradox between Taft's limited vision of the substantive issues presented to the Court during his tenure and his enlightened vision of the need for procedural reform in the administration of justice. It is this paradox which accounts for the range of evaluation of Taft as a Chief Justice. Mason states that as "a judicial architect, Taft is without peer," and adds that "Oliver Ellsworth, his closest competitor, drafted the famous Judiciary Act of 1789, as a United States Senator, not as Chief Justice."² At the same time, "informed professional opinion would not think of him in the same class with such judges as . . . , [Benjamin N.] Cardozo or Learned Hand."³ Taft himself felt that procedural reforms would enable the courts to secure the interests of property. As Mason says, by "putting its own house in order, the legal profession might counteract the disruptive influence of wild eyed reformers. This indeed was the link which bound together judicial reform and judicial defense of property."⁴

The present volume is not a full scale biography in the manner of the author's studies of Brandeis⁵ and Stone.⁶ It is rather "the byproduct of a comprehensive study of the office and powers of the Chief Justice of the United States, now in preparation."⁷ (A full treatment of the life of William Howard Taft can be found in Pringle's two volume study.⁸) Mason's purpose here is to show Taft in his role as Chief Justice and to account for his view of the office and his discharge of its duties.

Taft is the only man to have been both President and Chief Justice of the United States. He greatly preferred being Chief Justice and it is one of the perversities of history that while he remained for many years an eligible pretender to the High Court, his political fortunes accelerated his journey to the White House. As President, Taft had the difficult privilege of making six appointments to the Supreme Court. The least

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1. ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* (1964). [Hereinafter cited as MASON.]

2. MASON 301.

3. MASON 236. The author cites an unsigned article written by Felix Frankfurter, *Mr. Chief Justice Taft*, *THE NEW REPUBLIC*, Vol. 27 (July 27, 1921), pp. 230-231.

4. MASON 54.

5. ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946).

6. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956).

7. MASON, Acknowledgements.

8. HENRY F. PRINGLE, *LIFE AND TIMES OF WILLIAM HOWARD TAFT*, 2 vols. (1939).

satisfying must have been the elevation of Edward Douglass White from Associate Justice to replace that tardy decedent, Melville Weston Fuller. (Elihu Root had predicted of Fuller that "they will have to shoot him on the day of judgment."⁹) Mason points out the probability that "Chief Justice Fuller's unbudging refusal to surrender the Chief Justiceship, more than anything else, kept Taft free to run for the Presidency in 1908."¹⁰ That Taft was practical as well as idealistic about his goal, may be deduced from the appointment of a successor to Chief Justice Fuller. The choice was between Associate Justices Charles Evans Hughes and Edward Douglass White. Mason describes Taft's dilemma:

What went through the President's mind when he decided to pass over Hughes is pure speculation, but certain things are incontestable. White was twelve years older than Taft; another Republican President might appoint him Chief Justice. To be the first man in America to fill the most exalted posts in the land was a glowing prospect. Taft wanted to be Chief Justice and made no bones about it, especially in the presence of those in a position to advance his cause. The appointment of Hughes would almost certainly have precluded any possibility of ever realizing it; the elevation of White would not.¹¹

To view the matter, however, as a dilemma of promise or frustration is perhaps too simple. White had been on the Court since 1894, he was a veteran of the Confederate Army, a Democrat and a Roman Catholic. Mason acknowledges that "Taft had a profound distaste for bigotry—sectional, partisan and sectarian. The chagrin he may have felt in appointing White to the position he cherished may have been mollified by the triple blow his action dealt various aspects of these hateful things."¹² Somewhat severely, Mason concludes that Taft "overlooked no contingency that might improve his own chances of winning the office which, in his mind, ranked above that of President."¹³

When he was finally appointed Chief Justice in 1921 by President Harding, Taft brought to the Court a long record of public service and firm views regarding the role of the Court as a conserving institution in our government. Very early he had formed the notion of the Supreme Court as a palace of the "Guardian Kings" whose function was to preserve the rights of property against the encroachment of popular government. It followed that in order to perform their proper role the courts must be designed and equipped to work quickly and oriented in the proper—Taft would have said "safe"—constitutional theory. As presidential nomi-

9. MASON 33

10. MASON 32.

11. MASON 39.

12. MASON 40.

13. MASON 40.

nee in 1908 Taft had proclaimed that, "The inequality that exists in our present administration of justice, and that sooner or later is certain to rise and trouble us, and to call for popular condemnation and reform, is in the unequal burden which the delays and expenses of litigation under our system impose on the poor litigant. . . ." ¹⁴ It is really not so strange that judicial reform should be invoked in the interest of conservatism. Within a wide range of reasonable bounds one substantive view or another can be served by more efficient and fair procedures. The paradox is that the enduring monument of the Chief Justiceship of Taft should be in the area of procedural reform and not of the conservation of constitutional views which time has so eroded. Taft, impatient to be appointed to the Court had once remarked of Brandeis' appointment: "When you consider Brandeis' appointment, and you think that men were pressing me for the place, *es ist zum lachen*."¹⁵ The judgment of history here is proverbial.

Although some remedial legislation had been enacted prior to Taft's tenure, the Court at the time of his becoming Chief Justice was beset by a volume of litigation which only comprehensive change could lighten. Increased government participation in the nation's economic life, anti-narcotic and smuggling laws, auto-theft and white-slave statutes, income tax cases, litigation arising from wartime activities, bankruptcy following the post war financial readjustment, and the lawlessness of the prohibition era all added their measure to the Court's excessive docket. In spite of Congressional opposition, especially in the Senate Judiciary Committee, and in part to stem the popular ill will against the Court's efforts to slow the tide of popular government, Taft advocated, and lobbied in an unprecedented manner, for what he felt were necessary and effective steps in judicial reform. Taft was largely, though not entirely, successful in his program. The Act of September 14, 1922,¹⁶ providing for an increase in the number of federal judges, increasing the effectiveness of their distribution and establishing the Judicial Conference of the United States, was a great victory. If Taft did not get all he wanted, he may have had himself to blame. His lobbying for remedial legislation raised issues of propriety and the image he projected of himself suggested the assumption of both judicial and political functions attributed to the Lord High Chancellor of England, but uncommon in a Chief Justice of the United States Supreme Court.¹⁷

Taft thought that one appeal as a matter of right was all that a litigant in the federal courts was entitled to and that much of the Court's overcrowded docket could be reduced by expanding the Court's discre-

14. MASON 53.

15. MASON 72.

16. 42 Stat. 837 (1922).

17. MASON 106.

tionary jurisdiction. With the aid of Associate Justices Van Devanter, McReynolds and Day, Taft prepared a bill "to reduce the obligatory jurisdiction of the Supreme Court in cases from the District of Columbia and in a good many instances where a direct review by the Supreme Court is given quite out of keeping with the present system of certiorari. . . ." ¹⁸ The Judge's Bill, as it was known, was slow in its progress through Congress, but an overwhelming majority of the Senate eventually acceded in large measure to the needs of the Court in the Act of February 13, 1925. ¹⁹ Taft said quite candidly: "The way to get legislation through is to continue to fight at each session and ultimately wear Congress out." ²⁰

What Taft really wanted was a thorough revision of the Judicial Code which would also bring a uniform procedure and abolish the distinction between suits at law, suits in equity and suits in admiralty. (Here Taft met the reluctance of several members of the Court, notably Holmes and Brandeis.) Although the reforms he wanted eventually came, Taft was, in this instance, unfortunately ahead of his time.

Less pleasing to many were Taft's efforts to people the federal courts with judges sharing his own "safe" views. Taft betrayed what Mason identifies as the limitations of his concept of law and the function of the judiciary. Paramount for Taft was "the maintenance of the Supreme Court as the bulwark to enforce the guaranty that no man should be deprived of his property without due process of law. . . ." ²¹ So obvious and pervasive was Taft's concern with the nomination of judges that after the appointment of Pierce Butler to the Court in 1922, George W. Wickersham, Attorney General under Taft, wrote: "I congratulate *you* on the President's selection of Pierce Butler for the existing vacancy in your Court." ²² Mason summarizes somewhat equivocally: "As Chief Justice, he merely confirmed the Supreme Court for what it was and always had been—a political institution." ²³

In the chapter entitled "At the Helm," Mason shows Taft's talents as administrative head of the Supreme Court. Taft's success in working harmoniously with his fellow Justices and his own capacity for hard work, often exceeding that of the others, are sympathetically portrayed. Although the harmony of accord fell off in the later years of his tenure, Taft's good nature and solicitude for the feelings and positions of his associates enabled him to speed up the docket and to combat what he considered the instability of close decisions by reducing the number of

18. William Howard Taft to Albert B. Cummins, Nov. 25, 1921.

19. MASON 109.

20. MASON 113

21. MASON 158.

22. MASON 169.

23. MASON 176.

dissents. The Chief Justice felt that the dignity of the Court and its capacity to preserve the Constitution (as Taft saw it) and do effective justice were best served by a solidity of decision among the Justices. Taft himself was often flexible about the statement of his views and amiably reported that he had "told Brandeis that the experiences of a Chief Justice were those of an impresario with his company of artists."²⁴ Ironically the judicial opinion which favorably serves Taft's reputation in retrospect, is his dissent in the *Adkins* case.²⁵

In discussing Taft's "Constitutional Creed" Mason weaves several themes which run through his opinions, sometimes smoothly complementary, occasionally at odds and seemingly askew. While it was consistent with Taft's views of the Court's prerogative that the judicial review of legislation should be widely exercised in favor of now outmoded views of economic due process, his notions of the expansive power of Congress under the commerce clause led occasionally to what Mason considers inconsistent views. To support his analysis Mason discusses a selection of cases decided by the Taft Court in several areas. Taft's first major opinion was in *Truax v. Corrigan*²⁶ in which the Court declared unconstitutional a state anti-injunction statute. Taft reasoned that the law, enacted specifically to protect labor unions, deprived the owner of a business of a property right in violation of the due process and equal protection clauses of the Fourteenth Amendment. Said Taft: "The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."²⁷ Mason likens Taft's broad conception of the national commerce power to that of Chief Justice John Marshall. Here Taft was willing to defer to legislative judgment. Taft's opinion in *Stafford v. Wallace*²⁸ "not only upheld broad Federal power under the commerce clause, but announced that Congress had a wide area of discretion, effectively free from judicial second-guessing."²⁹ Taft's views were further amplified in *Board of Trade of Chicago v. Olsen*.³⁰

Taft was not so deferential toward the exercise of the federal taxing power, even when the legislative motives were socially laudable. In *Bailey v. Drexel Furniture Company*,³¹ the Court held unconstitutional a special tax levied by Congress on incomes of concerns employing children. Mason criticizes Taft's opinion as "a striking example of conscious

24. MASON 209.

25. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

26. 257 U.S. 312 (1921).

27. *Id.* at 338.

28. 258 U.S. 495 (1922).

29. MASON 242.

30. 262 U.S. 1 (1923).

31. 259 U.S. 20 (1922).

judicial involvement in the policy implications of legislation."³² Taft inveighed against the indirection by which congress sought to interfere with matters reserved to the concern of the States. Taft found exceptional circumstances to justify a restraint on the freedom of contract in *Adkins v. Children's Hospital*.³³ There he dissented against the Court's finding unconstitutional an act of congress which sought to establish standards of minimum wages for women in all occupations in the District of Columbia. Given the exceptional circumstances, Taft did not consider it the function of the Court "to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound."³⁴ In support of his view that Taft's dissent in *Adkins* "may have been an aberration," Mason cites *Wolf Packing Company v. Court of Industrial Relations*,³⁵ decided shortly after *Adkins*, in which the Court voided a Kansas plan of compulsory wage arbitration as a deprivation of property and freedom of contract without due process. Mason observes pointedly: "It followed that state legislation impinging the liberty of contract would be presumed unconstitutional, thrusting upon the state the burden to show 'exceptional circumstances.'"³⁶

For what are viewed as Taft's extravagant claims regarding the authority of the President, Mason offers *Myers v. United States*,³⁷ upholding the President's authority to remove a postmaster without the consent of Congress and *Ex parte Grossman*³⁸ upholding the President's power to pardon a condemned criminal. Taft's last major opinion was in *Olmstead v. United States*,³⁹ allowing the admissibility of evidence obtained by wiretapping. To the modern mind, with the exception of his dissent in *Adkins*, the opinions selected by Mason to indicate Taft's "Constitutional Creed" are obviously from another era. As a result of the lack of "a large vision of things to come" Taft does not assume the high rank that might be hoped for one so dedicated to his role. The evenness of Mason's conclusion is instructive.

Exercise of the judicial function requires in its very nature "the sober second thought of the community." . . . But the Justices must not lose sight of the fact that government means action, that power to promote the general welfare is inherent in governing. . . . Needed is the ability to weigh realistically the strength of the popular will and its claims to prevail. Taft,

32. MASON 245.

33. 261 U.S. 525 (1923).

34. *Id.* at 562.

35. 262 U.S. 522 (1923).

36. MASON 251.

37. 272 U.S. 52 (1926).

38. 267 U.S. 86 (1925).

39. 277 U.S. 438 (1928).

along with a host of Supreme Court Justices, did not meet this test. . . .⁴⁰

This book offers a profitable excursion into the activity of the Supreme Court and its Chief Justice during the 1920's. Although some of the ground has already been traveled,⁴¹ the author has drawn upon additional materials and presented his exposition in an objective and engaging manner. The figures in this historical and biographical study speak for themselves and the author's conclusions seem reasonable throughout. One need not require that they claim unanimity of assent.

*Robert Felix**

CONTRACT LAW IN AMERICA. By *Lawrence M. Friedman**: University of Wisconsin Press. 1965. Pp. X, 280. \$6.50.

The idea that in order to get clear about the meaning of a general term one had to find the common element in all its applications has shackled philosophical investigation; for it has not only led to no result, but also made the philosopher dismiss as irrelevant the concrete cases, which alone could have helped him to understand the usage of the general term. When Socrates asks the question, "what is knowledge"? he does not even regard it as a preliminary answer to enumerate cases of knowledge.

Ludwig Wittgenstein,
The Blue Book, p. 19.

Professor Friedman reveals himself as a strategist of some subtlety and ingenuity. By undertaking the study of the contracts opinions of a selected state supreme court, during specified periods of time, he has undertaken the task of dispelling the myth which he describes as ". . . presenting the body of law . . . as if it were a timeless catalog of existing rules." While to some extent he has set up a straw man, nevertheless it must be conceded that the bulk of contracts literature warrants his strictures:

The dominant purpose of Contract scholarship has been taxonomy, despite an occasional glance at broader social, economic and psychological implications of the law of contract. . . . From

40. MASON 305.

41. See MASON, *THE SUPREME COURT FROM TAFT TO WARREN* (1958) Mason, *The Labor Decisions of Chief Justice Taft*, 78 U. PA. L. REV. 585 (1930).

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the standpoint of the historian or social scientist, one trouble with formal legal scholarship is that it tends to exhaust its energy with presenting the body of law . . . as if it were a time-less catalog of existing rules.¹

While this is a battle that has been fought before, and in which Professor Friedman is clearly on the side of the Realists, his tactics are original and for that reason effective. What Professor Friedman has done has been to reintroduce into the armory of legal realism a weapon relied on heavily to support the Traditional position, and discarded as obsolete by Jerome Frank some time ago. The element of surprise involved in this methodology has proved most effective. Using it as a means of attack, rather than defense, has produced results of value and interest to students of the law of contracts.

Professor Friedman has made use of the techniques of modern historical scholarship to place the decisions of his selected court, that of Wisconsin, in the movement and development of the State, during the periods selected. His concern is not that of Langdell, who used history to reduce the growth of the law to a few principles, fundamental and precise, arrived at by the gradual accretion of case law refining and abstracting the essential principle from the ephemeral facts. Rather, Professor Friedman is concerned to relate the case law to the life and times of Wisconsin, and is less impressed with the need for finding harmony and consistency than he is with recreating each case as unique, with its own problems, litigants, witnesses, story; all of which bear on the greater society which was growing up and developing all around it. For Professor Friedman, the case law is a collection of microcosms of society and its history, and frequently not even the most significant cross-section at that. But in another sense, every case was an important one—to the litigants what the courts did with their problems was crucial. Professor Friedman's concern is with the litigants—who they were, what their problems were, how these arose, how common they were, how much they were a part of their time and place, only to disappear with progress into the history of Wisconsin. The difference between sales of timberland and of property located in downtown Milwaukee is more than a matter of the rule of decision applicable—it is the very texture of the society which separates them. It is this texture that forms the subject of the book—the ephemeral and unique characteristics of the people involved, the types of transactions they engaged in, the causes leading to complications in these arrangements, both those of the larger society as well as those inherent in the nature of the transactions.

Accordingly, Professor Friedman reminds us that a contract is a little old lady in Baraboo, Wisconsin selling the family household to a blind

1. FRIEDMAN, *CONTRACT LAW IN AMERICA*. p. 10 [hereinafter cited as FRIEDMAN].

and legless District Attorney in need of a home near the courthouse²—something scholars tend to forget. The answers one gets depend on the questions one asks. By asking about the people who fought the cases, Professor Friedman develops a rich and human picture of the people who lived and litigated their disputes in Wisconsin from its earliest, rudimentary economic beginnings to its present state of development. In this manner he is able to recreate for us the milieu in which the court operated, the basic assumptions within which the Judges decided the cases brought before them, usually not stated explicitly, but nevertheless fundamental to understanding their work. For in deciding cases courts do more than formulate principles—they reach conclusions about the parties before them. In a sense judicial opinions are misleading since these underlying factors, the unspoken premises, are operative factors in reaching decisions. Without an awareness of these factors, it is almost impossible to understand what the courts are trying to do. Professor Friedman in trying to show that every case turns on its facts establishes that not all of the influential facts are in the record. It is the prerogative of the historian to reveal what these assumed factors are. Against the background of society the judges weighed the conduct of the parties, in terms of unstated but very tangible value-preferences. Professor Friedman concludes that the greatest concern of the Wisconsin Supreme Court has been the disposition of the case directly before it:

First, doctrine changed less than the application of doctrine. Second, “rules” of contract law tended to develop into branches, verbally but not functionally reconcilable, which could be malleably applied to fit particular fact-situations. Third, one branch of each rule tended to fit the needs of the abstract approach to contract law; while another subserved particularistic ends. Fourth, the relative frequency of use of each branch was determined by the particular situation before the court; but changes in the nature of the court docket worked to present the court with more and more frequent instances in which the non-abstract use of a doctrine was the one which was more persuasive. Fifth, the cumulative effect of the changes in doctrine and application of doctrine resulted in appellate court decision-making in contract cases which was so far removed from the original abstraction of classical contract law that the abstract element could no longer be said to predominate.³

As a means of dispelling myths about the nature of contracts doctrine this technique is invaluable. It is the thesis of the book that, for historical reasons, the court had ceased to either initiate broad policy decisions,

2. Kelly v. Ellis, 272 Wis. 333, 75 N.W.2d 569 (1956).

3. FRIEDMAN 139.

or even be influential in shaping policy in any major areas of concern. Contracts law, therefore, has tended to apply in a residual area:

In such a context, the law of contract remained alive, not, however, as the organic law of the state's economic system—a kind of constitution for business transactions, transactions which might, in exceptional cases, call for problem-solving and dispute-settling. "Contract" stepped in where no other body of law and no agency of law other than the court was appropriate or available.⁴

Further, the variety and profusion of the fact-situations involved, and the impossibility of judges obtaining anything more than a superficial understanding of the complex and specific needs of any one line of commerce or industry led to a stress on the dictates of "good faith in bargaining." Professor Friedman argues that this abandonment of *a priori* principles was an abdication of the social policy function, or at any rate, a recognition that in contracts questions, the power has passed elsewhere:

It meant forswearing the use of general principles applied absolutely; it meant that courts were dispute-settlers, not agencies creating general norms at the impulse of particular occasions. Though the source of the sense of "fairness" in any given case arose out of current conceptions of "fairness," their use by courts implied the abandonment of the role of the courts as creators of fundamental principles whose ethical rightness lay in their general, rather than their particular, applicability.⁵

Novel and striking as this approach is, it is clearly a compromise. A contract is many things to many people. To the parties involved it is a device for arranging their affairs, without any intervention from outside. To the social scientist, it is a particular illustration, relying on and reinforcing, simultaneously, the existence of a broader, more inclusive social institution.⁶ To the lawyer, a contract has traditionally been ". . . A promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."⁷ It is this closed circle that Professor Friedman is attempting to pry open. While he has achieved much, his technique suffers from sev-

4. FRIEDMAN 193.

5. FRIEDMAN 192.

6. In this sense of the word an institution is a pattern of behaviour repeated frequently enough to enable a series of contours delimiting its scope to be drawn. All particular cases fall within the pattern to a greater or lesser degree, and its growth and decay, as well as its functions, are defined by these cases pressing against the contours extending or retracting them. MOORE, *The Rational Basis of Legal Institutions*, in "ESSAYS IN JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW" p. 389.

7. RESTATEMENT, CONTRACTS § 1-1.

eral limitations, handicapping him in important ways. Were he to view contracts as a series of social facts, an institution, the best available technique would appear to be that of Professor Stewart Macauley.⁸ A close study of the uses of exchange relationships, together with the forms into which they are shaped, in a selected area or business, would be most fruitful, as has already been demonstrated. Again, if the concern is with the impact of legal institutions on society in the area of contractual litigation, a close study of the trial court dockets in that jurisdiction is indispensable. Merely studying the appellate court's work, without any investigation of its impact on the trial judges, can produce only limited data, as to impact.⁹ Professor Friedman is not unaware of these limitations. In a footnote, he points out that: "There is no easy way to analyze the work of the lower courts."¹⁰ Were this study confined to the analysis of doctrinal developments in terms of underlying issues, and the response of a court presumably concerned with broader perspectives to given fact-patterns, there would be no difficulty. Insofar as it concerns itself with "contractual behaviour," however, certain conceptual problems present themselves.

Throughout the book, Professor Friedman assumes the existence of an identifiable body of law called Contract Law, and has taken as his task the dispelling of certain myths attributed to it—the myths of its homogeneity and uniformity. In sum, it is basic to his approach that there is something in the fact-situations involved that can enable an observer to identify the existence of a contract, in each case. At this point Professor Friedman is balancing on a very tautly-strung tightrope. At one end is this assumption, that there is indeed a concept of contract, that the several decisions holding transactions to be contractual are illustrations of the types of forms the abstraction can take: this is nowhere more clearly revealed than in the passage where he deals with the nature of "pure" contract:

Basically, then, the "pure" law of contract is an area of what we can call abstract relationships. "Pure" contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold. In the law of the contract it does not matter whether the subject of the contract is a goat, a horse, a carload of lumber, a stock certificate, or a shoe. As soon as it matters—*e.g.*, if the sale is of heroin, or of votes for governor, or of an "E" bond, or labor

8. Macauley, *Non-Contractual Relations in Business: A preliminary study*, 28 AM. SOC. REV. 55 (1962).

9. The primary role of the appellate court in the judicial hierarchy is policy formulation. It is in his showing of the irrelevance of much appellate court dictum to the realities of business that Prof. Friedman makes a major contribution.

10. FRIEDMAN 223.

for twenty-five cents an hour—we are in one sense no longer talking pure contract. . . .¹¹

One wonders, on reading this passage, whether Professor Friedman has come out anywhere further than Williston did, despite his dismissal of the Restatement definition as: “. . . typically of marvelous vagueness.”¹² For the distinction between “pure” and other contracts is itself marvelously vague. There does not appear to be any reason given for this distinction; any means for drawing it; or in fact any explanation as to what “pure” is opposed to. It appears that Professor Friedman may well have reached the same position as Williston did—assuming the existence of a core concept of contract, from which special situations are split off as societal needs dictate, acquiring thereby a separate existence.

The difficulties which this approach create are nowhere better illustrated than by Professor Friedman himself. At the other end of the tightrope stands the solid data of chapter 2—by grouping the cases according to similar fact-situations Professor Friedman has revealed the enormous variety of social phenomena concealed beneath the uniform vocabulary of contracts law. What is surprising is that, having established the diversity of situations to be found subsumed beneath a single set of operative fictions (rules of law), he is content to analyze them in terms of the traditional philosophy. On the one hand, the cases are explained on the assumption of a core concept. On the other, the operating premise, that of a uniform body of rules, is destroyed by the explanation.

The difficulty confronting Professor Friedman at this point is the absence of any theoretical framework analyzing the nature of contracts except in the circular terms of the Restatement.¹³ The circularity arises from the closed nature of the definition—whether the law “. . . gives a remedy” or “. . . recognizes a duty” depends upon the judge. Until he so rules, the assertion of duty or remedy is a prediction. Once he has so held, then the promise is one imposing a duty, or a remedy is avail-

11. FRIEDMAN 20. See also his discussion of the impact of statutory law on insurance and sales contracts, p. 57 and ch. 4. There is a certain amount of difficulty in this method of treating the problem. Prof. Friedman appears to be trying to separate contracts principles from other concepts by studying the techniques of the Wisconsin Supreme Court in “Contracts” cases. The word “contract” appears to be used in two senses at this point. There is no way to determine the differences or to reach definitions of the various meanings. Possibly the objective of this ambiguous usage is to distinguish doctrines and abstract principles as strategies of decision as opposed to formulating policy preferences. However, it is not clear why the word “contract” is used for both purposes.

12. FRIEDMAN 15.

13. There are signs that some writers are attempting to break out of the net and open up new areas of thought. See Sharp, *Reflections on Contract*, U. CHI. L. REV. 211 (1966); Macauley, *supra* note 8; Ernest Jones, *The Impact of Legal Process on Bidding Process: A Study of the Mistaken Bid Problem*, Unpublished Doctoral Dissertation, Yale Law Library, (1965).

able. Totally absent from this approach is any indication as to the criteria employed by judges in deciding the issue. "I know one when I see one" is not a totally satisfactory explanation, considering the large variety of disparate arrangements which can be subsumed under the one generic term. Taking a random example will serve to illustrate what the difficulties are. Professor Friedman discusses the "support contract" cases as playing a prominent role in the case-law of Period 2. In describing it, he comments that: ". . . the support contract was a legal institution only in a narrow sense; more accurately, it was a custom which contract law, basically permissive, recognized and enforced."¹⁴ The questions this raises concern the reasons the court chose to recognize these arrangements as contractual; what features in them allowed the judges to identify them with arrangements already held enforceable? Again, apart from questions of criteria, it is not clear what the consequences of labelling an arrangement a "contract" are, or whether the only way to achieve these ends is through a unitary doctrinal analysis—was the concept of contract regarded as the most effective technique to achieve the policy goals of the court or the sole available means? *I.e.*, could other doctrines be developed to deal with the situation, and if so, would they have been considered part of the "pure" law of contract, the "other" law of contract, or a separate body of law, as has happened to labor law?

The unavailability of any body of theory explaining judicial behaviour on terms other than those of the courts themselves provides a severe handicap to Professor Friedman. It prevents him from taking an independent position, thereby providing a perspective on the nature of the subject. Since he is unable to refer to any source, other than the judges themselves, he is obliged to treat as contracts those transactions held by them to be such, without any independent means of assessing their actions. In a superficial sense, there is a common factor holding the cases together—the *Judicial Imprimatur*. But this is conclusory since the process has been reversed, solely for the sake of having a unifying factor—the reasoning appears to be: the court has found a contract, *ergo*, it was always a contract, and the process need not be investigated. Thus, while stressing usage, Professor Friedman is ultimately forced into discussing the usage of words, rather than the usage of concepts. In Tables 3 and 4, there appears to be a decline in the number of cases involving contract problems, from Period 1 to Period 3.¹⁵ The inference from these figures is ambiguous. It is, however, at least plausible that the explanation lies in judicial strategy, rather than in the nature of litigation initiated. It is not beyond probability that the court chose to characterize fewer cases as contractual, and thus made less use of "pure"

14. FRIEDMAN 36.

15. FRIEDMAN 219-220.

contracts doctrine. This is perfectly consistent with the number of disputes potentially classifiable as contractual remaining constant, or even increasing. There may be alternative techniques providing better equipment to reach results satisfactory to the courts than contracts theory. Problems created by unequal bargaining power could well be dealt with using contracts rules. Wisconsin, however, in the case of automobile franchises, has provided a specific remedy, which the courts may well regard as more efficient than general doctrinal language in the case-law.¹⁶ In one sense, then, the *Kuhl Motor* case¹⁷ is not contractual (in Professor Friedman's words it is not "pure"). On the other hand, such problems arise out of an exchange relationship, and could be so characterized if desired. Professor Friedman, however is debarred from considering the case as contractual, not because it is not "pure," (although this is not entirely irrelevant) but because the Court never treated it as contractual. He has been limited to judicial fiat and the judges never used the magic formula. This concentration on the language of the opinions bears a coherent theory resting on observed realities, as to why the umbrella of contracts law covers the circumference it does. For, if the various fact-categories under which the cases are grouped by Professor Friedman are regarded as spokes on an umbrella, and an imaginary line is drawn, connecting all points consecutively, the area covered at any point in time is considerable. What, then, is the nature of this line, connecting this assortment together? To argue that it is the fact of their "contractualness" is conclusory, for it is the decision to include them within the circle that provides them with the status. The argument that they are all exchange transactions ignores the occasional non-exchange transaction that is allowed inside. While Professor Friedman does not provide answers to these problems, his investigations have revealed the need for a coherent theory explaining the realities of modern contracts litigation, and have gone some way toward pointing out routes whereby the result can be reached.

In Wittgensteins' phrase, Professor Friedman has "enumerated cases" of contract for us. But what of the general term? Assuming no common element to all the situations which could be labelled a contract what criteria exist for identifying one? The question may be put in a different fashion—given that there is no effective contract, legally, until the judicial declaration of a contract, what mental process does the judge undergo in order to identify that which is before him as a contract? In answering this question, it must be borne in mind that the question is put to the judge for a specific reason: To determine the consequences flowing from his holding, for the parties. For the role of the judge, with the exception of the declaratory judgment suit, is similar to that of a coroner—to

16. See Wis. Stats., § 218-01(3)(a)17 (1961).

17. *Kuhl Motor Co. v. Ford Motor Co.* 270 Wis. 488, 71 N.W.2d 420 (1955).

declare as once having lived in order to prove that what is now before him is dead. While he may find as a fact that there is a contract, it lives only in his opinion. Were it in fact alive, there would be no need of his services. Thus the point of the question is to determine whether the remedies to be applied are contracts remedies, or are to be sought elsewhere, *e.g.*, restitution, torts. What is not clear is why this process has to be gone through—there is little or no advantage in suing in Contract instead of Tort, where the law seems more flexible and expansive. The one sensible reason for a separate body of remedies rules, specific performance, is limited to land sales transactions by and large.¹⁸ Historical reasons apart, it would appear that one of the strongest policies underlying the existence of a separate body of damages rules is the establishment of contracts as a separate body of doctrine. Rather than the difference flowing from clearly identifiable and distinct features marking contracts off from other societal institutions, the difference itself serves to provide the distinguishing characteristic.¹⁹ Thus we are forced to return to the question of the identifying features of contracts, as perceived by the judges.

It might be suggested that much of the difficulty is the result of thinking about the problem in terms of "the rough equation of the free market and the law of contracts. . . ." ²⁰ as Professor Friedman has described it. How this assumption came to be so readily and easily made is explained by him in the following terms:

The abstraction of classical contract law is not unrealistic; it is a deliberate renunciation of the particular, a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of social policy. The law of contract is, therefore, roughly coextensive with the free market. Liberal Nineteenth Century economics fits in nearly with the law of contracts so viewed. It, too, had the abstracting habit. In both theoretical models—that of the law of contracts and that of liberal economics—parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision. All goods could be treated as substitutable, one for the other, in money terms. All claims ("choses in actions") were assignable. All rights could be valued in monetary (economic terms).

Mention of a few of the doctrines of the law of contract shows how closely the two ideological systems fit together. The classical doctrine of consideration rejected the notion that any price

18. CORBIN, *CONTRACTS*, §§ 1143-1145 (1951). WILLISTON, *CONTRACTS*, §§ 1400-1435 (3d Ed. 1938).

19. *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

20. FRIEDMAN 22.

fixed freely by two parties might be condemned in law as unfair (inadequate); only the market, as evidenced by what a willing seller paid a willing buyer, measured value. . . . Conversely, the law of contract would not enforce contracts for which no market price was conceivable (for example, a contract so vague or one-sided that it had no ascertainable value) or purely personal agreements (such as a promise to attend a social function).²¹

This easy assumption that the end of the law of contracts is to serve the market, that it is designed to foster and render effective activity in the market place, has led to the next easy assumption, that its rules were designed to achieve these ends, and any other types of activity dealt with by means of these rules are incidental and basically irrelevant to their main function. There appears to be a fairly clear paradigm case, in terms of which policy decisions as to the perimeters are made. The easy case seems to be one that involves an exchange between two businessmen, of relatively equal bargaining power, both of them familiar with and responsive to concepts of honour and obligation—what Richard Hofstadter has described as the “mercantile ideal.”²² Unfortunately, there are two problems with this image—from the one end, bargaining power is not always equal, and as the Nineteenth Century moved on, the problem became greater, till it took on the nature of a political issue. On the other end, the “incidental” transaction emerged as a more and more important aspect of the work of the court as time went on. But the stubbornness with which the image of a commercial contract between equals lingered on created complexities at various points. Difficulties in accepting as valid nominal consideration,²³ even moral consideration²⁴ and disputes over the

21. FRIEDMAN 20-22.

22. RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 245 describes the way of life represented by this phrase: “In the relatively stratified society of the late Eighteenth Century a significant proportion of the upper business classes were men of inherited wealth and position, who brought to their mercantile roles the advantages of breeding, education and leisure” The early Eighteenth Century inherited this ideal of the man of business as a civilized man and as a civilizing agent.” But this was a period that was rapidly to disappear. By the 1840’s the “new men” had taken over from the old school. The results are described by Hofstadter as follows: (p. 251)

The more thoroughly business dominated American society, the less it felt the need to justify its existence by reference to values outside its own domain. In earlier days it had looked for sanction in the claim that the vigorous pursuit of trade served God, and later that it served character and culture. Although this argument did not disappear, it grew less conspicuous in the business rationale. As business became the dominant motif in American life and as a vast material empire rose in the New World, business increasingly looked for legitimation in a purely material and internal criterion—the wealth it produced.

23. See cases compiled in FULLER AND BRAUCHER, *BASIC CONTRACT LAW*, at 191-199 (1964).

24. See cases compiled in KESSLER AND SHARP, *CONTRACTS, CASES AND MATERIALS*, at 222-232 (1953).

validity of third-party beneficiary contracts²⁵ characterized the earliest litigation in which these issues were raised. So strong was the myth that for a while the courts struck down any legislation designed to redress inequalities in the balance of bargaining power, since that violated the image.²⁶

Again, the assumption that the law of contracts, being a child of the Industrial Revolution, was designed to effectuate the achievements of businessmen, is refuted by the realities. Businessmen are not governed in their decisions by the decisions of courts on contracts cases. The market is an independent mechanism, and the increasing irrelevancy of the courts as a factor in shaping business decisions is a noteworthy feature of this century. There are a number of reasons for the decline in importance of appellate court contracts decisions,²⁷ but among them an important one must surely be the fact that the market can give but little guidance for solution of these problems—it deals with a network of ongoing relationships, and has no answers for malfunctions—which are the responsibility of the court. While the Nineteenth Century experience may have supported a description of the scope of the law of contracts as primarily market-supporting, the current scene is one of a more complex nature, with no readily visible core, or paradigm case. The only feature common to all the separate arrangements is the label “contract” attached to them by a judge.

The questions to be answered concerning the nature and scope of the modern law of contracts involve less the attitudes of the parties or even the general public toward enforceable relationships; rather the unexplored areas are the thought processes leading judges to make use of the label “contract” and the social values protected and reinforced by judicial activity in this field. It might be hypothesized that the primary policy supported by the recent trend toward an expansive scope for contracts doctrines is one of asserting the importance of ethical principles in human affairs. Phrases such as “bargaining in good faith,” “reliance” and “reasonable expectations” have replaced the older emphasis on “consideration,” “mutuality” or “formality.” There is no institution to whom aggrieved parties can turn for redress, other than the courts. They are, ultimately, moral arbiters, passing on the merits of human behaviour brought before them for appraisal. Contracts law provides a set of techniques for expressing the moralities of conduct between parties. It is left to determine the process whereby the court decides to avail itself of these strategies in a given case. In demonstrating the trends which these decisions have taken, and in revealing the continuing importance of the courts in redressing particular grievances, Professor Friedman has made a

25. See Comstock, J's dissenting opinion in *Lawrence v. Fox*, 20 N.Y. 268 (1859).

26. *E.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915).

27. FRIEDMAN 198-220.

highly significant contribution to an understanding of the Law of Contracts.

Michael Katz†

SEX, PORNOGRAPHY & JUSTICE. By *Albert B. Gerber*.* Pp. 319 Lyle Stuart, Inc., New York, 1965. \$10.00.

This book is interesting and informative. It is a pity it was so casually written. The author, an attorney acclaimed on the dust jacket to be one of the "nation's foremost authorities on pornography in our law," has something for everyone—everyone, that is, except the censors. On second thought even the so-called bluenoses might enjoy portions of the book because, in addition to lengthy quotations from judicial opinions, gamy reproductions of condemned works and a handful of "filthy pictures," the author has some of the wildest subchapter headings this reviewer has ever read. Take, for example, the heading, "The Other Side Of The Coin Of Time," appearing in the first part of the book which the author has labeled "Clarification." Now, I admit that this is the age of pop art, the Non-novel, the Theatre of The Obscure, and Camp, but the "coin of time" bit has to be Camp of the highest degree.

Other subheadings are novel, if not to say, peculiar, but it would not do to repeat them here. Besides, serendipity is half the fun of this book. I don't mean to suggest that this non-law book is devoid of charm; Mr. Gerber comes through with an occasional winner. He describes television, for example, as "the wonder and drug of our age." That's pretty good.

The origin and development of the legal concept of obscenity in England and the United States is described beginning with the case of Sir Charles Sedley of Kent, who, with other inebriated nobles engaged in hi-jinks culminating in the discharge of the contents of recently filled chamber-pots upon the startled crowd from the balcony of a tavern near Covent Garden. The rise and fall of America's acceptance of the *Hicklin* Test is portrayed; again, in the author's intriguing style: ". . . despite the straws in the wind, it took another decade and a half for the protest to become real rather than verbal." Unfortunately, he ends his survey before the recent *Ginsburg* decision. However, quotations from Mr. Justice Warren foreshadow the result in *Ginsburg*.

The author concludes that the law is hopelessly, helplessly and totally confused. "[T]he law of obscenity is a quicksand of conflicting and emo-

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tional decisions." He's right. But he offers little in the way of helpful suggestions. He suggests that we should ". . . punish people, not things. In the abstract no book, movie, play, sculpture or drawing can possibly be obscene. Examine what the defendant does with it." One can easily quarrel with the premise that no thing can be obscene but, that aside, Mr. Gerber has not given us anything that pulls us out of the "quicksand." Even under his rule, we would still have to look to the item in order to determine whether or not the artist, writer or purveyor is a bad man. And so we are left with the absurd business of distinguishing between "art" and filth. In obscenity cases, the road to utter confusion is paved with bad distinctions.

We should not criticize Mr. Gerber too harshly, for no one has yet come up with an answer. The root cause of our dilemma may lie in our inherited notions of good and evil. Our problem may have something to do with what we preach and what we practice. If sex is really inherently bad, then we ought, for one thing, to stop throwing it around at the drop of a commercial.

We condone violence, high crime, bestiality and other assorted goings on more readily than we support pretty pictures, sweet music and nice poems. Yet life is all of that *and* sex as well. We must live with the dilemma of setting standards by which we can judge what is good sex and what is bad sex. But who is qualified to set those standards?

The serious student of the subject will find the book enjoyable and the bibliography and summary of important cases handy and helpful. The interested layman will learn much about the pull and tug of society trying to erect an acceptable guide. There are even goodies to appeal to the ordinary prurient person.

On the whole *Sex, Pornography and Justice* is worth reading notwithstanding it is written in a breezy style and clumsily put together.

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