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Book Reviews: EARL WARREN: A POLITICAL BIOGRAPHY. By Leo Katcher, THE JURY AND THE DEFENSE OF INSANITY. By Rita James Simon, LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISHLEGAL SYSTEM 1750-1965. By Brian Abel-Smitht and Robert Stevens, and HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM. Edited by Stephen Parks Strickland

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BOOK REVIEWS

EARL WARREN: A POLITICAL BIOGRAPHY. By *Leo Katcher*.† New York: McGraw-Hill Book Co., 1967. Pp. 502. $8.50.

When Earl Warren was asked which of his opinions he considered the most significant, he replied: "*Reynolds v. Sims*,[1] of course." With the so-called "one man—one vote" decision directing the reapportionment of the Alabama state legislature, the Supreme Court, having previously rejected the argument that the issue constituted a political question, acted to correct the self-perpetuating situation of unequal legislative districts. Under Chief Justice Warren, the Supreme Court has acted in many areas where it has observed the existence of a vacuum and the necessity for a remedy.

In this political biography of Earl Warren, the author points out that an analysis of Warren's views during the time when he served as District Attorney of Alameda County and later as Attorney General of California did not presage either his outlook as Governor of California or the emergence of the activist judicial philosophy which Warren has exhibited on the Supreme Court. Mr. Katcher's explanation, however, is simply that Warren maintained a certain flexibility with respect to his ideas at a time of life when most people's views have solidified to the point of rigidity. This simplistic approach to his complex subject is the author's principal flaw.

There is no question that Chief Justice Warren possesses the flexible quality which the author attributes to him, but the fascinating questions of why Warren moved in the direction he did and how the different types of offices he held influenced the trend of his views is largely unexplored. The transition from local elective office to the national judiciary, for example, is one in which the office by its nature exerts a broadening influence. Moreover, a judge whose entire career has been in elective office and who has been charged with the responsibility of solving problems and producing results may be less inclined to bow to precedent or notions of judicial restraint when faced with problems long neglected and susceptible to judicial resolution.

The author, however, has largely chosen to avoid some of the interesting questions posed by Earl Warren's career and to concentrate instead on recounting numerous comments made by former associates of Warren, many of which are general and unilluminating cliches. In so doing, the author has amassed information about a number of cases which Warren handled as well as interesting sidelights on his conduct in

† Author; former city editor of the New York Post.

1. 377 U.S. 533 (1963).

the offices of District Attorney and Attorney General. He notes, for example, that when Warren decided to put an end to corruption involving bail bondsmen, he called in those whom he suspected and warned them that if their objectionable activities did not cease, he would conduct an investigation aimed at obtaining indictments and eventual convictions. In this situation, his associates recall, Warren believed a warning should be given first. " 'He told us never to hit anyone from the blind side.' "[2]

Such insights serve to create some understanding of Warren's approach to these two offices.

The author, although obviously an admirer of the Chief Justice, has also made an effort to include the viewpoints of those who not only differed from Warren but were critical of his motives. He thus succeeds in presenting a general view of Warren's career along with some interesting character observations. The author's style, which tends at times to be over-dramatic, is, perhaps, best suited to his discussion of Warren's activities during his campaign for Vice President on the Dewey ticket and his subsequent efforts to secure the 1952 Republican Presidential nomination.

It was apparently not the author's purpose to undertake a deep analysis of the significant Supreme Court decisions during Warren's tenure as Chief Justice. He mentions the principal ones in each area of the law, simplifying them and explaining their effects in journalistic terms. Of *Mapp v. Ohio*,[3] for example, Katcher says: "Out the window went many police procedures such as roundups and 'rousts' * * * The police 'dragnet' was made obsolete."[4] This view of the Court, easily understandable to the layman, emphasizing not the reasoning which led to the conclusion, but the dramatic effect of the result reached achieves Mr. Katcher's evident purpose to present a solely political view of the Chief Justice. Those interested in an in-depth or scholarly analysis of the truly great accomplishments of the Supreme Court under Earl Warren will have to await another study.

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2. L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 50 (1967).

3. 367 U.S. 643 (1961).

4. L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY 442 (1967).

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THE JURY AND THE DEFENSE OF INSANITY. By *Rita James Simon*.† Boston: Little, Brown and Company, 1967. Pp. xiv, 268. $10.00.

This book is almost worth its weight in gold. It is 268 pages and costs $10.00.

I know that Little, Brown and Company is a "prestige publisher" similar to The Plant where They did the Ten Tablets or Justinian's printing house. But just why do all law books cost so much?[1]

It is getting so that law books, without "interesting pictures" cost even more than comparably page-numbered medical books, the latter of which are generally done on better paper and are, with their illustrations and pictures, more expensive to produce.

Anyway, I suppose a good law book, like a good lawyer, should be expensive—except in the case of law review articles and book reviews (and lectures) which we good lawyers do for free.

I hope that this is not a wilderness voice crying for more reasonable prices for law books from the "publishers' trust." With my own recently published book,[2] I practically had a D-Day (with my publisher) over the Christmas holidays getting the two volumes down to a reasonable price.[3]

In *The Law Revolt*, I had occasion to discuss the jury and the defense of insanity but not nearly as thoroughly as has Professor Simon. Indeed, I wondered whether all of these dissections of the jury and its deliberations do not dishearten laymen in their appreciation of the jury system. The greatest capacity of the jury is its humanity and we all know that errancy is a built-in ingredient of humanity, i.e., to err is human. A computerized, blue-stockinged, 100% all-the-time-perfect jury would not do. At least for our society it would not because a jury's benefit lies in its being a mirror of community conscience. It is a microcosm of the city, each of which moralities, if not laws, are different.

Show me a jury in operation and tell me its verdict and I will know more about the culture of the particular city, its economics, its cosmopolitanism, its provincialism, the care accorded in its hospitals by its doctors and the safety of its freeways, than if I were to call as expert witnesses specialists in each of these areas.

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1. The obvious unsatisfactory answer is that "so few are sold." Law book companies have a price-fixing combine that would make Rockefeller's (The First—the "evil one") Standard Oil the prototype of laissez faire by comparison. *See, e.g.* the Department of Justice's recent anti-trust suit against the publisher's for price-fixing the library editions of children's books at 5 TRADE REG. REP. (1968 Trade Cas.) ¶ 45,067, at 52,647.

2. M. BELLI, THE LAW REVOLT (1967).

3. This is a book laymen (I hope) will buy. But they will not at $37.50.

A jury cannot be "taken apart" like a watch to see "what makes it tick," although Professor Simon makes a pretty good attempt and arrives at some interesting conclusions. Whether they are valid or "just statistics" is another question. We have found no way yet of categorizing or putting into pints and quarts or measuring with feet and yards, morality, ethics or even equity, for that matter.

I do not mean to say that a jury has "open season" on law or that it has a built-in right to be capricious.

A jury is a safety valve to a community's too rigid morality. But since commodities of community conscience cannot be measured, when we take the system apart to pry into it and try detailedly to measure it, we may traumatize the very delicate unseen and unmeasurable anatomy which has made the system work for many years.

And work it does. I have never seen a jury after some thirty years of practice which did not *try* to do its honest and conscientious best. And this refers to *that* jury in Dallas, Texas. I think *that* jury was exemplary. The verdict of that jury was not the result of that jury's misdeliberations; it was the fault of the trial judge in not changing venue.

The appellate court ordered venue changed in reversing the lower court's decision.[4] *That* jury did its job too well. The function for which that jury was impaneled was to reflect community conscience in Dallas at that time. Dallas "unconsciously" wanted to plump Jack Ruby into the public abattoir at any cost in order to prove that it was a law-abiding city. And so spoke the appellate court.

Plato, living today, would see that his "Myth of the Marketplace" and "Myth of the Cave," the imagery and semantics by which really too many of us are bound instead of good thinking, is most evident in the jury room in a "not-guilty-by-reason-of-insanity" case. Contrary to public opinion, this is not an easy defense to prove. It is not a defense readily acceptable by the jury. This is not because many poor devils are not "insane" when they commit a crime, but because editorials and cartoons and writers have propagandized this defense into "the last resort of the clever criminal lawyer."

"It is easy for anyone to act insane" *think* jurors. "I won't be fooled" they resolve. Cartoonists, editorialists, unknowledgeable politicians, super-patriotic law enforcement agencies all contribute to the prejudice against the plea.

But it is not easy for one to "act insane." I have hesitated in placing a defendant on the stand in a not-guilty-by-reason-of-insanity case because I was afraid that he would "act" anything but insane. I thought Jack

4. Rubenstein v. State, — Tex. Crim. —, 407 S.W.2d 793 (1966).

Ruby was "insane." But a principal reason why I did not have him testify was that he would have made the supreme effort to "show the jury" ("fool them") that he *was* sane. And they would have been "fooled" with an "I told you so!"

Professor Simon's book purports to show what jurors consider in the insanity plea and what influences them most. It is valuable to the trial lawyer even in disagreement with Professor Simon's conclusions because considerations, perhaps otherwise overlooked, can now at least be addressed to elements of jury motivation.

I am in disagreement with some of the book's conclusions. I think that the straight-jacketing and barbaric M'Naghten Rule has caused many unfair convictions. Simon, no. I believe that an insanity "test" which is purposely amorphous and ill-defined ("liberal," if one will) will give the psychiatrists more of an opportunity for expert testimony help on "responsibility" to the jury. It would also allow a jury more freedom to exercise its principal function in voting community consciousness. After all, if we had a negligence definition (the reasonably prudent person) as restrictive as M'Naghten, it would drive all negligence lawyers crazy!

Minus these reservations, however, Professor Simon's book remains a serious, sincere and valuable study.

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LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965. By *Brian Abel-Smith*† and *Robert Stevens*.‡ Cambridge: Harvard University Press, 1967. Pp. xiv, 504. $11.00.

Nemo iudex in causa sua. It is a significant vindication of this honoured maxim of English Law that the first critical analysis of the social role of the legal profession in England has come, not from practising lawyers, but from a Professor of Social Administration and a Yale Professor of Law (albeit an Englishman). But while the result is a major work which should, alongside the generally complacent books on advocacy and professional ethics, be essential reading for present and future English lawyers, that recommendation must be coupled with a warning that, in some matters, the work is far from being the objective sociological analysis it purports to be for it argues a case against the legal profession which is sometimes regrettably over-stated.

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The English legal profession divides horizontally into sectional groupings ascending in strict order of labour division. At the foot, solicitors' managing clerks ("legal executives"), then solicitors, barristers' clerks, junior barristers, senior barristers (Queen's Counsel), Benchers of the Inns of Court and, at the apex, the judiciary, itself segmented into a hierarchy. Essentially, this stratification has changed little through the centuries. But this study convincingly demonstates that, once smaller sections, such as attorneys, scriveners, serjeants and pleaders had been absorbed into the two major branches of the profession, power has concentrated around two nuclei, the Law Society, which has represented the solicitors since 1823, and the Bar Council, summoned into existence in 1895 to consider "all matters affecting the profession, including the maintenance of the rights and privileges of the Bar. . . ."[1]

Like all trade union executives, these bodies have been concerned, for the most part, to maintain a rate of remuneration for their members sufficient to uphold (and, in the case of solicitors, improve) their status, especially during times of inflation. Thus, in 1944, the Law Society achieved an upward revision of fifty per cent in the scale of conveyancing charges which had been standardized in 1883. These "Schedule I" charges are calculated as a percentage of the value of the property transferred, but this built-in regulator had broken down with wartime control of property values. In 1953, lump sum charges under "Schedule II" were substituted for the former itemized account. These charges were enforced as minimum fee scales by strict control of undercutting. In 1958, amongst other revisions, barristers secured a one hundred per cent increase in fees for interlocutory work which had remained static for many years owing to the supervision over these fees exercised by Taxing Masters of the High Court. But, most significant for the Bar, especially its younger members, was the government's decision in 1960 to pay genuine remuneration for legally aided criminal cases, resulting, in some instances, of increases of up to ten times the former nominal fee.

The facts, however, are presented so as to convey the impression that these increases were grossly excessive. But the picture is a distorted one. For example, it is stated that "[f]rom 1939 prices had multiplied threefold, but solicitors' incomes had probably multiplied six or sevenfold."[2] This is based on an annual average income of £400 in 1939, rising to £3,000 in 1964. The former figure derives from a statement by the Law Society in 1939, a source which elsewhere, on this topic, the authors justifiably consider suspect. In fact, a study by Dr. Routh[3] puts the

1. Bar Committee, *Annual Statement and the First of the General Council of the Bar* 1894-95, at 2.

2. B. ABEL-SMITH AND R. STEVENS, LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965, at 400 (1967) [hereinafter referred to as ABEL-SMITH AND STEVENS].

average annual income for solicitors in 1935-37 at £1,238. So the increase was probably not far from threefold. Even more interesting is Dr. Routh's comparative analysis by occupation of earnings and their increase. The average earnings of barristers, solicitors and medical general practitioners in 1956 expressed as a percentage of their average income in 1913-14 was, respectively, 425, 367 and 667. These increases are by no means disproportionate to those in other occupations, for the percentage increase (for the period 1913-14 to 1960) for business managers was 925, clerks, 689, foremen, 898, skilled workers, 804 and unskilled workers, 849. The legal profession simply kept abreast with a general rise in income levels. Nor is the actual average income itself excessive in comparison with other professions. In 1955-56, of the combined incomes at the median and upper and lower quartiles of barristers, solicitors, doctors and dentists, the barristers' proportion was only 77% of the average, and that of the solicitors, only 93%. Since publication of the book under review, an examination of solicitors' remuneration by the Prices and Incomes Board has shown that the percentage increase from 1955-56 to 1966 (82% at the mean; 88% at the median) differed little from the increase in other occupations. If the criticisms of the writers had been offset by this background, they would have fallen into truer perspective.

Professor Abel-Smith and Professor Stevens are more justified in their critical exposure of the *methods used* to ensure that income. The solicitors having lost ground to accountants and bankers, coupled with rigid demarcation between the two branches of the profession, each side clung tenaciously to the time-and-money-consuming restrictive practices in the remaining areas where their respective monopolies operated, *viz.*, in the case of solicitors, that of the transfer of land and the sole right to counsel, and, for barristers, the sole right of audience in the Supreme Court and House of Lords. It is revealed that attempts to institute an efficient system of land registration have been continuously thwarted by solicitors since 1815 until opposition eventually faded away in the 1950's when fees for transferring registered land were substantially increased. The Bar opposed the establishment of County Courts in 1846, and fought every increase of jurisdiction of those courts (in which solicitors may appear and which are cheaper to the litigant). The Bar's opposition to the extension of undefended divorce jurisdiction to County Courts was overcome after the book was published. Not only has simplification of interlocutory work been opposed, but also the more far-reaching proposals to establish a Court of Criminal Appeal (achieved in 1907) and a Ministry of Justice (as yet unrealized). The two-counsel rule, requiring a "junior" to be briefed whenever a Queen's Counsel appeared and entitling him to a fee amounting to two-thirds of that of his leader was entrenched by the Bar Council. Furthermore, any barrister appearing on a circuit other than

3. ROUTH, OCCUPATION AND PAY IN GREAT BRITAIN, 1906-1960 (1965).

his "own" was required to exact a special fee and also engage a member of the local circuit. The exacting of "refreshers" and brief fees was subject to some abuse. The authors describe the growing criticism of these practices, and the government Monopolies Commission is currently reviewing restrictive practices in all professions, including the Bar. The defensive response to these external pressures probably accounts for the extraordinary emotional outburst during recent unsuccessful litigation challenging the barristers' traditional immunity from suit for negligence in court when a Lord Justice of Appeal said that the barrister-defendant had been "treated abominably by the bringing of this action and the conduct of the plaintiff and those who have sought to embarrass the Bar for their own selfish and opinionated ends."[4] The case was reported too late for inclusion in their book, but the authors refer to an interesting Bill to render barristers accountable, introduced, equally unsuccessfully, as long ago as 1876.

Scarcely more edifying is the history of the attitude of the Inns of Court towards legal education, which is shown to have been, until very recently, little short of scandalous. A perceptive chapter describes the change in judicial attitudes to creative law-making from the controversial period at the turn of the century to the "withdrawal" in the 1950's. But the discussion of more recent developments is less happy. It is true that the judges have become more "interventionist" and that this has led to some criticism, but the authors abandon objective valuation for simple quotations from popular press and partisan sources. On the *Enahoro Case*,[5] which is misspelt in the book, they merely comment that it ". . . was regarded by many as an example of the judiciary deferring too easily to the Executive."[6] It is difficult to see how the courts could have acted otherwise in that affair, and this reviewer believes that most of the other cases alluded to in this section[7] are perfectly defensible on legal and policy grounds. Mere citation of one-sided comment is both uncritical and misleading.

Errors of detail are few. There is, for example, a momentary confusion between Lord Reid and Lord Radcliffe;[8] it was the latter who retired in 1964. But the bulk of the book is superbly documented and, despite the points at which the presentation has been criticized, remains irresistibly convincing.

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4. Rondel v. W., [1966] 3 All. E.R. 670 (C.A.), *per* Danckwerts, L.J.

5. R. v. Governor of Brixton Prison, [1963] 2 Q.B. 455.

6. ABEL-SMITH AND STEVENS at 306.

7. *E.g.*, Ward v. James, [1965] 2 W.L.R. 455 (C.A.); Rookes v. Barnard, [1964] A.C. 1129; Att'y Gen. v. Mulholland, [1963] 2 W.L.R. 658 (C.A.); Overseas Tankship Ltd. v. Morts Dock & Engineering Co. Ltd., [1961] A.C. 388 (P.C.).

8. ABEL-SMITH AND STEVENS at 296.

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HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM. Edited by *Stephen Parks Strickland.*† Indianapolis: The Bobbs-Merrill Company, Inc., 1967. Pp. xxix, 365. $10.00.

Mr. Strickland's *Hugo Black and the Supreme Court: A Symposium* contains essays by nine contributors about Mr. Justice Black. The essays attempt to analyze and summarize the views of Justice Black on many subjects. Some deal with Black's views and activities in specific legal fields such as taxation, anti-trust and federal procedure. Others inquire into the Justice's values and philosophies. Another group deals with specific topics such as race and the Bill of Rights and the Justice's views thereon. It is apparent from the tone and contents of these essays that all of the contributors greatly admire Justice Black's legal philosophy, outlook and growth over the years. All of the essays analyze the topic with which they deal but they are not at all critical of Justice Black's approach or views on the problems covered in the particular essays.

Many of the essays are exciting, especially those dealing with Justice Black's views on the Constitution. None of them give any unusual insight into the personality of Mr. Justice Black or discuss his relationship with the other members of the Supreme Court. This, I believe, will be a disappointment to the members of the practicing bar.

The Symposium fails to contain any essay directly antagonistic to the views of Mr. Justice Black. In fact, none of the essays are really critical of Justice Black. This, I believe, makes the Symposium somewhat one-sided or unbalanced. Obviously, in view of Mr. Justice Black's intellectual ability and personality, there must have been numerous conflicts with his colleagues. Since his appointment to the Supreme Court, Justice Black has succeeded in turning into majority decisions his views which at first represented lonesome dissents. An essay on how this was accomplished would greatly help to round out the Symposium.

In reading these essays, one is struck by the change of many of the majority doctrines over the last thirty years. The Symposium drives home the point that many of these changes were brought about under Mr. Justice Black's leadership. His dissents in many cases became majority opinions in a relatively short period of time. For example, compare the dissenting opinion in *Betts v. Brady*[1] with the majority opinion in *Gideon v. Wainwright*.[2]

The essays are well reasoned and beautifully written. They certainly contribute to the understanding of Mr. Justice Black who without a doubt is one of the outstanding personalities sitting on the United States Supreme Court.

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1. 316 U.S. 455, 474 (1942) (dissenting opinion).

2. 372 U.S. 335 (1963).

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