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Book Reviews

BOOK REVIEWS

THE MODERN APPROACH TO CRIMINAL LAW. Edited by L. Radzinowicz and J. W. C. Turner. London. Macmillan and Co., Limited. 1945. ix and 511 pages.

The advertisement of this book stated that scholars of various English universities "have collaborated in producing this work"—which raised expectations that a new contribution would be published. Actually the book, except for some papers by Dr. Radzinowicz, is a reprinting of previously published articles, some of them going back many years. The Editors, together, account for almost three-fifths of the space; the remaining articles range from 11 pages by Kenny to 88 for Prof. Stallybrass. The book, on the whole, represents a high order of scholarship, and it will be a valuable addition to the libraries of those who have not previously read the articles, or who do not have convenient access to the journals represented.

Since there is no continuity in subject matter or theory, it is impossible within the limits of a review to do more than give the titles of the various papers and make brief comments that may be of some significance to those who read the book. The book opens with a short paper by Kenny on Lombroso. Kenny was certainly not very critical, but he also showed his awareness of the crucial issue in his exception to the positivist views on responsibility. Next, the Editors jointly contribute a paper on *The Meaning and Scope of Criminal Science*, in which they conclude that it consists of Criminology (criminal biology and criminal sociology), Criminal Policy and Criminal Law. They do not show how this classification has any special merit as regards the solution of problems. Their assertion that "the first really scientific contribution in this field was made . . . by the *Scuola Positiva*" merely helps perpetuate the Lombrosian myth. There follow three papers on Punishment, reflecting a rather definite positivistic bent. They fall far short of any adequate consideration of the relevant ethical principles, although one of the writers, Mr. Turner, in a later paper, reveals his appreciation of these important questions. Dr. Radzinowicz exhibits a doctrinaire criticism of the common law theory of punishment in his restrictive view of "liberalism" and in his implication that English scholars lagged behind French criminologists in insistence on the principle of legality. His theoretical predilection is seen in his rigorous division of English penology into three periods. But one need only compare his characterization of the third period (which he approves) (p. 43) with the last sentence from the Rev. S. Smith, who is representative of the first period (p. 40) to see that this is historical over-simplication. So, too, the statute book at the end of the eighteenth century, prescribing capital penalization for more than 160 crimes is accepted as accurate description of the actual administration of the law at that time. There is an uncritical reliance on Ferri and an almost naive reiteration that "modern criminal policy is proceeding empirically . . . " (46) Certainly it may be questioned whether such continued worship of the Italian and German positivists will aid the sound progress of 20th century penology.

Next, Prof. Stallybrass' short paper on *Public Mischief* presents criticism of *R. v. Manley* which, with questionable or no precedent, found the defendant guilty of the above named crime. The author raises important questions but his analysis is too summary to provide adequate answers, and he sometimes exhibits an unexpected tendency to cite a line of cases holding or leaning in a certain direction, and then drawing an opposite conclusion that supports his argument. Dr. Jackson's paper on *Common Law Misdemeanors* is a helpful supplement to Stallybrass' discussion. Dr. Wade follows with a short searching analysis of *Police Search*, and Dr. Jackson with a splendid critique of *Jury Trial Today*. Dr. Radzinowicz next provides five informative papers dealing with *The Assessment of Punishments by English Courts, The English Prison System, After-Conduct of Discharged Offenders, The Persistent Offender*, and *English Criminal Statistics*. It is these pages (110-194) which will be of greatest interest to American criminologists. In the last of the above papers, Dr. Radzinowicz criticizes "the dogmatic classification of criminal law," and he suggests (p. 185) that "motive" would provide a sounder basis. But he nowhere works out the implications of this hypothesis.

The next chapter is Mr. Turner's excellent study of *The Mental Element in Crimes at Common Law*. It is probably the most important contribution to this volume, and I wish it were possible to discuss it in detail. He is not as clear as one would like in his distinction between "the mental element involved in the *conduct* of the accused" and that involved "in his realization of the consequences." (p. 204) The like difficulty in distinguishing "recklessness" from "intention" is apparent from his statement that "in many cases the same facts may equally well indicate either." (208) This is theoretically untenable despite the undoubted fact that in actual adjudication it may be difficult to determine whether the defendant acted recklessly or with intent. Finally, it would be interesting to know why Mr. Turner insists that "in modern times criminal liability is no longer based upon a moral standard," (223) but has given way to "a newer one which bases the liability of the accused person on his foresight of the consequences of his action." (215-16) If such modern liability does not represent "a moral standard," how would he characterize it? These questions are not raised in any adverse criticism of Mr. Turner's paper as a whole; on the contrary, as noted, it is a very scholarly essay.

Dr. Jackson follows with a short study of *Absolute Prohibition in Statutory Offenses*. It is an accurate statement of the present law, but one wonders why he and Mr. Turner, who concurs in his views, are content with strictly liability in penal law. As a vigorous critic of it, I should welcome their further analysis of this problem. Mr. Turner in his succeeding paper on *Attempts* accepts the Carrara-Salmond theory without realizing that it stipulates no more than what is required to prove any crime, i.e., that "sufficient" external data must be relied upon. His criticism of the courts mishandling of "impossibility" is especially good.

Mr. Seaborne Davies' excellent study of *Child-Killing in English Law* is especially significant for its methods of historical analysis—which are rather similar to those employed in *Theft, Law and Society*. Mr. Turner then writes on *Assault* and he criticizes the court's adherence to the older definition, i.e., an attempt to commit a battery. He insists that the correct definition must include appre-

hension by the victim. While his criticism is warranted, his own proposal is equally particularistic. The common assumption is that "Assault" is univocal whereas it includes both the traditional and Mr. Turner's situation. This is evident in the unsatisfactory disposition of cases where the intended victim is blind or asleep since nothing can be gained by treating these as "attempts to commit batteries"—that is what "Assault" has traditionally meant. Hence it should be recognized that "Assault" has more than one meaning. In his final contribution, Mr. Turner discusses *Two Cases of Larceny.* The paper reveals a thorough grasp of a technical subject. Mr. Turner holds that *Middleton's Case* was not based on precedent, and he implies that he does not approve it. His chief comparison is with *Pear's Case.* It seems to me that larceny by a finder is a closer analogy, and I also wish Mr. Turner had discussed *R.* v. *Hehir.*

The next chapter is Prof. Stallybrass' well-known comparison of English Criminal Law with the Italian Draft by Rocco. Although Prof. Stallybrass does not thoroughly examine any of the general principles of criminal law, he provides apt summaries of most of them, together with references to related Italian law. Many of his observations are of questionable validity. Dr. Radzinowicz contributes the last chapter, in an interesting discussion of *International Collaboration in Criminal Science.*

In conclusion, hearty congratulations are to be extended to the University of Cambridge not only for sponsoring a notable series of studies in Criminal Science but also, and even more, for courageously and far-sightedly establishing a Department of Criminal Science and thus lending the weight of its ancient prestige to encouragement of the study of the oldest branch of law and related subjects.

JEROME HALL

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PROBLEMS OF THE POSTWAR WORLD, by Thomas C. T. McCormick (Ed.). N. Y.: McGraw-Hill Book Co., Inc. (1945). Pp. viii, 526, $3.75.

Those who assume that all symposia have in common the characteristic of duplication of material and matching of weak with strong contributions will be pleasantly surprised to discover a volume of twenty articles of almost uniform high scholarship on "Economic Policy," "Government and Society," and "International Relations,"—a volume which is, in addition, ably edited to provide continuity. Although each article merits careful consideration for its timeliness, style, and research, the following must be mentioned for their special interest: "Income and Employment," by Dr. Walter A. Morton; "Taxation after the War," by Harold M. Groves; "The Bases of an Economic Foreign Policy," by Paul T. Ellsworth; "The United States and the Far East after the War," by Frederic A. Ogg; and "The Pattern of Postwar Pan-America," by Russell H. Fitzgibbon.

The outstanding article in the symposium for students of the administration of justice—particularly in relation to criminal law—is Professor Thomas E. T. McCormick's, "The Negro" (pp. 242-266). Using the statistical approach in a thoroughly competent manner, Professor McCormick analyzes and explains the problem

of the negro in the United States in terms of his numerical importance, present economic status, changes that have taken place in his economic and social life since emancipation, forces tending to reduce discrimination, the bases of discrimination, issues of policy among negroes as to how best to improve their inferior position, and future prospects. Careful selection of relevant data, precise organization, and sound, objective conclusions define this work as one of the most valuable short contemporary studies of the negro yet published. In considering the negro's role in politics, however, perhaps more systematic attention should have been given to the effect of *Smith v. Allwright,* 321 U.S. 649 (1944), declaring the Texas white primary unconstitutional (see pp. 248, 256), although the answer to this suggestion may well be that such information is difficult if not impossible to obtain at the present time. In addition, Dr. McCormick posited one question which the reader probably will wish he had answered more completely, for it seems to be of fundamental importance. He asked, "Do the whites penalize themselves also when they keep the Negroes in their 'places' and if so, will this come to be generally recognized?" (p. 258). He was thinking of the drag of the negro on society because of his low efficiency, poor health, and tendency to crime. This problem assuredly is one that should be carefully examined.

WILLIAM S. STOKES

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THE LEVELLER TRACTS (1647-1653) Edited by William Haller and Godfrey Davis. Columbia University Press in cooperation with Henry E. Huntington Library and Art Gallery, 1944, Pp. 464.

The able, litigent character of a soldier in the days of Cromwell, is sharply brought into focus in the Tracts written by John Lillburne who deserves recognition in the realm of law for his championship of democracy and his fight for individual rights and free enterprise. Lillburne's qualified leadership, his constant agitation under persecution, his fearless authorship of the so-called "treasonable" pamphlets, his persistent appeals to Parliament, to both the House of Lords and of Commons was the ultimate step towards constitutional reform in the English law.

Up to this time no layman had attempted to interpret the Common Law for it had been introduced by William the Conqueror and contained foreign terms and uncomprehensible statutes and precedents.

Lillburne contended that the laws for Englishmen should be written entirely in English and in easily understood idiom.

The Tracts set forth the grievances of the people in eloquent diatribes against Parliament. Many of these papers are overburdened with Biblical quotations but such writing was the style of the period.

The epithet, *The Levellers,* had been given in derision to Lillburne and his party by the supporters of Cromwell who falsely asserted that Lillburne desired to level all ranks. Lillburne, however, fought for the principles of democracy as free men, basing their rights on the Magna Carta—on the precedents of Alfred the Great and Edwin the Confessor.

Hundreds of soldiers, shopkeepers and reputable citizens signed these Petitions to Parliament demanding that there should be a

people's representative in the House of Commons and for political reform founded upon history and law.

Lillburne argued that Parliament was proceeding contrary to its own declaration and entreated that these rights be at once restored. He urged his plea from studies he had made in Canon Law saaying that Common Law was defended by the old Ecclesiastical Laws.

Throughout, Lillburne argues from *first* principles, that all power is essentially in the whole body of the people. Therefore their free choice or consent by representation is the only just foundation of government. The peoples thus assembled in Parliament should be declared to have power to make laws or repeal them and this assembly should have power to call to account all offenders by neglect or treachery.

During that period in England there was great oppression due to excise on cloth, manufactures, etc.; the army suffered from arrears in payment and there was the additional burden of tithes and many objected to the Oath of Supremacy which was forced upon every one.

Lillburne makes the accusation that the judicial and high offices were obtained by bribery, extortion and partiality. He asks for equitable laws so that jails and prisons be used as places of security until the time and place of trial instead of as places of "torment" where prisoners languish for years without benefit of legal trial, even for *supposed* offenses.

Lillburne was not suffered to continue printing his incendiary Tracts. He was taken prisoner and put in the Tower for treason by order of the House of Lords. There he continued to write and smuggled his manuscripts to friendly printers. On renewed charges he was summoned to appear before the House of Commons; this called forth his Petition: "The Earnest Petition of many freeborn people of this nation". He demands a legal trial and points out that no supposed offender whatsoever should be denied his legal right to a trial at the first sessions, assizes or jail delivery after the prisoner's commitment.

He speaks against Monopolies of all kinds as contrary to the fundamental laws of the land arguing that such combinations restrain trade, which in turn destroys property and liberty itself. This tirade was directed against the Company of Merchant Adventurers which he suggests, should be abolished as oppressive to free trade.

He asks that the poor be granted certain waste lands so that by private industry and native commodities therefrom "these poor may receive better wages."

At the end of this manifesto is the request that all lawyers, members of the House "by reason of their over-aweing power over judges of their own making may attend to the service of the people or else be expelled." It is interesting to note that in this tract Lillburne insisted that no law be passed without two-thirds of all the members of the House being present.

The Bloody Project, a long tract, was written not by Lillburne, but by an anonymous accomplice, a member of "The Levellers" who signed himself "W. F. Gent." The document upholds all the principles of Lillburne and his party which Lillburne defined in his *Earnest Petition.* It contains a threat to expose the promotor of a Causeless War "to the destruction of the King, Parliament and People." The question is asked who is the supreme authority:

King, Lords or Commons "which is a riddle that no man understands for who knoweth what appertains to the king, what to the Lords and what to the House of Commons"?

No people can put themselves into Arms, or engage in War, "to kill and slay men, but upon a lawful call and invitation from the Supreme Authority, or Law-making power."

Lillburne addresses himself to the Army saying it is not sufficient to fight by lawful authority without making sure that the cause is just, lawful authority being sometimes mistaken, and many times so perverted and corrupted, as to command the killing and imprisoning of men for doing what is just and commendable, and for opposing what is unjust and destructive.

This tract warns both soldiers and people to prevent further threatened dangers, to remember "those late bloody turmoils" as men and Christians not to take up arms "until you know what you fight for, and be sure you have the truth of Freedom in it or never meddle, but persist and let who will both fight and pay."

To emphasize his point Lillburne adds a postscript to his tract beginning with, "Can there be a more bloody project than to engage men to kill one another, and yet no just cause declared?"

A copy of Lillburne's *Legal Fundamental Liberties of the People of England* was delivered to Ireton, who finally agreed to meet Lillburne in discussion. Accordingly four members of the High Council, four of the Independents, four from the Army and four from the Presbyterian party met with Lillburne and three associates to discuss the Petition.

Liberty of conscience and the supreme power of Parliament were the two moot points of the debate, Cromwell himself came to the meeting but according to Lillburne's record, Ireton showed himself "an absolute king, if not an emperor against whose will no man may dispute."

Base and abusive language from the High Council so insulted Lillburne that he took his leave, seeing that the cause was lost for Liberty of conscience from "this pack of dissembling, juggling knaves, there being neither faith, truth, nor common honesty among them."

The proceedings of this meeting were published but false statements were put in Lillburne's mouth and against these Lillburne protested in a pamphlet of his own.

His reply was flowery but always logical: "Shall it be treason to embase (debase) the King's coin, though but a piece of 12 pence or six pence and must it not be the effect of a great treason to embase the spirit of his subjects and to set a stamp and a character of servitude upon them when by it they shall be disabled to do anything for the service of the king or the Commonwealth?"

Imprisoned and released from prison several times, Lillburne continued to write and proclaim his rights. Influential friends saved him from the block and at length the courageous Lillburne who had fought not only for his own but every Englishman's rights was sent to the Low Countries into exile. He sums up his cause in this brilliant paragraph:

"For what is done to any one, may be done to every one; besides, being all members of one body, that is of the Commonwealth, one man should not suffer wrongfully, but all should be sensible, and endeavor his preservation; otherwise, they give way to an inlet of the sea of will and power, upon their laws and liberties which are

the boundaries to keep out tyranny and oppression; and who assists not in such cases, betrays his own rights, and is overrun, and of a free man, made a slave when he thinks not of it, or regards it not, and so shunning the censure of turbulency incurs the guilt of treachery to the present and future generations." (From *The Just Defense of John Lillburne.*)

The Just Defense was written after Lillburne's return to England in 1653, after the dissolution of Parliament by Cromwell. Lillburne was arrested again and sent to Newgate, put on trial for his life but was acquitted.

The editors, William Haller and Godfrey Davies, engaged in research in the Huntington Library, are to be congratulated for thus bringing to light these Tracts revealing that a democracy should be developed from the ranks of the people with, as these editors point out, a new kind of reorganization giving foundation to the old idea of Natural Law.

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ALCOHOL, SCIENCE AND SOCIETY: Twenty-nine Lectures with Discussions as Given at the Yale Summer School of Alcohol Studies. New Haven: Quarterly Journal of Studies on Alcohol. 1945. XII and 473 pages. $5.00.

This is the second year of this project of the Laboratory of Applied Physiology of Yale University. Of 33 general lectures 29 are published and the class room or seminar discussions transcribed but not edited. No claim is advanced that this book is any solution to the problem of alcoholism; it is a series of serious essays from multiple approaches.

It seems to this reviewer that perusal of the book will broaden greatly the reader's horizon; at least it will prevent limiting generalizations. The orbits of all professional people and administrative people are crossed by the comet of alcoholism, hence this well organized book should be widely read. It is hoped that there will be more such books in this series. This and others like it are needed.

It is a hard book to follow because the discussions after each lecture are largely one sentence questions from the floor and one paragraph answers. One paragraph or a few may be too brief. It would be better if the practice of medical meetings were followed, namely, all the questions submitted before the one systematized reply was formulated.

One-third of the lecturers or essayists are from the Faculties of Yale University, the others are guest lecturers from academic chairs or non-academic walks in life. The post-graduate students also are from many colleges and from several professions and many occupations. Thus the reader audience can tune in without much static; each serious reader will find some chapters particularly helpful to him.

It seems to this reviewer that there are several most important phases of alcoholism which are not touched upon at all and which should be presented next year or before the next volume of this series is published. In studying alcoholism, there are three important queries. First, why do some people *not* drink under the circumstances in which others do drink? Second, epidemic drinking, as during the first half-week of a strike. Third, when should there

be drinking, e.g. after a battle, a first battle of green troops. In other words, studies on the normality of drinking and of not drinking. Experimental drinking, to learn one's tolerance or capacity, is almost a norm for sophomores. In the abnormal field, run-down hypoglycemic (opposite of diabetic) persons may start drinking at tea time, the so-called Four O'clock Drinker, and deteriorate rapidly, but can be wholly salvaged by diet. Post mortem studies, by such authorities as Professor James Lisa, M.D., pathologist of Welfare Island, New York City, on who is and who is not hurt by drinking are also topics for further inquiry.

Judges, probation and parole officers, lawyers both for the prosecution and the defense, legislators, and all in the fields of criminology will find wise information here and there in this book and in this series.

Chicago HAROLD S. HULBERT.