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Mr. Soule begins his book on "The Future of Liberty" by expressing his attachment to the words in our Declaration of Independence and Bill of Rights. He has "an ineradicable confidence that somehow or other such words are valid; that they provide, if properly defined and applied, an indispensable frame of reference and a standard of value." Taking the word liberty as the nuclear word in these documents, he devotes the main part of his book to showing that the groups who first employed it, and most of those who have employed it since, were not expressing an interest in liberty for mankind at large, but were seeking a free field for their own particular interests. In all this he is cogent, and his book would be useful to a mind unacquainted with socialist writings of the last fifty years.

To me, having lived my intellectual life more or less among those writings, he seems to be doing over again, and in a slightly less downright language, what the socialists did before the war. I keep wondering if it is really necessary to the pride of these liberals whom the Russian revolution and the advent of Fascism have driven toward the socialist camp to "discover" the Marxian view of things all over again, or necessary at least for us to accompany them on their voyage.

However, I should be willing to "assist"—as the French say so astutely when they mean look on—at the process of Mr. Soule's Marxian education, if, after he got through and had passed a 100% examination, he would confront some of the problems that Marx left unsolved. Among the chief of these, as they stand in my mind, is the problem of liberty. For all that Marx ever did about liberty was to hitch it into a phrase with economic equality, and declare that they would be born together like identical twins, as soon as, or soon after, the instruments of production were socialized. This was certainly more utopian than scientific, and the fact that in Russia, as soon as socialization occurred even on paper, it proved necessary to revive from the darkest history the death penalty for theft, has made even some Marxians aware of the outstanding problem of civil liberty.

A real solution of the problem would begin, it seems to me, by recognizing that liberty means absence of governmental restraint, and would then proceed to inquire whether, within what spheres, and to what extent, people who might be described as sane and not criminal could enjoy liberty under a system of industry owned, planned and controlled by government. It would then further inquire by what means their enjoyment of such liberty could be established and guaranteed. Instead of solving, or even confronting, this hard problem, Mr. Soule wishes it away by the simple process of "redefining" liberty. And the process is simple indeed, for it consists of calling liberty the exact opposite of what it is.

Liberty, Mr. Soule declares, is "subordination"—a most astounding declaration, and one which could probably not stand up on a page of type, if he did
not immediately add "to a common purpose", which fits in well enough with our Christian lore and tribal instincts to lull our logic to sleep. After enlarging for a while upon the values to be achieved by transferring the name of liberty to a state of subordination to common purpose as such, or any common purpose, Mr. Soule lets it out almost incidentally—although just at the moment when our reasoning faculties were beginning to revive—that the common purpose he has in mind is not war, glory, territory, or any of those common purposes with which history has made us so familiar, but "an equitably shared abundance." This again sounds noble, almost as noble as the Declaration of Independence, and again lulls us into imagining that something has been said about The Future of Liberty.

That Mr. Soule is merely solving problems of his own emotion by shifting words around inside his head appears most clearly in his bland ignoring of the question how this new and quite unusual purpose is to be made "common," and the still more obvious question—to one objectively concerned about liberty—what is to be done with those who fail to fall in with it, or who have dissenting ideas about how it is to be achieved? On these objective questions what Mr. Soule is really saying, although, I hope, unconsciously, is that people who will not fall in line are going to be jailed, shot, sandbagged, herded into concentration camps, or otherwise put out of the way, but that instead of being done in the name of "subordination" to a Totalitarian State or Monolithic Party, this is going to be done in the name of "Liberty," the Bill of Rights and the Declaration of Independence—redefined.

It is not surprising, after seeing such a rude trick played with the meanings of words, to find Mr. Soule's book concluding in a word of praise for the tyrannical regime set up on the ruins of the Russian revolution, and patched and plastered into a hypocritical semblance of socialism by similar "redefinitions" of the language of the revolutionary fathers—and by shooting the fathers. Even the deliberate swindle of the masses perpetrated by Stalin in his new "democratic" constitution Mr. Soule finds courage to describe as a "significant aspiration." Why is Stalin's phoney constitution a "significant aspiration," while Hitler's phoney plebiscites are a travesty of popular government? They are both foul cheats and insults to civilization.

This surrender of the integrity of the mind, this kidding of yourself and others into accepting bureaucratic exploitation in the name of socialism, tyranny in the name of democracy, "subordination" in the name of "liberty," is the intellectual essence of fascism. Moreover, it is with the aid of these soft-headed liberals of the New Republic and The Nation that fascism, or in James T. Farrell's phrase, the Totalitarian State-of-Mind, is being infiltrated into this country. It can not come from Italy or Germany because the tyrants there have been impulsive enough to repudiate instead of "redefine" democracy. But it can come, and is coming, from Russia where a more unscrupulous and more absolute tyrant has deceived a more ignorant population into believing that tyranny is not only the last word in democracy, but is socialism—"completely and irrevocably achieved."

Since we can not attain all the ideals in the Declaration of Independence, let us guard as our most precious heritage, its mental temper. If we have to
surrender our liberties in the cause of organization, let us say so. If we have to surrender a part of them, let us say what part, and how many. Let us confront our problems with a clear and downright mind.

Max Eastman.

Croton-on-Hudson, N. Y.


One of the latest and greatest of the achievements of civilization has been the establishment of the principle of Neutrality. "Neutrality," says Sir Thomas Barclay, "is the most progressive branch of modern international law." During the time of the acute religious differences which sundered Europe in the sixteenth and seventeenth centuries, Neutrality seemed impossible. The most that could be done was to endow a principle of Limited Assistance, according to which minor acts of assistance to a co-religionist power would not necessarily expose a state to be treated as an enemy. This pis-aller saved Europe from universal war; but it was not until passion had died down, and Richelieu "threw into the scale against Catholic Austria the sword of Catholic France," that Neutrality could become perfect. In every dispute there are two sides; and legal right is not always evidently moral justice. Passion extinguished, states could now remain friends with both the disputants, and Neutrality was born. The world smiled on the new conception. Neutrals began increasingly to be favored. Belligerents were an evident nuisance. The presumption was more and more coming to be against them. The Neutral was the normal. By the end of the nineteenth century, the belligerent seemed obsolescent. Neutrality reached its high-water mark when at the Hague in 1907 Great Britain proposed to abolish contraband.

The Declaration of Paris in 1856 was supposed to have set the seal on this movement in favor of neutrals by abolishing the ancient law which allowed a belligerent to pay the freight and to take his enemy's goods from a neutral vessel. Unfortunately, the Declaration ultimately rendered the condition of the neutral far worse. It excepted contraband; naturally the result was to stimulate an enormous extension of that category. When this extension became effective, neutral carriers of innocent goods, instead of getting freight from the captors, lost their ships as quasi-criminals. But this development, though dimly foreshadowed in the American Civil War, did not materialize until the twentieth century. A long period of maritime peace made the public, and even the professionals, ignorant of what neutral rights really were. The Russian acts of 1904-5, when neutral ships were sunk and corn and cotton attacked as contraband, left neutrals surprised but embarrassed. The old objective tests began to be abandoned. Neutrals were required to prove their cases at vast expense like ordinary litigants; nor did the abortive Declaration of London in 1911 do much to vindicate their rights. The war of 1914 swept away those rights altogether.
The authors, after a careful sketch of the pre-war history, devote the bulk of their work to an account of the unsatisfactory way in which the American government dealt with this alarming situation. There were at least two things which a government really devoted to neutral rights might have done. It might have embargoed munitions, or it might have put itself at the head of a Neutral League. Holland forced armed merchantmen to throw their armament overboard. Sweden impounded the trans-Siberian parcel-post. But the United States sent notes. As Mr. Page, her representative in London, was engaged in instructing Sir E. Grey how to answer them, it is not surprising that that minister did not take them as anything but academic exercises. In fact, as the authors show, the American government, in spite of specious exhortations to the public against “partizanship” and “taking sides,” was ardently hoping for an Allied victory from the very first. It was never really neutral. It held Germany to “strict accountability,” while to her enemies it was complaisant. To one supposed friend it was stern and exigent; of the other it only asked that it should frame its measures in a way that could be put nicely. “You might in the strictest confidence intimate to Sir Edward Grey the following plan . . . stating very explicitly that it is your personal suggestion, and not one for which your Government is responsible [!] . . . ,” viz., adopt the Declaration of London, increase the list of contraband under its elastic license, and proclaim such neutral ports as you like to be of “enemy character.” “I am sure that a full explanation of the nature and necessity (of such a startling proclamation) would meet with liberal consideration by this government, and not be the subject of serious objection.” So said Lansing to Page. But when Germany announced an intention of treating armed hostile merchantmen as enemies liable to instant attack, was the same liberal consideration of the circumstances extended? On the contrary, accountability was insisted upon for the breach of an imaginary right of Americans to be immune from the consequences of war when embarked on armed belligerent ships on the high seas. The authors say with considerable force that this differential treatment was not Neutrality. No one can help his feelings; but a neutral must not be carried away by them. Bryan was a convinced antimilitarist and democrat. But the authors regard him as a better neutral, a better statesman and a better prophet than the President.

As submarine warfare was the rock upon which American Neutrality foundered, exhaustive examination is devoted by the authors to the respective cases of armed and unarmed belligerent merchantmen and American lives lost on board. Particularly the case of the Lusitania receives adequate and impartial investigation, but no case is neglected. The writer has never been able to find any precedent or authority for the view, which seems to have been taken in 1916 for an axiom, that there is anything to prevent a belligerent from destroying his enemy’s ship at sight because there are passengers

1. “The Allies . . . were dependent on American supplies.” 2 Grey, Twenty-Five Years 135, cited p. 228.
2. They even declined to join Sweden (and Norway!) in a protest against the British closure of the North Sea (p. 127).
4. Chapters II, III, IV.
on board. British men-of-war, when dispatched against the Spanish Treasure-ships by Canning, were not deterred from attacking them because they had passengers on board! And the authors quote a remarkable passage by Admiral Aube, in which he contemplates the sudden extinction by a torpedo-boat ("with a clear conscience and great satisfaction") of a modern steamer with "cargo, crew and passengers" by the hundred in the darkness of night. Admiral Aube's views attracted enormous discussion, and the fashionable reply to them was that commerce destruction was useless. But nobody called his system illegal. Wanton destruction of life and property is as unlawful at sea as on land. But purposeful destruction is not wanton. The authors proceed to a short discussion of the American notes on what was inaccurately called "The British Blockade" (really an interdiction of trade). The notes were good but useless, because, as Lansing cynically admits, he deliberately introduced technical and controversial matters and so extended the "interchange of arguments." until American opinion should veer round, and he, "sympathetic with the Allies," would find himself able to "join with them," as he was all along "convinced we would."

The remaining part of the volume is occupied by an exposition of the post-war situation, and the attempt to abolish Neutrality in favor of universal war against a wrong-doer. Aside from the objection that in many cases it will be uncertain who the wrong-doer was, with the consequence of promoting an embittered universal strife between people who have nothing to do with the case, Messrs. Borchard and Lage demonstrate the folly of the cry that the League of Nations and the Briand-Kellogg Treaty rendered neutrality impossible. The wish was father to the thought: for a moment's reflection would show that the League explicitly, and the Treaty implicitly, permitted war in certain eventualities—and, if war, then also neutrality. Finally, the authors develop Professor Borchard's well-known objections to the voluntary resignation by the United States of their neutral rights, arguing that fluctuating self-denying ordinances of this kind will lead to complaints and irritation which will be much more liable to lead the country into war than would a calm insistence upon established rights.

The book concludes with a summary, short and brilliant, in which the authors argue that "a strong neutral is the trustee for civilization in a shell-shocked world." The men of Versailles replaced the common sense and foresight of the men of Vienna by apocalyptic vision and paper machinery. The causes of strife were left untouched. The system of international law was stigmatized as "anarchy." Yet, the authors ask, do nor we all look back to that "anarchy" as an age of peace and tranquility?

It is difficult to discover any point on which exception can be taken to the authors' statements of fact. At one point the League Council is referred to as "the sole agency to determine whether a state had gone to war contrary to the Covenant." This needs qualification. No intervention by the Council is necessary: res ipa loquitur. True, the Council is to recommend what quotas the members should respectively contribute to the armed forces to be used; but the boycott provisions of paragraph 1 of Art. XVI are absolute,
and cannot be evaded, even by the preposterous Resolution of 1921. The authors also seem—perhaps unintentionally—to give color to the contention that a recognition of belligerency involves the obligation to behave with neutrality to government and rebels alike. This is surely a mistaken view; the rebels are recognized as lawful belligerents, but not necessarily as friendly belligerents. Certainly their own government, when it recognizes their belligerency, does not intend friendliness! There seems no reason why a foreign state should find that its recognition of the rebels as lawful combatants involves an interruption of its favors to their regular rulers.

Professor Borchard has always evinced an unfashionable power of piercing to the essential core of a subject. Mr. Lage is a worthy coadjutor. Exact thinking and ruthless logic pervade the present volume. For example, the authors clearly distinguish the question of the lawfulness of arming merchantmen from the question of the propriety of receiving such merchantmen as pacific traders—a distinction which some writers are apparently unable to draw. The whole work is deserving of the profound attention of all who are interested in international affairs. It would be a fatal mistake to treat it as a polemic against Wilson and Lansing and Page. There would be no point in a campaign against these by-gone figures. It is only incidentally that they have to be censured. It was their misfortune that it seemed good to them to put the enforcement of their own ideals of government upon recalcitrant nations before the upholding of the hard-worn conception of Neutrality and the great rule of statesmanship which dictates that a government shall first and foremost secure the peace and prosperity of its own people.

Some thinkers wish to establish a “dynamic” International Law. A law which is constantly exploding fire-crackers under our feet hardly seems to fulfill the definition of “Law.” The function of law is to secure stability throughout the dynamic events of life. The authors are not blind conservatives, hostile to all change. But they deprecate making changes which will not work.

The advocates of “collective security,” “sanctions,” the new (i.e., unreal) “neutrality” boycotts and coercion generally receive short shrift from Messrs. Borchard and Lage. The pacifist views of these advocates are admitted to be admirable; but their zeal is held to far outrun their discretion. When they clamor that “Neutrality” brought us into the war in 1812 and 1917, the authors reply that Neutrality kept us out of war for twenty years prior to 1812, and that it was disingenuous and half-hearted neutrality that brought us in, a century later. “The ‘new neutrality’ of coercion, having on several occasions proved its utter futility, has become moribund and no longer deserves serious consideration.”

“Neutrality,” they hold, “is incompatible with the new theory that peace can be produced by coalitions of the worthy ‘peace-loving’ nations against an ‘aggressor’.” This revolutionary idea has no roots in experience, is antillegal in its connotations, and has naturally produced, together with the ‘peace’ treaties with which it was born, a state of international disequilibrium and distemper unparalleled in modern times. . . . Non-intervention has been

denounced as immoral. Partiality and intervention have been clarified. No wonder that armaments have steadily increased and wars appear imminent. The result of these unfortunate contradictions has been to extol force and war in the name of peace, to characterize neutrality as an invitation to war, and sanction and intervention as peaceful devices.

Whether we agree with Messrs. Borchard and Lage or not, we cannot deny the force of their facts nor the clarity of their arguments. They are to be congratulated on a work which must have a powerful influence on the future of International Law.

THOMAS BATY†

Tokyo, Japan


This little volume contains the prepared addresses delivered at the Conference on the Future of the Common Law held at the Harvard Law School in August, 1936, as a part of the tercentenary exercises of that University. The subject matter of the Conference was sufficiently broad to include many and various types of law so long as all came from a single original source, the English common law. The various speakers were assigned topics which would show the operation of the common law in different places. Thus, Sir Maurice Amos discussed its influence—as well as that of the civil law—in the British Colonies and in Scotland, Lord Wright considered its status in England itself, while Justices Stone, Davis, and Hanna set forth its present and future condition in the United States, Canada, and Ireland respectively.

In view of the plan of the Conference, which thus emphasized the spread and extent of the common law, it was natural that the addresses tended to be descriptive and informational, rather than analytical or controversial. A considerable body of useful and interesting information was thus conveyed. Naturally it was of matters known in a general way to common law lawyers. But to have the similarities and the contrasts so strikingly portrayed as parts of one entire picture gives a persuasive view of the vitality and force of the common law, hardly to be obtained from a separate examination of each item. To this extent certainly, the Conference seems most successful.

Almost all the speakers accepted a broad and inclusive content for the term "common law." It was held to embody the various types of living law now operative in the countries whose judicial systems are modeled upon those of England. Thus, the effect of modern social and economic conditions upon the law was recognized. Characteristically, Justice Stone was particularly clear-spoken here as well as upon the notable influence of the academic law teachers upon its growth. Practically all the speakers stressed the importance of legislation in the development of the common law. Lord Wright had some very illuminating things to say about the work of the Law Revision Commission, of which he has been chairman, in its proposals for correction by statute of defects in the common law. Justice Stone raised the query why statutes

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should not operate beyond the confine of their literal language to become a basis for new precedents, just as judicial decisions have so served, referring to the doctrine of "the equity of the statute" under which the principle of the statute is applied to other cases not within its exact terms. American lawyers will be most interested in his ideas as to the revivifying of the common law through the growth of administrative law, in ways similar to those achieved by equity in times past. Those who now view with alarm the destruction of our liberties coincident with the growth of efficient and expert governmental agencies should be reassured by the equanimity with which the Justice views the past record of such agencies in this country:

"It is a record which encourages us to believe that our concern for the future should be not so much to secure for the citizen the adequate protection which, under the Constitution, cannot be denied, as to secure a more unified system of administrative procedure and to make certain that court review, whether by constitutional or statutory requirement, shall not go beyond that need, and shall be made available at such time and in such manner as will not unnecessarily impair the efficiency of the administrative agency, or duplicate its work by courts."

Justice Davis of Canada took occasion to emphasize the denial of the doctrine of supremacy of the courts in Canada and the assertion of the sovereignty of Parliament, which he asserted was "an impressive contribution of the common law of England to the power of parliamentary institutions in Canada." His emphasis was deliberate to show the contrast between the situation in his country and that obtaining in the United States. He pointed out that it was of the genius of the British people that this power had seldom been abused, and, in any case, was subject to immediate correction by the electorate. The alarms felt in this country at proposals to unshackle the legislative power seem remote indeed from the picture of Canadian governmental activity which Justice Davis so calmly and temperately painted.

In view of all the doctrines, new and growing as well as old, thus properly included by the speakers as a part of the common law, it is perhaps to be regretted that Dean Pound at the outset, in defining the common law, took special occasion to exclude the American realists from its sacred precincts. The movement for viewing the law as it is realistically, and not as the rationalistic expressions of judges would have it seem to be, actually stems from the Dean himself in the days when he made sociological jurisprudence a new and an exciting and important thing. Of course, there may be exaggerations of statement by individuals, as the Dean suggests, but that is hardly likely to lessen the effect of the movement, which will not detract from the force and validity of the common law, but, by pressing for its honest adjustment to present day conditions, will make it a truer expression of the needs of the modern society. As such, the movement has its place in forces affecting, even promoting, the future of the common law, along with the others so well stressed in this volume.

New Haven, Conn.

Charles E. Clark†

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The message which this book seeks to convey is simple and unmistakably clear. The sub-title announces it as "The Betrayal of the American Investor." Corporate managers and bankers, the book says, lie, deceive and take money under false pretenses; and accountants are their willing tools. In boom periods, they oversell, under-secure, and build up their personal fortunes. In depressions, they are not content to live on accumulated fat. They increase their own salaries and fees, taking losses, insofar as they can, out of the hide of labor and investors; they rob the graves to which they have led broken ventures; and triumphantly they rise, in all their glory, from the ashes of ruined businesses, destroyed investors and starved labor.

Mr. Reis makes his points by a series of case studies drawn chiefly from court files and the records of governmental investigations. The collected material in his book is a part and only a small part of the accumulated wealth of facts, history and anecdotes. The stories selected by Mr. Reis are not the richest; and they do not always make the point as well as other available stories. But they are well told. They are recounted in simple language; yet Mr. Reis has the faculty of combining simplicity of statement with accuracy of essential detail. The book is the work of an excellent craftsman.

If you already subscribe to his conclusions, you will enjoy Mr. Reis’ book. He cites evidence of them with a minimum of rhetorical denunciation and an avoidance of epithet. If you don’t believe them, this book will be instructive, but not convincing.

The general purpose of the book is excellent. To the ordinary man, it should be evidence that high finance is not a game for the amateur; that the odds against success are high; that investments in securities are character loans which should not be made by persons without ability or opportunity to ascertain and weigh the risks. And if the result of these propositions is unduly to diminish the supply of capital to enterprise, it is not difficult to place responsibility for killing the goose that laid the golden eggs.

Mr. Reis’ book, however, has definite limitations. Some of them follow from a characterization of the described financial practices as "The Betrayal of the American Investor." It is a decided over-simplification to think in terms of widow-orphan-investors and financiers, locked in deadly embrace. In this respect, the book is like a history of the world which speaks of nothing except armies and battles. This disregard of underlying economic and sociological fact (and of what Thurman Arnold calls "folklore") leads to superficiality of presentation and inadequacy of solution.

Mr. Reis’ “suggested remedy” for the evils of high finance is formation of an investors’ organization. This investors’ organization will, it is suggested, be a sort of glorified investment counsellor. It will, where desirable, represent security holders on boards of directors. It will investigate new issues and promote legislation in the interests of investors. It will also keep

its members informed as to new devices inimical to the interests of investors. This is not a new idea. It has been talked about, in various forms, for many years. But it has never been worked out in detail, so far as I know, and Mr. Reis does not attempt to do so. The problems which it raises should have caused Mr. Reis to suggest it with the greatest misgivings.

It is clear to me that the dishonesty, disloyalty, and gutter-morality characterizing some of our financial and business practices must be eliminated. Their continuance is suicidal, and we are not willing to permit finance and business to commit suicide. But an investors' organization is not the means whereby the job can be done. In addition to the many and perplexing problems of organizing and managing such an agency I think there is a basic difficulty. Emotionally and politically, most investors are in sympathy with the captains of finance and industry. Their occasional howls are the outraged cries of those who bet on the home team and see it sell out. But they are still loyal. Those who have been disillusioned buy government bonds or put their money in a box.

Public indignation comes largely from persons who do not own corporate securities. It has its roots in dislike for dishonesty and distaste for excessive fat. And deeper than these, the student may imagine an inarticulate, unconscious concern for the health of the body politic.

Honest dealing and prudent stewardship in high finance, therefore, will not result solely or principally from the efforts of investors. I think it also clear that they will not be brought about by self-regulation of business and finance. If they come, they will be primarily the product of governmental control, founded on the broad basis of popular demand and national need. This means that effective legislation, effectively administered, is essential.

How this can be obtained is a problem of surpassing difficulty. The history of prior efforts does not promise a large measure of present or future success. Those whom we seek to regulate conceive themselves—and have successively proved themselves—to be more powerful than the regulators. Laws directed at financial control have been successfully assailed and subtly undermined. The ink on the statutes has scarcely dried before efforts to administer them have begun to pale. Agencies for control have themselves been controlled by those whom they are supposed to regulate. But the difficulty of the problem should not obscure its importance or stand in the way of valiant efforts at solution.

Mr. Reis has done a service, and written a book of good quality. The answers to the problems which I conceive to be of greater importance must come from those wise in the psychology of people and from experts in governmental technique.

New Haven, Connecticut

Abe Fortas†

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Briefly put, the object of this book is to show that the origins of English criminal law should not be sought in insular sources alone, but that one requires for an understanding of them a knowledge of both Frankish and Norman law and of the effect of the Franco-Norman upon the Anglo-Saxon system. The traditional English belief allowed little or no place for the idea that foreign influences helped in shaping early English law. Therefore, to those schooled in this tradition it came as something of a shock, a half century or so ago, when the researches of continental scholars proved conclusively that the origins of what was allegedly one of the most distinctive of all English legal institutions, the jury, were to be traced through the Normans back to the Franks and thence back even to the Roman *inquisitio*. If Professor Goebel's conclusions are correct, many further modifications will have to be made in the present generally accepted beliefs as to the origins of some of the fundamentals of our criminal law. From the very beginning of the work, new theories follow one another with almost startling rapidity. In fact, the things which first strike the reader are the militant spirit in which the author refuses to accede to the generally accepted conclusions of recognized authorities, and the number and purport of his own theories. It must be admitted that many of these are both ingenious and plausible. He has reasoned well; his arguments are persuasive; his conclusions seem sound.

On the value of most of Professor Goebel's new points of view this reviewer is unable to pass judgment. The substance of the book is concerned largely with what, in one form or another, is distinctly Frankish law. Any one who would attempt to act as judge between the author and the older authorities, with whom he so frequently disagrees, should have an intimate and accurate knowledge of the not too well known Merovingian and Carolingian periods and their source materials, as well as a high degree of philological competence. A mere ability to read the modern writers will not suffice. The issues raised by this book can be settled, ultimately, only by going back of Brunner, Waitz, Wilda, Goebel, et al., to the sources themselves. And this the reviewer is not qualified to do.

It may be said, however, that the strength of the author's reasoning does not necessarily prove the soundness of his theories. For it must be kept in mind that he is dealing with matters of history; that historical facts have to be derived primarily from documents; that they can not be deduced by a process of logic and reasoning alone without documents; that argument, however convincing it may seem, can not take their place.

All the writers on the history of the Frankish period— even those who have had the largest measure of highly technical training in several lines of approach— have had to contend with a paucity of actual documentary evidence. On almost any given point of detail such evidence is at best comparatively little, usually quite inadequate, and not infrequently altogether lacking. Consequently it happens here, as in many another field of history.
where documents are scarce, that a writer is always under a temptation to eke out his modicum of direct information by the use of analogies drawn from other fields or from other times. All of the foremost writers on Frankish history have yielded at times to this temptation; too many of their statements rest on this unsatisfactory foundation. Professor Goebel is conscious of the way in which the use of such an expedient must necessarily vitiate a conclusion based upon it; he very justly condemns the employment of this method by the writers who have preceded him:

“For want of contemporary records there has been an irresistible temptation to treat sources of the late twelfth and early thirteenth centuries as reliably depicting the institutions of earlier generations. The risks of relying upon the latter assumption are patent. The sources of one century should never be permitted to speak too boldly for another. The way things happened can not be proved by the result.”

Aware though he is of the danger in resorting to the use of analogies, Professor Goebel has nevertheless followed the example of earlier writers in yielding to the truly irresistible temptation. He has even gone so far in the use of analogy as to cite known facts of economic history existing in the South as a result of the Civil War to support his contention in regard to what he believes to have been the economic situation in northern France as a result of the Norman invasions.

Incidentally, at this same place, where he is intent on proving that an ancient practice of settlement by fixed payment of horses and cattle could not be continued because of the destruction of moveables in the Norman invasions, he several times weakens his argument by making assertions of “must” or “probably” instead of giving facts which would argue for themselves. Actually, of course, we do not have the desired historical facts. We do not know whether this part of France was, normally, in these times richer or poorer in animals than other places. We have no means of computing, even approximately, the number of horses or cattle in this region before or after or during the invasions. We do not know the number or the percentage of those killed by an invading army, or by disease, or in any other way. Yet some degree of knowledge of such facts is indispensable if we are indisputably to prove the author’s contention. Strength of assertion, however plausible, can not be used in the absence of documentary evidence to establish an historical fact.

This general lack of evidence may cause such evidence as exists to be stretched to the breaking point. Thus, at the place already referred to, the alleged destruction of live stock is said to have an “obvious connection” with evidence furnished by a chronicler—that from 970 to 1040 there were forty-eight years of famine. It is not contended that this connection is referred to or pointed out in the chronicle itself. There is no discussion of certain questions which clearly have a most direct bearing on the problem—that whether famines were common in this district before the invasions began, whether they became unusual after the effects of the invasions ceased, or whether

1. P. 190; see also id. at n. 4.
these seventy years were years of famine in France or Western Europe generally. When we take into consideration the well-known facts in regard to the food supply of medieval Europe—that even under normal conditions the people of a great part of Western Europe were separated from an acute food shortage only by what we would regard as a precariously small margin, that famines were common and recurrent, that they are known to have occurred frequently and for a variety of causes in districts where there had been no destruction of livestock by an invasion—it becomes clear that the “obvious connection” is merely an assumption, an assertion which the evidence produced does not warrant. Where so little is actually known, it is futile to argue on the basis of analogies and assumptions.

Apart from all question as to the soundness of the new theories advanced, this book is a valuable contribution to the literature on Franco-Norman law. Now for the first time a trained American lawyer has entered a field where before only continental historians have as thoroughly delved; we get, preponderantly, the lawyer’s, rather than the historian’s, interpretation of the meaning of happenings in the dim past. For the first time in English we have a detailed account of Frankish law and procedure. The treatment of some of the subjects—as that on the immunity, for example—is full and unusually satisfactory. If the author has dealt but sparingly with the original sources, he has gone deeply into the German and French secondary writers. They have been discussed with a thoroughness that brings them and their ideas very close to many a reader who otherwise would not have been acquainted with them. The reputation of most of these writers has been so great that the authority of their statements, in their own particular fields, has hitherto hardly been questioned. Now that Professor Goebel has so openly, and we may say so forcefully, combated the validity of many of their interpretations and claims, we may expect to see their conclusions in general subjected to a more vigorous testing than has been customary in the past. Undoubtedly, also, this book will make writers on English legal history feel the necessity of more often looking across the channel when origins are concerned. However one may disagree with individual theories of the author in detail, or criticize his historical method, it can hardly be denied that he has established enough to place the burden of going forward on those who dispute his main thesis.

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Kenny’s “Outlines of Criminal Law” appeared in 1902. From its first publication, its scholarly properties and lucid style have entitled it to a place among the classics of the law. Its superintendence through its various edi-

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tions has been exceptional, and, though it now is in its fifteenth, it has escaped hackneyism, a fate common to the later editions of most works. The present revision is by G. Godfrey Phillips, an English barrister, who revised also the fourteenth edition. Revisions previous to that were made by the author. The work presents a brief account of the English criminal law. It is accurate in its historical materials and in its descriptions and definitions of crimes. Succinctness and literary style, as well as accuracy, constitute its principal distinguishing characteristics.

A number of alterations but no substantial changes in text were made in this edition. In one instance the position taken in former editions is frankly abandoned. Professor Kenny found it difficult to conceive of a criminal offence which did not involve mens rea. He was ready, therefore, to lend some support to the opinion of Bramwell, B. in Regina v. Prince\(^1\) that there is sufficient mens rea "wherever there is an intention to do anything that is wrong morally," and to lend full support to the view taken by some of the judges in Prince's case "that an intention to do anything that is wrong legally, even as a mere civil tort and not as a crime at all, would be a sufficient mens rea." The present revision takes the position that mens rea is no longer entitled to this courtesy. "The real reason for the conviction of Prince," it is asserted, "was simply that he had done the act prohibited by statute."

Two chapters of the work offer interesting material for reflection in the contrasts they present. They are the chapter on The Purpose of Criminal Punishment and the chapter on The Problems of Punishment. The former is speculative and abstract. A number of eighteenth and nineteenth century writers are here introduced. Beccaria, Blackstone, Romilly, Paley and Feuerbach advocated deterrence as the sole object of punishment. But this purpose, in itself, Kenny believed was insufficient. The feelings of the person injured must be gratified. As Sir James Stephen would have it, criminal procedure "may justly be regarded as being to Resentment what marriage is to Afection—the legal provision for an inevitable impulse of human nature." The purpose of punishment in still another of its phases is to be found in the effect it has "in elevating the moral feelings of the community at large." As Hegel stated it, "Wrong contradicts right, but punishment contradicts the contradiction." This chapter thus discloses the views which Professor Kenny probably for years taught to his classes as the summa summarum of the purposes of punishment.

When this subject is revisited in the final chapter—the materials of which have, for the most part, been added in the last two editions—the revisor appears to be beset with doubts and desirous of making a frank and realistic reappraisal. He admits that our doctrines on punishment and our modes of inflicting it cannot be said "to be in logical accord with each other." He quotes Sir Henry Maine as saying that "all theories on the subject of Punishment have more or less broken down; and we are at sea as to first principles." The jurists of the eighteenth century, indeed, earned a just fame in purging medieval criminal law of its aimless severities, "but experience has shown that they exaggerated the simplicity of the problem they were dealing with." Dis-

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satisfaction with their views caused many to seek intellectual guidance in the opposite extreme from the "Positive" school of criminologists, but the influence of that school, in its turn, is waning.

But that is not all; other thoughts expressed in this chapter come yet closer to earth. "What have we better than a blind guess," wrote Holmes, "to show that the criminal law in its present form does more good than harm?" A great doubt such as this must have been troubling the writer, for he appears quite ready to abandon all the finely drawn theories of the past and to start from new premises. He stresses prevention, and mentions sanitation, improved social surroundings, "better education, greater sobriety, healthier dwellings, increased thrift, more sympathetic provision for the events of sickness, accident, and fitfulness of employment, and readier assistance for orphans and other destitute children."

May it be that this new insight into the problem is typical of a general awakening? Are we ready to admit that the treatment of criminals in the present stands in some such general relation to the treatment to be given them in the more enlightened future as alchemy once stood to the chemistry of our day, or sorcery and witchcraft once stood to modern medicine? The subject is tremendously complicated and fascinating, and a humble realization of the inadequacy of our present methods may be the proper intellectual climate for the beginning of more enlightened thought and action in the future. Let us start then with prevention. A program of prevention involves removing the conditions which cause crime and setting up counter influences. This in turn may lead to further studies, to efforts to discover the reasons why men engage in anti-social conduct, and to a study of their motives and the therapy of motivation.

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This book, published under the title of "The Trial Judge", is a compilation of three lectures delivered by the author at the Law School of Northwestern University during March of the current year. The lectures are constructively critical both in their analysis of the characteristics deemed essential to ethical and intellectual integrity of a trial judge, and also of the present methods employed by the various States in the selection of judges.

The experience of Justice Lummus entitles his words to considerable weight. His judicial service in Massachusetts has covered thirty years, fourteen of which were spent on the district court, eleven on the superior court, and five on the supreme tribunal of his State.

2. Collected Legal Papers (1921) 188.
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The wisdom of a review of these lectures by any trial judge may well be questioned, for they point at too many flaws in his own armor. The safest course to pursue is to intone, “Amen, Amen” as the author summons one judicial virtue after another to adorn the object of his subject. Yet any trial judge, after sober meditation, will know full well that, though some of the attributes discussed by Justice Lummus may be missing in himself, their absence bars an approach to perfection. The author is sound and forceful in all that he says concerning the trial judge.

While apparently the lectures were made to law students, their scope is such that the student is less apt to appreciate the force of the author’s thought than one who is on the bench or is about to assume the role of a trial judge. The book ought to be read by every jurist and by those members of the bar who seek reformation of judicial selection in those States where it is needed.

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