REVIEWS

ERRATUM

In the review of United States Code Annotated, Title 15, Secs. 81-1113, by Ralph S. Brown, 58 Yale Law Journal 511, the first two sentences should read:

A truly “unusual feature ... is the practical and scholarly article in this volume, by Daphney Roberts on the Lanham Act, which revised the trade-mark laws effective July 5, 1947.” The author, whose name is correctly spelled “Daphne Robert” at the beginning of her twenty-three page “Commentary” is described as “a recognized national authority on trade-marks.”

The errors herewith corrected were solely the result of fallibility in the editorial process; the Journal extends its apologies to the author of the review.


The histories of law firms, like those of villages or regiments, are generally too parochial to be of much use. Occasionally some one writes a piece of local history which has value not only as a deposit of raw information, to be mined through a heavy layer of reverent prose, but as a work of genuine historical insight. Mr. Swaine’s account of his famous law firm has already become a classic of its type. The Cravath Firm makes a substantial and original contribution to our understanding of American law, the American economy, and the life of the American community. Originally written for members and former members of the firm, it should be made generally available, perhaps in a one volume edition minimizing biographical detail, to all who are interested in understanding how the twentieth century developed from the nineteenth.

The Cravath Firm is primarily a study in the evolution of a modern Big-City, Big-Business, Big-League law firm. But it is a good deal more. It presents the materials for a critical analysis of the changing role of the lawyer in relation to modern business and government.1 With considerable

1. Especially when supplemented by Mr. Swaine’s carefully considered article, “Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar,” 35 A.B.A.J. 89 (1949), which brings together reflections on the public responsibilities of lawyers and law schools scattered throughout his two volumes. It should be read as the concluding chapter of his work. In tone it is more balanced than many of the comments in the book itself, and takes a rather less heated view of the development of contemporary social legislation.
frankness it sketches the personalities and the major professional work of
the men who led the firm: the Blatchfords and the Swards, in the days when
the firm was rooted both in New York City and in up-state Auburn; Gris-
wold, Da Costa, Guthrie, Morawetz, Cravath and the elder Henderson, to
mention only the dead. Written with crisp precision, and not a little humor,
*The Cravath Firm* fills in the background and the unrecorded substance of
many celebrated lawsuits, and of many more negotiations of great importance
to the growth of contemporary business institutions and practices. It suc-
cceeds remarkably in conveying a sense of the manner of men these lawyers
were, and of the way in which they worked, lived and took their (occasional)
ease.

Naturally, the most important question raised by Mr. Swaine's book is
whether the modern Big Law Firm is a good thing. Chief Justice Stone and
others have expressed their doubts. And there is always a popular suspicion
of lawyers, going back at least to Jack Cade, which is more readily roused
by great Wall Street law firms than by individual lawyers and their in-
dividual "cleverness," however conspicuous.

Mr. Swaine's study is not a polemic but a history. Like all history, how-
ever, it inevitably has an hypothesis. And, as a good historian, Mr. Swaine
meets the obligation to make his hypothesis clear. He does not smuggle his
theory in between the lines, nor does he pretend that it doesn't exist.

Mr. Swaine's thesis is that the great modern law firm is the inevitable
counterpart of business and banking on a national and an international
scale. In a business system which has grown in complexity as well as in size,
law firms competent to carry through major transactions or major law
suits must have a considerable staff. The business law of the United States
has become almost unbearably elaborate. An effective law firm must there-
fore be equipped with specialists and working parties—tax men, labor men,
accountants, economists, anti-trust experts, trial lawyers, business-getters,
scholars, negotiators; men with political and governmental know-how; and
often also with men of outstanding personality whose reputation, either
within the profession or with the public, constitutes a firm asset. *The Cravath Firm* pictures the process by which the big firms developed, and by
their strength and reputation became bigger. Unfortunately it cannot pre-
sent the materials from which one could determine whether such firms
actually earn more than their smaller fellows, and whether their members
live fuller, more influential or more independent lives.

Of itself, a great law firm is neither moral nor immoral. Its members are,
if anything, less likely to lose their freedom of judgment than lawyers de-
pendent on a single client. What standards, however, have governed their
work, and govern their work today? To what extent are they mere technical
servants of their clients? Can they (or indeed should they) bring their ex-
perience and judgment to bear in the formulation of advice which is wise
from the point of view of the community as a whole, as distinguished from
that of the special interests they serve? Could lawyers who kept such a
standard also keep their clients? Is a rule of professional conduct which puts
great emphasis on the public responsibility of the lawyer too much to expect
even of strong-minded and independent men? After all, though many big
business lawyers were and are highly individualistic personalities, they are
all mortal lawyers, subject to the normal and on the whole beneficent
psychological process which forces most attorneys to believe strongly in the
righteousness of their client's case. In Mr. Swaine's gallery of colorful and
devoted men, there are very few—perhaps only Cotton—who were capable
of real detachment towards the work they were doing.

The history of the Cravath firm epitomizes the revolutionary shift which
has taken place in all our thinking about the social limits on business free-
dom. The bar is inevitably conservative, and the part of the bar representing
considerable wealth finds it hard to avoid reaction, at least on issues re-
lated to its own work. In the period between the Civil War and World War
I, it was rare for a corporate lawyer to conceive of his job as more than the
creation of tools which would permit his clients to do what they wanted.
"The corporate executives and bankers of the old days usually resented
any political, social or economic advice from their counsel as beyond the
proper field of the lawyer." 2

One may doubt whether Mr. Swaine's comment is the whole story. In the
palmy decades of business growth which followed the Civil War, there was
little possibility for a difference of view between the big business client and
his lawyer. Cut off from the currents of public opinion and politics which
were a vital part of the lives of Seward and Blatchford, the lawyers who
commanded the confidence of business at the end of the century were not
afflicted with doubts about their course, nor with much sympathy for social
reform. Their job was difficult, creative and exciting. They were architects
of new forms, and new empires. That was enough for a man to do, without
worrying about issues of ultimate policy. Thus Guthrie could with deep
faith write a defense of the Pinkertons at Homestead which shocked the
Herald, although apparently Mr. Swaine retains a certain lurking symp-
pathy for its principle. 3

In the middle of the twentieth century, however, the world of business
is far less stable and assured. Both business leaders and their lawyers are
far more conscious of the pace of social change, and of the new and complex
dimension which social change has added to all business planning. Intelli-
gent conservatism understands that abuses of power, and failures to utilize
power in the general interest, are the real sources of social protest, and of
political movements which can threaten the continuity of our social develop-
ment.

"Today the American lawyer deals with the problems of his busi-
ness clients on a much broader basis, considers substance as more

2. Swaine, supra'note 1, at 171. See also 1 Swaine, The Cravath Firm 667; 2 Id., at
131.
3. 1 Id. at 483-4.
important than form and attempts to relate legal problems to their political, economic and social implications. The teaching of our law schools is accentuating this broadening function of the modern lawyer. The clients of today also generally recognize the interrelation of legal questions with political, economic and social questions.

"Big Business, Big Labor and Big Government are all here to stay. But in the gigantic concentrated power of their aggregate collectivism there is real danger that they may be leading us along the road to state collectivism. If we believe that such an end would be a tragedy, and that individual freedom of opportunity in a system of private enterprise should be maintained, it behooves all of us who render 'specialized service to business and finance' to seek such solutions of the legal problems of our clients as are compatible with changing social concepts and as will avoid the abuses of economic power to which our profession too often contributed in past decades." 4

This conception of the business lawyer's responsibility is not an easy one to maintain. Most lawyers, like most men in other walks of life, cannot function on so detached a level. On the other hand, there have always been business men and business lawyers capable of statesmanlike leadership within their own realms, as well as of last-ditch fighting against all change. An occasional lawyer for big business reports that he has more difficulties persuading his clients to accept the legitimate claims of government than in persuading government officials to appreciate the legitimate claims of his clients. But such a view of the lawyer's job is still far too rare.

Nonetheless, the conception of the lawyer as an intermediary between business and the public, educating both sides in the general interest of compromise, mediation and progress is a challenging ideal. In articulating it, Mr. Swaine comes extraordinarily close to the principle of a lawyer's obligation which Brandeis defended a generation ago. If a substantial part of the leadership of the bar can school itself in Mr. Swaine's moral, and accept its challenge in works as well as in faith, our chances of orderly social development will be greatly improved. Societies find themselves in revolutionary predicaments when there is too wide a gap between the ideas and aspirations of different groups and classes of the community. The normal pattern of healthy social competition can become uncontrollably violent if dominant groups fail to meet their responsibilities, or to compromise with insistent and generally agreed demands for social change. The secret of the continuity in British life has been the centuries-old willingness of the British ruling classes to understand and finally to accept the ambitions of other classes as they gained in strength.

In this respect the state of American opinion today is far more encouraging than it was fifteen years ago. The area of agreement on policy between the

political parties, and between those who speak for business, labor and government is far greater on essentials than was the case during the tempestuous early administrations of Franklin D. Roosevelt. The right of labor to organize free trade unions is no longer resisted with Pinkertons, spies or goons. The principle of regulating the securities markets and a good many other aspects of business life is accepted without debate. The broad idea of the Employment Act of 1946 is supported, apparently without notable dissent. The impact of the National Association of Manufacturers is tempered by the work of the Committee for Economic Development, and there are signs of progress even in the American Bar Association. There is plenty of disagreement about particulars. But the vigor of such disagreements, often explosively stated, should not be allowed to conceal the fact that there is a large zone of common understanding and common purpose about the respective roles of business, government and labor in American life.

The business bar can perform an immense service, both for its clients and for the community, if its members can effectively keep business thinking abreast of events, and business policy within reasonable reach of public aspiration. The lawyers of business are well placed and well equipped to carry out that function of persuasion. Occasionally a Disraeli, a Bismarck or a Theodore Roosevelt can even bring the thinking of "conservative" groups to anticipate the emergent problems of society, and to lead in their solution. Leadership on that level may appear from time to time, but it cannot be expected as a matter of course. It would be a great deal if the lawyers who specialize in the problems of business and finance accepted it as part of their professional responsibility to help bridge the gaps of interest and ideas which divide society. In our threatened world, any lesser conception of the lawyer's job is hazardous to the point of irresponsibility.

One can trace the growth of this dynamic conception in Mr. Swaine's study. The pressures on Mr. Swaine and his partners are conspicuously different from those which Guthrie and Cravath faced. There are new participants and new ideas in the process of railroad reorganization, the flotation of securities, the promotion of enterprises and the development of business policies towards prices, patents, industry relations and labor. Mr. Swaine calls for an attitude towards these and like problems which would have shocked some of his worthy predecessors. His is an attitude of enlightened, if still decidedly conservative self-interest, which is the antithesis of the Liberty League position of the middle 'thirties. The next volume of his history may tell us how well such ideas can be translated from the level of abstraction into working reality. The entire community has a stake in the acceptance and the practical fulfillment of his views.

So far this review has been concerned with a process of change in which the whole corporate bar participated. But Mr. Swaine's book is of great interest also for its portrayal of a particular firm, its people, its law suits and its policies. While most of the cases and negotiations he reports concern corporate, financial and industrial problems of high seriousness, there is a
good deal of well-written drama about spectacular will contests, forgery
trials and human frailty in general. There is much too about the life and
organization of the law firm. The Cravath firm was a pioneer in the practice
of recruiting large numbers of young men from the law schools, many of
whom were expected to go on to other careers. In a sense this policy
has made the big firms valuable graduate schools in law, particularly de-
sirable at a time when law school faculties are staffed more and more by full-
time teachers, rather than by practicing lawyers. The Cravath policy has
given the big firms some useful apprentices, and a wide choice of permanent
personnel. And it has provided large numbers of lawyers with an unrivalled
chance to cap their academic work with an internship at the highest level
of professional training.  

What will these great legal institutions be like twenty years from now?
What kind of lawyers will then command the loyalty of business and finan-
cial clients, and the respect of the profession? Cravath said in 1920, of the
qualities required for success at the bar, that:

"Brilliant intellectual powers are not essential. Too much imag-
ination, too much wit, too great cleverness, too facile fluency, if not
leavened by a sound sense of proportion are quite as likely to im-
pede success as to promote it. The best clients are apt to be afraid
of those qualities. They want as their counsel a man who is pri-
marily honest, safe, sound and steady."  

This was doubtless shrewd insight for a stable society, if not altogether fair
to some of his partners. In a world where disaster may be the price of mis-
judging the forces of social change, will business men be led by their in-
stinct of self-preservation to choose lawyers of imagination, or even of
brilliance, suspect as such qualities commonly are? It remains to be seen.
Surely business and the business bar will need counsel of imagination and
brilliance, resting on a broad understanding of society and its development,
as well as a sound sense of proportion, if it is to retain even its present
qualified position of leadership in our community.

EUGENE V. ROSTOW†

A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750.

In this first of several projected volumes of his History of English Crim-
nal Law Professor Radzinowics has, I believe, contributed a classic to
Anglo-American legal literature. Its quality will surprise none acquainted

5. Perhaps the reviewer should disclose that he had the pleasure and benefit of this
   process for a short time.
6. 2 SWaine, The Cravath Firm 266.
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with the vitality and seriousness of his interest in this field and the rich
general background which he brings to his particular researches. His depth
of knowledge of continental criminal law, product of graduate studies at
Cracow and Rome before assuming his post at Cambridge University, where
he is now a Fellow of Trinity College and Assistant Director of Research in
the Cambridge Law Faculty's Department of Criminal Science, were already
familiar to American readers of the English Studies in Criminal Science
which he has edited together with Professor J. W. C. Turner.¹

The motive and plan of the present work, briefly restated in the Preface
and in a Foreword by Lord Macmillan, were set forth by the author at
length in the *Cambridge Law Journal* in 1943.² He seeks scientific under-
standing of "the present state of criminal legislation" in relation to other
aspects and institutions of society, and "the course of its future evolution
rightly conceived." His plan involved an exceedingly arduous and far more
complete use of available sources bearing on the development of English
criminal law than had previously been made. The sources, hitherto little
exploited, which Professor Radzinowics has attempted to cover in addition
to the usual juristic material of statutes, decided cases and commentaries
of textwriters, fall into two broad categories: (1) State Papers, and (2)
Parliamentary Debates.

State Papers include the so-called Blue Books—that enormous accumula-
tion of Blue Books and White Papers officially printed and falling into three
main groups of documents: (a) The material embodied in the various Com-
misions of Inquiry, including data accumulated by Royal Commissions,
Departmental Committees, Inter-Departmental Committees, Select Com-
mitttees, Joint Committees of Both Houses, and Tribunals of Inquiry; (b)
The material embodied in Accounts and Papers, covering much the same
range of subject matter as that dealt with by the Commissions of Inquiry,
and (c) The Annual Reports published by the various State departments
concerned with the administration of criminal justice, including those of
the Prison Commissioners, the Children's Branch, the Public Prosecutor's
Office, and the Criminal Statistics.

Probably in no country in the world, as the author points out, does there
exist so voluminous and informative a collection of sources on the develop-
ment of a system of criminal law. There is hardly a problem of criminal
legislation and policy with which these papers do not deal, spread over a
period of more than two centuries during which the criminal law and its

¹ See particularly his articles in the fourth volume of that series, *The Modern
Approach to Criminal Law* (1945), dealing with *The Meaning and Scope of Criminal
Science* (with J. W. C. Turner), at 12; *Present Trends of English Criminal Policy*, at
27; and *International Collaboration in Criminal Science*, at 467.

² *Some Sources of Modern English Criminal Legislation*, 8 CAMB. L.J. 180-94
(1943). Assembly of the source materials on which the present volume is based was actu-
ally begun in 1941, and since 1944 has been carried on under the auspices of The Pilgrim
Trust.
administration in England have undergone a thorough transformation. In his present study the author has surveyed some 1250 Reports of the different Commissions of Inquiry, some 3000 Accounts and Papers, some 800 Annual Reports, and some 5000 items taken from 1100 volumes of Parliamentary Debates. The resulting scope of his work and something of the measure of its significance are suggested by the paucity of reference to this whole body of material in Sir James Fitzjames Stephen’s three-volume work on the *History of English Criminal Law* and in the published works of the late Professor Kenny. Stephen, it appears, referred to the Blue Books on only three occasions in his treatise; and Kenny on similarly few occasions.5

The method pursued in using this data was outlined by the author in the *Cambridge Law Journal* article mentioned above. The preliminary stage consisted in selecting from the State Papers and Debates as a whole the items relevant to the present study. These were then regrouped under some 130 topical headings intended to include the range of criminal legislative issues raised in the Papers and Debates or otherwise suggested. With the data thus arranged the next question was whether to single out each topic or problem for separate examination throughout the entire period of time, or to break the total period of time into sub-periods corresponding with broad phases in the development of the society as a whole as well as in criminal legislation (from a scanning of the material it appeared to the author as it had to others 4 that there was such a correspondence) and then examine all of the topics in relation to one another as they might appear during each subperiod. The latter choice was adopted, three such sub-periods being identified: (1) 1760–1830; (2) 1830–1895; and (3) 1895 to the date of completion of the manuscript. The current volume deals with the first of these, designated *The Movement for Reform*.

The volume is in five parts: (1) Capital Punishment in the Eighteenth Century Criminal Law; (2) Administration of Statutes Imposing Capital Punishment during the Eighteenth Century; (3) Leading Currents of Thought on the Principles of Punishment in the Eighteenth Century; (4) The Beginnings of the Movement for the Reform of Criminal Law; and (5) The Growth of the Movement for the Reform of Criminal Law. It also includes voluminous appendices digesting the capital statutes of the Eighteenth Century, the judicial interpretation of some of the more significant of these, views of contemporary foreign observers on the state of criminal justice in England during the period, some leading petitions in favor of the reform of criminal law, and a table of the capital statutes as of 1839.

Many of the culture-conditioned reasons for the restriction of vision of past generations of Anglo-American legal scholars to that part of the crim-

3. *Id.* at 190.

inal law which deals with common crime and delinquency in stable societies enjoying a maximum of continuity in their development become clearer as one reads this volume. A major issue during the period covered was the progressive restriction of the capital penalty. As Lord Macmillan says in his Foreword:

"The pioneers of nineteenth century reform were concerned chiefly with the barbarity of the law and the inefficacy and injustice of the penalties which it prescribed. It may be that future reformers will be concerned with problems of another nature. The conception of crime which the ordinary citizen entertains involves the commission of some act which transgresses not merely the law but morality . . . . But in recent times the criminal law has invaded almost every department of daily life with countless restrictions to the contravention of which penal consequences are attached . . . . 'The more laws there are the more crimes there will be', said the founder of Taoism about the sixth century B.C." 5

The recurrent character of the issues and controversies which center on the existence and use of criminal sanctions is also illustrated by this study. Again to quote Lord Macmillan:

"By an apposite coincidence it so happens that while these pages have been passing through the press Parliament has been engaged in the consideration of a Criminal Justice Bill embodying a wide range of amendments of the existing law. The discussions which have taken place in both Houses on this measure, when read along with the account given by Dr. Radzinowics of the debates on earlier reforms, illustrate the perennial character of the controversies which always attend alterations in the criminal law . . . . If this book had been published before the Bill was discussed in Parliament its wealth of historical and statistical information on the subject would have provided speakers with a veritable arsenal of ammunition." 6

The foregoing reactions suggest one refreshing aspect of this work. Professor Radzinowics and his colleagues of the Cambridge Law Faculty are interested in the "why" and the "ought" as well as the "is" of their law, recognizing that such distinctions represent useful intellectual abstractions and suggest a range of appropriate investigative tools for the legal scholar rather than distinct bodies of social phenomena, professional knowledge and skills, supposed separately to exist in some state of nature. 7 This book dem-

5. P. vii.
6. P. vi.
7. See, for example, the conception of the interrelation between criminology, criminal policy and criminal law on which the curriculum and research program of the Cambridge Department of Criminal Science are based. Radzinowics and Turner, The Meaning and Scope of Criminal Science, in The Modern Approach to Criminal Law 12 (1945).
onstrates, if indeed demonstration is needed, the advantage of a professional orientation which does not exclude all sources of information concerning the status and meaning at a given time of a supposed rule or institution of law other than cases and statutes and the views of properly licensed commentators who have confined themselves to the same. It is true, despite the more limiting attitude which was invoked as a doctrine of statutory interpretation in the Camineti case,\(^8\) that American lawyers do not as a rule question the relevance of official documents which evidence legislative history. Professor Radzinowics, in this sense, is using conventional legal materials. The aim, and properly, was an "exhaustive use" of the State Papers together with more formal legal sources;\(^9\) and this aim has been fulfilled. The preliminary work with these materials was obviously so painstaking that the end result is far more readable and stimulating than might otherwise have been the case. The high degree of synthesis achieved is manifested both in the exceptional clarity of the author's exposition and in a skillful use of quotation which brings his sources to life.

But it is also apparent that this work, and indeed the possibility of its conception, rest on a broader base. It had not, after all, previously been done in England; and a comparable investigation of American sources of criminal legislation equivalent to the English State Papers still remains to be done. The nature of that broader base should therefore be of interest. Three aspects of the work, evidenced in the text as well as in the extensive included Bibliography, are suggestive. First, there is nothing parochial in the perspective. The general problem is conceived and English developments are viewed in an international and comparative if perhaps primarily Western World context, with considerable attention to parallel developments on the Continent and to contemporary views of the English scene by foreign observers. Second, and without prejudice to the goal of exhaustion of the State Papers, the English sociological, economic, and political science literature was surveyed along with contemporary newspapers, periodicals, and biographies of significant participant-observers. And third, here an avowed concern with policy is found coupled with and indeed prompting a more rigorous examination of the exact meaning at each stage in its development of a body of legal doctrine than had previously been made.

Professor Radzinowics has done more than produce a work which from now on will be standard. He has set an example of what can be done, and one which will be as much appreciated by his colleagues elsewhere as it already has been in his adopted country. The publisher is also to be congratulated on giving this book the attractive format which it deserves.

GEORGE H. DESSION\(\dagger\)

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8. 242 U.S. 470 (1917).
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THE SIZE OF THIS BOOK IS ALARMING. IT EXCEEDS BY 100 PAGES THE NEW GREGORY AND KATZ BOOK WHICH SEEMS TO BE AS MASSIVE AS A LAW STUDENT SHOULD BE ASKED TO CARRY. INCLUSION OF SOME 400 PAGES DEALING WITH "THE COLLECTIVE BARGAINING AGREEMENT, ITS NEGOTIATION AND ADMINISTRATION" IS RESPONSIBLE FOR ITS EXCESSIVE SIZE. IN DEVELOPING THE DISCUSSION OF COLLECTIVE BARGAINING, SOME COURT AND NLRB CASES ON MAJORITY RULE, THE DUTY TO BARGAIN IN GOOD FAITH, THE FLSA, AND JUDICIAL ENFORCEMENT OF AGREEMENTS ARE UTILIZED; BUT THE MAIN BODY OF MATERIAL RELATES TO THE SCIENCE (OR ART) OF BARGAINING, AND THE INTERPRETATION OF BARGAINS BY ARBITRATORS AND IMPARTIAL CHAIRMEN.

BY INCLUSION OF THIS MATERIAL SHOWING THE IMPORTANCE OF THE UMPIRE'S ROLE, THE AUTHOR FOLLOWED THE TREND SUGGESTED BY DISCUSSION AT THE ANN ARBOR CONFERENCE OF TEACHERS OF LABOR LAW. IT CANNOT BE GNASEID THAT SUCH MATERIAL SUPPLIES INFORMATION AND TECHNIQUES OF VALUE TO SOME LAWYERS. NOTHELESS ITS PLACE IN THE ALREADY CROWDED SYLLABUS OF AN INTRODUCTORY LABOR COURSE IS QUESTIONABLE. THE STUDENT SHOULD FIRST LEARN WHAT A COURT OR THE BOARD IS LIKELY TO DO ABOUT A STRIKE, A PICKET LINE, OR AN ALLEGEDLY UNFAIR LABOR PRACTICE. THESE MATTERS OF BASIC CONCERN TAKE UP AS MUCH TIME AS IS GIVEN TO THE STANDARD COURSE AND OUGHT NOT, I THINK, TO BE DISPLACED BY MOST OF THE MATERIALS ON THE ACTIVITY OF UMPIRES. FURTHER, THE DECISIONS OF COURTS AND THE BOARD PROVIDE INTERESTING AND PROVOCATIVE MATERIAL WHICH SERVES MUCH BETTER TO HOLD THE STUDENT'S ATTENTION THAN THE DAY-TO-DAY DISPOSITION OF ROUTINE SQUABBLES BY THE UMPIRE.

IN THE AUTHOR'S PART II HE HAS INCLUDED THE KNOTTY FLSA CASES FROM MISSEL TO HARNISCHFEGER. MOST LABOR LAW CASEBOOKS CONTAIN NO MATERIAL AT ALL ON THIS IMPORTANT ACT; PROFESSOR COX'S SINGLING OUT OF ONE PUZZLING PROBLEM ON THE FLSA SEEMS ILOGICAL. THERE WOULD BE GRAVE DANGER OF BOGGING DOWN FOR TOO LONG A TIME IN THESE FEW CASES.


THE EXTENSIVE SPACE GIVEN THE RECENT GENERAL SHOE CORPORATION CASE IS WELL MERITED BY THE QUESTIONS WHICH IT RAISES AS TO THE EMPLOYER'S CONSTITUTIONAL AND STATUTORY RIGHT TO ELECTIONEER. BUT SOME WAY SHOULD BE DEVISED TO BRING TOGETHER FOR TEACHING PURPOSES THE FREE SPEECH, PICKETING, AND EMPLOYER FREE SPEECH CASES, SO THAT THERE CAN BE DISCUSSION OF THIS IMPORTANT BUT ALMOST INSOLUBLE PROBLEM OF PERSUASION PLUS.

1. P. 637.
2. P. 708.
Professor Cox has given us a good teaching book. Because of the scarcity of Taft-Hartley Act cases, and because of the present uncertain posture of that Act, any 1948 book on labor law is fated to be out of date within a couple of years. But Professor Cox, together with Professors Gregory and Katz, has seen to it that the need for the current year is well filled.

J. Warren Madden†


Comparative Law has been a dead language in American legal education—partly because of the insularity of the Anglo-American legal tradition, partly because of the failure of the comparativists to develop significant criteria of comparison and contrast. This is not to say that the study of foreign law has not been recognized as important. Many are the distinguished jurists who have hailed its significance. The proposition that it is impossible fully to understand our own law without some knowledge of other legal systems would probably command universal assent. Indeed, Comparative Law in general is much in vogue. But in particular, when the professor has finished with his discussion of the difference between causa and consideration, or when the writer has explained that Civil Law judges get along without a doctrine of stare decisis, the question is bound to arise in the student’s mind, if not on his lips, “So what?”

This predicament is not new, nor is it unappreciated. It is well known that a purely descriptive comparison of legal systems is inadequate from any point of view other than that of the practitioner in such fields as foreign trade and international conflict of laws. It is almost as well understood that the underlying purpose of teaching foreign law must be to provide a perspective for the understanding of our own law, and that therefore everything hinges on the development of a science of comparison. What is perhaps not so clearly appreciated is that such a science of comparison can only be developed if Comparative Law clearly and consciously faces the real issues which confront the peoples of the world today and attempts to find in various systems of law a key to the understanding of these issues.

Two such issues come to mind immediately. One is the conflict of competing conceptions of social-economic organization. To study, for example, the impact of socialization on the legal systems of England, France, Germany, Sweden, Poland, Yugoslavia—would be to raise traditional Comparative Law from the level of “weigh, measure and count” to the level of a social science. A second issue is the conflict of competing conceptions of

† Judge, Court of Claims of the United States; formerly Chairman, National Labor Relations Board.
civilization altogether. What, for example, has been the effect of the introduction of western concepts into the legal systems of China, Japan, and India? Here, all the lessons of the various disciplines—economics, sociology, anthropology, history, philosophy, theology, linguistics, and what have you—are relevant and applicable to what remains, nevertheless, a lawyer's problem.

In terms of both the impact of social-economic change and the conflict of civilizations, the study of Soviet law provides a unique opportunity to widen and deepen the American lawyer's understanding of his own legal system and of law in general. It is this fact to which Professor Hazard undoubtedly has reference, in the Preface to his collection of cases and materials on Soviet law, when he states that his purpose is "to awaken appreciation in the student of the fact that law is a social science and that there are various ways of meeting the issues with which the student has become familiar in his study of American law." "Such purposes," he states, "are achieved with greater facility by the use of Soviet materials than with those of many other countries. The relationship between law and society is more clearly drawn in the U.S.S.R. than in most of the western world. The added fact that the law is designed for a socialist economy gives rise to contrasts which exceed those in economies more similar to that of the United States."

It is not Professor Hazard's intention in this small book to spell out the lessons of Soviet law, but rather to provide basic source materials—cases, statutes, code provisions, authoritative commentaries—from which teacher and student together can draw implications. It is not expected that from these pages alone an adequate conception of Soviet law can be obtained. One would need also to study carefully the various books and articles to which reference is made in footnotes and in the select bibliography at the end. But it is expected that the American law student has a craving to study not merely what has been written about the law but also the law itself, particularly as interpreted by judges in concrete situations. Without such materials as these, therefore, the American student of the Soviet legal system will miss the direct experience of what happens in Soviet law.

Professor Hazard arranges his cases and materials in a manner familiar to American law students. After a brief introduction into Soviet legal theory (through a definition by Vyshinsky and some bibliographical references), and two interesting cases illustrating the Soviet system of trials and appeals, the book deals in turn with the Protection of State and Society (particularly through criminal law), the Protection of the Individual (through procedural due process, labor law, patent and copyright, housing law, torts, and contracts), the Protection of the Family (through marriage and divorce law, rights of children, and the law of marital property), and the Protection of Property (state, communal, and private). Except through this classification, Professor Hazard nowhere indicates the interpretation which he himself puts upon these materials. And with the exception of a footnote citation of
two American cases on treason, following a Soviet case on counter-revolutionary crime, he nowhere indicates the relevant comparisons and contrasts to be made with American law. The reader is left to his own analysis and his own conclusions—to be drawn out, presumably, in class discussion.

Those who are fortunate enough to be able to take Professor Hazard’s course in Soviet law at Columbia (or, this spring, at Yale) need no review of this book. The question is, what can students, lawyers, and law teachers who are not so fortunate derive from studying the materials presented?

They will learn much—but they will also miss much. They will learn that in the effort to achieve “stability of laws” and to encourage personal initiative, Soviet law has gone very far in the protection of rights of tort and contract and property; and this generalization will shine through the cases—the case of the peasant Dogadin who recovered damages from the collective farm “Krasnyi Pakhar” for losses arising from its wrongful appropriation of land belonging to plaintiff’s peasant household; the case of the worker Kravets, who recovered back wages for the time he was under detention on a criminal charge, the Supreme Court of the U.S.S.R. holding that the statute of limitations for availing himself of the normal grievance procedure ran not from the time he was arrested but from the time of his acquittal; the case of Sysoeva, who had been required to surrender her cow to the army for evacuation during the war and who was allowed to recover it from a bona fide purchaser, the Plenum of the Supreme Court holding that where property is taken from the owner against his will as a result of force majeure, the owner has the same rights against a subsequent good faith purchaser as where the property was lost or stolen (although the code provision on which plaintiff relied did not mention force majeure, but only loss and theft); these and many other cases—some good and some bad from the point of view of American legal conceptions, but all interesting for the light they shed on the nature of the judicial process in the Soviet Union.

To those who think that the Russians are barbarians and that the Soviet regime is a police state run by a gang of thugs, it will come as a distinct shock to discover—not from what anyone says about it, but from the reports of decided cases—that the Soviet courts are deeply concerned with the problem of justice as between man and man, that officials (including judges) who fail to do their duty in respect to citizens under their control (as, for example, by imprisoning them falsely, or failing to issue orders for their release from detention, or unduly delaying their trial) are punished, that there is litigation in Soviet courts over contracts and torts and wills, that authors receive royalties and may sue for infringement of copyright, and that in many other respects as well Soviet law seems to be quite civilized. To those, on the other hand, who imagine the Soviet system to be the incarnation of rational materialism, in the Marxist-Leninist sense, these things may be equally shocking. Consider, for example, the “bourgeois sentimentality” with which the Supreme Court of the U.S.S.R. reversed a decision of the Supreme Court of the Georgian Republic in a suit for the
custody of a child. The parents having been divorced and custody awarded to the mother, the father subsequently sued—successfully—for return of the child to him, the People's Court stating as grounds for its decision that the father was an Assistant Professor and Deputy Director of a pedagogical institute "and could provide the child with a respectable communist upbringing," whereas the mother was only a student at the institute and had neither the means nor the time to take care of the child. The Georgian Supreme Court affirmed, but the U.S.S.R. Supreme Court, in reversing and remanding for a new trial, stated:

"The court must bear in mind that the interests of the child are not secured solely by the material conditions necessary for its upbringing. Better material conditions of a father are not reason for taking a two-and-a-half-year-old child away from its mother. . . . As was evident from the testimony of the witnesses . . . the child was being reared and was developing under normal conditions. The mother, grandmother and grandfather were taking care of the child. The occupation of the mother at work, studies and elsewhere could not be the basis for taking her child away from her."

On the other hand, it will probably come as a shock to no one to read the decree establishing, under the People's Commissariat of Internal Affairs, a special board with the power "to apply, in accordance with administrative methods, [sentences of] exile, banishment, internment in correctional labor camps for periods up to five years and expulsion from the U.S.S.R." to persons who are found to be "socially dangerous." Nor is it surprising that Professor Hazard has found no reported cases of decisions by this board.

For those who want to know what life is like in Soviet Russia, and what the Soviet State stands for in the life of the people whom it governs, these cases and materials are invaluable. What better clue is there to the true character of a social order than the law which it produces? Law is at the same time "value" and "fact"; the legal norms of Soviet society are more than propaganda—yet they are also more than given patterns of behavior. They represent a synthesis of, or compromise between, what is and what is believed in. The American lawyer, therefore, has an extraordinarily good means of access to Soviet realities. For one who earnestly desires to be a student of Soviet society, it is worth while to become a lawyer for the sole purpose of being able then to understand Soviet law.

Yet these materials are designed only in part for students of Soviet society. They are designed also for students of law as a social science. They are designed to serve as a basis for a course in Comparative Law—a course which, presumably, seeks to be more than descriptive. As one who has not had the benefit of Professor Hazard's own analysis and synthesis of the materials, but who has himself struggled with the problem of comparing Soviet and American law, I confess I find them, from this point of view, somewhat unrewarding. Since the importance of Comparative Law lies in
comparison, it is disappointing to find only a few references to parallel or contrasting aspects of American law. In considering the Soviet doctrine of analogy, for example, it would be extremely useful if mention were made of American cases in which the results of a doctrine of analogy were obtained without benefit of the doctrine itself—or in which the repudiation of analogy led to a doubtful decision; or, for that matter, of cases in the courts of Nazi Germany which applied the doctrine. Similarly, in dealing with Article 1 of the Soviet Civil Code, which declares private rights to be enforceable only when they are exercised in accordance with their social-economic purpose, it would contribute greatly to our understanding of the significance of such a provision if we were led to compare it with the effect of "public policy" considerations on the outcome of American cases. Professor Hazard apparently felt it wiser to leave the discovery of comparisons to the reader, or to class discussion. But there is a deeper question involved—namely, what is comparable to what? This is the sixty-four dollar question of Comparative Law, and it is probably more crucial in the treatment of the Soviet legal system than it is in the usual Comparative Law course.

Closely related is a second crucial question—namely, what, among comparables, should be compared? Here again it seems to me that Professor Hazard, by confining himself for the most part to the "private-law" aspects of Soviet law has missed a golden opportunity. Only in one case are Soviet state business enterprises involved; in that case alone is there illustration of the direct effect of national economic planning upon traditional legal categories. This is because Professor Hazard has confined himself to the regular courts. He has not dealt with cases decided in the system of commercial courts (Gosarbitrazh) which handle disputes between government corporations. One might go on from problems of commercial law to those of administrative law, by comparing, for example, the new Soviet fifteen-year plan for afforestation with our own soil conservation program—not from the economist's standpoint of whether the proposed or accomplished measures will actually prevent soil erosion, but from the lawyer's standpoint of who makes what decisions on what levels and by what processes. The question of contractual freedom and contractual responsibility of state business enterprises in a planned economy is one of the most important problems that the Soviet legal system has faced, and it raises the question of socialism and of planning in a way which lawyers can understand and through which lawyers can make a contribution.

The author has nevertheless done an important and remarkable job in bringing out the first collection of cases and materials on Soviet law as a whole that has ever appeared in any language. This is further pioneering in the field in which Professor Hazard—the only American to have taken the equivalent of an LL.B. at a Soviet law school—has been a distinguished pioneer for fifteen years.

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