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REVIEWS

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In one of the dream-sequences of Through the Looking Glass, Alice found herself in a little dark shop where an old sheep sat knitting behind the counter. She looked around her to see just what was on the shelves. “The shop seemed to be full of all manner of curious things—but the oddest part of it all was that, whenever she looked hard at any shelf, to make out exactly what it had on it, that particular shelf was always quite empty, though the others round it were crowded as full as they could hold.”

This is the kind of nightmare sensation that is likely to come when for the first time one examines critically some shelf or other in the shop he is used to call his cosmos. Philosophic inquiry at its outset is an agitating experience, charged with vertigo and sudden discomforts. Whoever engages in it in the skeptical manner that intellectual honesty compels will appear to be snatching away his neighbors’ familiar supports. Hence for some twenty years (since Law And The Modern Mind) Jerome Frank’s writings have met with two classes of readers: one, those whose disturbance led only to resentment; the other, those whose disturbance prompted them to reassess old assumptions, to grapple with new challenges, and to feel grateful for the light he had let into the dark shop. For the latter group and for anyone hardy enough to join them, the publication of Courts on Trial is an important event, because this is his most illuminating work.

Addressed as it is to the general public, the book is written in an easy, pungent, and relatively simple style. Thus it invites reading on more than one level; in fact, sophisticated students are likely to find more beneath than above the apparently smooth surface of the text. And to those who, like myself, receive a very modest income of insights and ideas, Judge Frank seems, as in his earlier works, to be flinging his revenue about in an almost prodigal fashion. But then, considering the intellectual expenditure he has been able to maintain these many years, who will venture to call him a spendthrift? Fortunately, certain of the book’s ideas can be recognized as variations of what Judge Frank has said before, and it is enlightening to see how these familiar thoughts draw new cogence and direction from the general thesis to which they contribute.

The thesis is entitled “fact-skepticism.” It is developed with such a variety of illustration, analogical digression, and exposition of corollary applications (e.g., to the problems of legal education) that this review will become hopelessly lost unless we resolve to stay on the highway. The highway is directed toward a fundamental reformation of popular understanding of the nature of the judicial process. En route, certain significant procedural reforms are recommended, but Judge Frank would probably agree that they
are not inextricably attached to "fact-skepticism" and that his principal theme may be considered independently, on its own merits.

Stated as bluntly as possible, this theme is: a court generally decides a case without knowledge of the relevant circumstances that actually occurred and in reliance on a mistaken belief in other circumstances that actually did not occur, i.e., on "the wrong facts." Judge Frank buttresses this conclusion with copious reasons and illustrations, neglecting no argument in vindication of his "fact-skepticism." Some of the reasons (those that result from defects in judicial method) are curable or at least mitigable, but others, arising out of faulty human capacity to observe, to remember, to articulate, etc., are bound to remain with us permanently. Modern litigation, heir of the magical ordeal and of the resort to brute force, is miles removed from a scientific investigation into the truth of "what actually happened." Amid the conflicts of testimony, the stratagems of counsel, the prejudices and perjuries, amid the blind of eye, the lame of memory, and the halt of articulation—the judges and the juries, themselves myopic and inept, sit and render judgment; and no one ever discerns the "true" facts of the case.

On the way to this conclusion, the lay reader (and many of us at the bar) will learn much concerning the operations of the courts and the views of contemporary theorists. These by-products are very valuable regardless of one's attitude towards the author's incidental positions. I for one would be inclined to except to (1) the sharpness of the dichotomy between rule of law and finding of fact, which is maintained through most of the book and appears inadequately relieved by the brief treatment of Gestalt; (2) the supposed relative clarity of the law-rules, and (3) the treatment of "natural law" as an influence on the law side only of the dichotomy. But as to Judge Frank's principal thesis—the inaccessibility of the "true" facts—I am convinced and freely assent.

Once having assented, however, I would suggest that the thesis gives rise to certain further questions that Judge Frank may see fit to consider fully in the future. (That the questions are phrased here tendentiously does not mean that they are intended as answers).

In an ordinary civil litigation, are we or the parties really interested in ascertaining the "true," transcendental, mind-of-God facts? Is it not enough to conduct a rigorous examination of recollections to make them as sincere and careful as possible in the present (which is all we ever have)? Is not the controversy causing its individual and social disturbances now? Should we not focus on a decision (a value judgment), i.e., some concededly

1. As I see it, the search for a major premise is like the search for a mate: it changes both parties. Judge Frank's mathematical phrasing [R(ule) x F(acts) = D(ecision)] correctly implies the functional modification of F by R and of R by F; the ultimate subsumption of F to R comes only after each has received the imprint of the other.
2. The best literary instance of Gestalt emergence is Robert Browning's magnificent THE RING AND THE BOOK.
imperfect and approximate resolution that will send the litigants back to their respective pursuits and to the use of their non-litigated rights? 3

Does not the adversary method of litigation at least promote relative impartiality of the tribunal? 4 If our objective is a decision rather than a finding of scientific accuracy (verification by controlled experiment being generally impossible), is not the partisan political debate a relevant analogy to the same limited extent as scientific method?

The answers to these questions would, I hope, indicate that the shelf of adjudication is not nearly so bare as it first appears in the light of Judge Frank's thesis. If the answers are in the affirmative, then the litigative process is not a mere juggling with myths and its decisions are not congenitally based on the "wrong facts." In general, such data as a liberalized procedure would disclose do seem to be all the data that make up the controversy at the time of trial. They are the "right facts" to be evaluated in deciding it, whether or not they have noumenal counterparts in the past.

On the other hand, future fact-findings appear quite as unpredictable as Judge Frank insists they are. And that unpredictability (both lex and justitia being feminine) is almost completely irreducible. Such being the case, how much utilitarian value remains in Holmes' treatment of a legal right as "the hypostasis of a prophecy"? Viewed in the light of this radical unpredictability, Holmes' analysis might seem to deny the existence of any rights except those already adjudicated in specific litigations between the same parties: the outcome of future litigation concerning other rights or other parties would be mere guesswork. "Hypostasis of a prophecy" may somehow be made to include a reservation (or an auxiliary prophecy) that, in all probability, the instant right will not be contested before a court or administrative agency. Perhaps the moral is that Holmes' highly useful insight has been extended beyond its legitimate province. Perhaps societal practice, which pays a right its wages on the assumption of good health and regards the advent of litigation the way we regard cancer (as something terrible that may happen to someone else) is an equally suggestive criterion. These are indeed profound questions, but it will not do to withhold praise of a preeminent book until they can be thought through to a firm position.

Those of us who were introduced to the law in the conceptualistic murk of the 1920s are bound to remember with gratitude the brave company of so-

3. A similar reaction is expressed in Max Radin's sagacious book, Law As Logic and Experience cc. II-IV (1940), but with a special emphasis on arbitral values and on the hope that the disputants may be induced to go forth and do business again with each other. This would shift the focus from the partly known but irrecoverable past to the future with its compound contingencies, and thus might generate more grievances than it cured. Would not the dimensions of the problem be reduced by analysis of our system's emphasis on substitual relief?

4. See Calamandrei, Eulogy of Judges 52-5 (1942). Judge Frank's sharp criticisms of the adversary method are not followed by a recommendation that it be abandoned. The reforms he proposes are modest and, for the most part, obviously needed to realize the very values that have been traditionally ascribed to the adversary method.
called "realists" who forced the windows open and gave us light and air. Foremost of that band, Jerome Frank continues—with zest and sparkle—to disturb the complacent, to shock the intellectual prudes, and to lay a youthfully tempestuous siege to the heart of justice. Of all men, he may be least concerned by the gap between the excitements of the present and the past's pathetic illusion.

EDMOND N. CAHN†


It is trite but true to point out that modern western civilization has made incredible advances in the knowledge of techniques, but has failed pitifully in its understanding of the proper or desirable use of these techniques. Just as we have developed procedures which lead to atomic fission but have not learned how to restrict its use to human betterment (since we cannot even define the latter term), so have we developed the machinery of effective unionism without a clear knowledge of the purposes which unionism is properly to serve. Professor Lindblom does not give us glib answers to the question, but for the first time the problem is effectively pointed up and a gauntlet has been hurled at the feet of all students of labor-management relations, whether they be scholars of jurisprudence, economics, political science, or sociology. Unions and Capitalism will be a burr under the saddle for all who read it, and all persons interested in the general subject will, sooner or later, find it necessary to read it.

It is impossible to compress this book any more than has been done between covers by the author; no summary of its contents can be accurate. But since the readers of a review are entitled to a clue as to the content of a book, I will undertake a generalized statement of the central theme. Unions, in their present form, developed inevitably out of the necessities of their environment. Because of their correct adaptation they may be applauded. However, the form of these same unions also tends toward the destruction of the free and democratic capitalism to which the American people are devoted. Because of their destructive influence upon a desirable free economy they must be deplored. The reasons for the latter conclusion are numerous, but the principle is made clear in the following: "No monopoly except that of the commodity labor could ever reach into every corner of the economy, every industry, every occupation, every product. And hence no other power can so effectively challenge the rules of the competitive game as unionism—ever determined to 'take wages out of competition' and succeeding." ¹

Professor Lindblom is well aware of the fact that there are other forces

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¹ P. 136.
within capitalism which tend toward the destruction of capitalism—corporate strength, government, and international competition, for example. He says: "Abolish unionism and the competitive system would still be threatened. . . . The importance of union power is that it hastens its decline and will govern in large part the form of the new institutional arrangements which are being created to take the place of the market." 2

All things change; we could not have it otherwise if we would. But if man's intelligence be adequate, he can to some extent direct the route of change. Perhaps the free competition of the American Dream is a will-o'-the-wisp. But unless we are to move into the brutalities of a fascist economy we must know what alternative is preferred and how to get there. Professor Lindblom's book is a fundamental prolegomenon to these questions.

The book is certain to be misunderstood (and, for this reason, unfavorably received) by many readers. Among the liberals will be some who denounce it as a "union-busting tract." On the other hand, there will probably be a few reactionaries who will take Lindblom to task for a seeming acceptance of the Marxian doctrine that "capitalism contains the seeds of its own destruction." Each viewpoint can find passages to support its contention. By way of reply, it can only be suggested that these people read the book again, and read it more carefully. They may then understand that Professor Lindblom is the kind of liberal who welcomes change, but who fears blind and unreasoned change. The book, read carefully and taken in its entirety, proclaims him thus without equivocation.

Another criticism of the Lindblom thesis must be taken more seriously. Is it really correct to say that unionism (as it is) is more destructive of capitalism than any other institution within the economy? It was not unionism which destroyed free enterprise in Hitler's Germany, in Mussolini's Italy, or in Stalin's Russia. Would it not be more correct to say that unionism shares with other institutions the participation in social change? It would perhaps be still more correct to say that the changes in developing unionism are part of the changes in the whole of capitalism. This is a question which we may hope will receive further consideration from Professor Lindblom as he broadens his study. In any event, he has made his point in the present volume, even though the point may be a bit too sharp. It is a point which requires careful consideration by all thoughtful scholars.

WILLIAM S. HOPKINS†


The first volume of Professor Powell's magnum opus demonstrates beyond question what we are all well aware of, that he is a thorough, con-

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2. P. 139.
†Director of the Institute of Labor Economics, University of Washington.
scientious scholar and teacher in the general field of Real Property. The Volume is divided into two parts. Part I, labeled Introduction, contains a short discussion of the meaning and origin of the term property; a discussion of the vocabulary to be used in the treatise; a somewhat broader than usual short synopsis of the English background on land tenure; and a three-hundred page treatment of the sources of American Real Property law including a state-by-state survey. This survey is the product of a good deal of original research and is not usually treated as a separate subject in other general treatises. Part II, entitled Capacity to Hold and to Deal with Interests in Land, discusses the protection of aliens, infants, mental incompetents and so forth and the treatment of non-profit and profit, non-incorporated and incorporated associations, fiduciaries and governmental instrumentalities. On most of these subjects Professor Powell seems to do a very thorough job of collecting the cases and statutes. Lawyers often need to consult these sources. A lot of painstaking and frequently not too enjoyable work has been done for them and they should all be thankful to Professor Powell.

Does the book do any more than collect this sort of material? In Part I Professor Powell tells us that he will use the terminology of the Restatement and Hohfeld.1 The possible evil consequences of this have frequently been stated by Professor McDougal and also to some extent by Judge Charles E. Clark. They need not be reiterated here, especially since their impact will probably be felt more in Professor Powell's subsequent volumes. Still, let the reader beware! More encouraging is Professor Powell's remark in his introduction that he wants to know "most important of all" the extent to which present manifestations of the institution of property "promote the welfare of the society in which it functions." This rather novel approach for modern treatise writers in this field does bear fruit occasionally. Sometimes the author presents his subject in a social setting. Here and there there is an attempt to appraise the desirability of a particular rule. But it is all very spotty. The social setting and appraisal is sketchy and almost always overwhelmed by the heavy, traditional, case documented text. Indeed, on the whole, Professor Powell's organization of material, in this volume, at least, does not aid a policy-oriented approach to the subject.

As to the historical material which takes up practically half of the book, one wonders to some extent what it is for. Professor Powell warns us that unless we know something about past practices and reasons for their existence we cannot understand and reform the present. But he tells us right in the beginning of his section on American Sources that his is a book of law and not of history. This suggests that without history the picture will be so incomplete as to be unrealistic and of no current usefulness. What follows largely supports this premonition. Thus while Professor Powell comprehensively surveys the so-called economic, political, religious and social factors in seventeenth-century England that moved the
colonists to settle here, all his scholarship simply yields broad conclusions
about "law" of no apparent significance today. For example, we are shown
that in the early years colonial law, though displaying traces of English law
"took most of its substance and all of its form and detail from the common
sense reactions of common folk to the basic problems of maintaining life
under the conditions encountered in the New World."  
And, in the same
vein, we are also told that "the reception of the common law can be re-
garded as the joint product of (a) the English government's desire to unify
the colonies for purposes of the empire's commercial gain; and (b) the col-
onists' desire to gain freedom from tyranny and exploitation by asserting
the inherited 'rights of Englishmen.'"  
Most of the rest of the historical
discussion simply consists of a literal chronological description of basic leg-
islation and cases, state by state, and contains amusing bits such as that
in 1939 a Delaware case reversed an 1873 case and declared that the English
doctrine of "ancient lights" was "unsuited to our condition."  
In short, Professor Powell has made an attempt to do more than write a
"standard" treatise. But what he has done beyond the expected seems, as
far as this present volume goes, to be marked by too much detail and not
enough significance.

David Haber†

Cases and Readings on Criminal Law and Procedure. By Jerome Hall.

Two or three years back, Jerome Hall published his General Principles of
Criminal Law, which was widely acclaimed as a noteworthy contribution to
criminal jurisprudence. Now Hall has prepared a casebook in which he has
organized the materials to accord with his theories of criminal law. Readers
familiar with Hall's work know his categorization of criminal law into prin-
ciples, doctrines and rules. Applying this analysis, the casebook deals first
with the principles of criminal law—those fundamental ideas running
through the entire body of criminal law. Part II deals with the specific
characteristics of the several crimes (rules), and Part III with the general
characteristics common to all crimes (doctrines). In addition, some 250
pages are devoted to criminal procedure.

By "principles" Hall means those fundamental ideas which are concerned
with the ultimate notions of criminal law theory: "crime" and "punish-
ment." These principles directly concern (1) certain external consequences
("Harms"), (2) which are legally forbidden (principle of legality); (3) con-
duct; (4) mens rea; (5) the fusion, or "concurrence" of mens rea and con-

2. P.98.
4. P.139.
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duct; (6) a "causal" relationship between the legally forbidden harms and the voluntary misconduct; and (7) (legally prescribed) punishment.¹ The chapter on these fundamental principles is placed first in the book in order to tell students "what to look for when reading criminal cases."²

Some criminal law teachers may deem it not worth while to spend the first forty-five pages of a casebook on the "principle of legality," namely, that crimes must be narrowly defined, punishments must be prescribed, that ex post facto laws are forbidden and that criminal statutes must be strictly construed. But in the 20th century, when we have seen these propositions challenged in other legal systems, it is perhaps well not to ignore them as too elementary to require discussion.

The four short cases on Harms are designed to illustrate the general principle that harm is an essential element of every crime; the further truth that each legal definition of a crime involves a more or less specific harm is left to be developed in connection with the several crimes.

The section on conduct seems less successful. The purpose is to illustrate the general principle that a criminal intent does not constitute crime without "an overt act or some open evidence of an intended crime" (quoting Blackstone). But the cases chosen to make this point, involving as they do the law of parties, lack of consciousness, respondeat superior, neglect of duty and solicitation, even though as a matter of sound theory they may all be regarded as applications of the same general principle, yet raise the question whether it is sound teaching technique in eight short pages at the outset of the course to touch upon so many topics that will have to be enlarged upon later.³

Readers of Hall's Principles will remember that one of the most striking propositions there urged was his defense of the unitary concept of mens rea, in opposition to the position of such writers as Stephen, who considered the term meaningless, since "there is no one such state of mind."⁴ In conformity with that position, Hall in his casebook includes mens rea among the general principles, but it is worth noting that it is given very little space, most of the cases in the section being devoted to distinguishing intent from motive.

Part II, dealing with "rules"—i.e., with the specific material elements of various crimes—shows an interesting difference in treatment of different crimes. Crimes against the person and crimes against "property and person" (robbery, arson, burglary), are treated legalistically. The material consists almost wholly of cases, with a minimum of text or footnotes.⁵ The law of

¹ Hall, General Principles of Criminal Law 10–11 (1947).
² P.2.
³ I raise this doubt with some diffidence. The proof of any casebook is its effectiveness as a teaching tool. I have not used Hall's Cases in teaching the course, and it is quite possible that this introductory survey of the various situations covered by the concept of conduct will prove an excellent teaching device.
⁵ The major exception is in the section on sexual crimes, which includes a seventeen-
theft, on the other hand, is treated in relation to social problems. The premise is that if the student has made use of the fundamental principles in analyzing the crimes against the person, he can do so in other crimes, and that he is now ready to learn to take account of other important aspects of criminal law, namely, the relation of criminal law to social problems and the use of non-legal disciplines to acquire the necessary knowledge. The law of theft was selected as the specific instance for such a study "because the available materials comprise an excellent laboratory for the indicated purposes." This is true, and it is true largely because of Hall's own previous contributions on the subject. Included in the chapter on theft are textual materials on the relationship of larceny, embezzlement and obtaining, on the subject matter of larceny, and on receiving stolen property, most of them taken from Hall's well-known work on Theft, Law and Society. Two of the longest of these are included specifically to illustrate (1) the method of institutional legal history (an excerpt from Theft, Law and Society on the growth of the law of theft in the eighteenth century), and (2) the method of factual research, illustrated by the author's study of the business of dealing in stolen goods, also taken from the same book.

It is significant that these methods are merely illustrated in this one chapter. They are not consistently used in other chapters. Those familiar with Hall's views will not find this surprising. The principal end to him is "justice." Deterrence and rehabilitation of the criminal, and "the general good" of society, are secondary. Factual research is not to be stressed at the expense of fundamental principles.

Part II also includes a chapter on strict liability—a concept which Hall attacked with great ability and great vigor in his Principles, as an "anachronism" which "stands as the major bar to rational solution of important social problems" and for which he proposed constructive alternatives in the form of "sound legislation, inspection, licensing, information, investigation by boards, informal conferences, and publicity." But in the casebook, the cases on strict liability are presented without editorial comment.

Part III, dealing with doctrines—the general material elements—includes such matters as mistake of fact and of law, necessity and coercion, incapacity
(infancy, insanity, intoxication) and doctrines concerning relational crimes and complicity (attempt, solicitation, conspiracy, parties). Hall, who has urged that the principle of legality be applied to condemn judicial decisions "which are unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," 10 includes under mistake of law cases distinguishing ignorance of law from the legality of the conduct, and cases where mens rea includes knowledge of illegality. On the other hand, entrapment, consent and condonation get only a quick summary in two pages of notes.

The cases devoted to criminal procedure include, in addition to the more usual topics, such headings as procedural effects of illegal arrest (habeas corpus, jurisdiction, exclusion of evidence), special pleas, interstate extradition, and federal removal.

A teacher confronted with the question what casebook to adopt must first decide what he wants to accomplish in the course. Presumably he wants to implant a certain amount of information about "the law" on the subject, but that involves no difficulty of choice; all the casebooks in the field do that reasonably well. Certainly, Hall's does it as well as most. If, over and above that, the instructor wants to give students the sociological setting of the rules of law, he will probably prefer to use one of the casebooks which make more effort to include such material. On the other hand, if he wishes to emphasize the schematic logic of the criminal law, his choice should be Hall's, for here is a casebook based upon a studious search for and analysis of the basic principles that comprise the foundations upon which the entire criminal law structure rests, and a painstaking tracing of those basic principles through the entire body of rules. Hall himself says of his method: "The advantages of having definite targets to aim at should become evident as the course unfolds—no shooting in the dark, no magical pulling out of rules and rationes decidendi from the cases by a mysterious 'inductive method' but, on the contrary, a definite plan of operations and a method of reading the cases that makes sense." 11

That statement perhaps gives an over-optimistic and over-enthusiastic picture, but it is true that this casebook, probably more than any other in the field, is consciously and carefully arranged to provide such a "definite plan of operations."

HENRY WEIHOFEN†

10. Id. at 29.
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As the author remarks, "this is a book about a definition." Fifty-one jurisdictions (when the District, Alaska and Hawaii are included) have their own unemployment compensation laws in which it is stipulated that unemployed workers may not draw benefits unless they are able to work and available for work. This book examines the meaning of this statutory provision. It is directed primarily to students and workers in the field of social insurance, for whose benefit numerous case citations have been gathered in the footnotes at the rear of the volume.

There are many excellent features which make the study as a whole an outstanding one. It begins with a four-chapter survey of the social and economic setting of the problem of availability for work. The influence of labor-market factors on availability is pointed out—how customary job-seeking and worker-hiring practices circumscribe the actual hiring market, how occupational and geographical immobility provides a frame of reference for the individual claimant's "conservatism of place or occupation," how restrictions on entry to job categories make availability at times a reflection of community prejudices. Labor-force factors affecting availability are also cited, such as the ageing and feminization of the work force, conditioning the suitability of proffered employment.

The author, Ralph Altman, who writes both from his experience as Appeals Analyst for the Bureau of Employment Security of the Department of Labor and from research as a Harvard Wertheim fellow, views the statutory availability requirement "as a gross sieve designed to keep the patently unqualified from entering or staying in the benefit system." He stresses throughout the need for a "presumption of availability," a presumption which he believes has a valid sociological foundation and accords with our political philosophy. "When availability is in doubt it is usually preferable to consider the claimant eligible and to look to the results of actual referrals to suitable work for a more precise answer. When such referrals are not available, it violates the presumption of eligibility that is every claimant's due if the claimant of doubtful availability is denied benefits."

This general presumptive principle is joined by other principles which act as a guide to its substantiation (for example, "Availability must be for a substantial amount of suitable work") or which serve as a check on its particular validity ("To demonstrate his availability the worker must look for work, as instructed by the agency"). In his later chapters, however, Altman repeatedly emphasizes the preferability of a case-by-case approach to the definition of availability rather than a principle-by-principle method. "The meaning of availability becomes real on a case-by-case basis only. . . . It is of more use to us to know whether a worker who accepts a retirement pension from an employer is ipso facto unavailable for work than to be able to give a well-rounded definition of 'available for work.'"
An administrative device suggested by Altman to meet the requirements of flexibility and at the same time to reduce the possibility of bureaucratic discretionary excesses is the local advisory council. Many state laws permit them, he reports, but they have seldom been activated. In situations of a crisis nature, such as the indefinite closing of a town's main plant, the advice of such committees "may transmute the agency decision on benefits from a bureaucratic decree to a community plan of action." Participation of both labor and management on such councils is a prerequisite for their success, he believes.

There are also chapters devoted to specialized aspects of the problem of availability, such as the cases of the self-employed and of women workers.

One of the noteworthy aspects of this able study is the author's recognition of the relation of his narrow problem to larger issues. Thus he is mindful of the impact of availability decisions on personal liberties, of their suggestiveness for refining labor-force and unemployment measurements, and of their relationship to full-employment programs. Despite a general diffuseness, perhaps arising from an attempt at exhaustiveness, and despite a poor index, this volume has notably accomplished its purpose.

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