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Book Reviews

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BOOK REVIEWS

A Rationale of Criminal Negligence. By Roy Moreland. Lexington, Ky.: University of Kentucky Press. 1944. Pp. viii, 175. $2.25.

"This book," says the author, "is an attempt to point out the leading legal problems in the field of criminal negligence, to draft the various formulae needed and to devise means for making them intelligible to judges and juries as they apply them to individual cases." He undertakes this task in a hundred thirty-eight pages of well-documented exposition which measurably achieves his purpose.

The historical introduction points out that "negligence entered the criminal law as a limitation on the defense of misadventure." The author finds the roots of criminal negligence in Coke's Third Institute, written at the middle of the 17th century: "If a man knowing that many people come in the street from a Sermon throw a stone over the wall intending to fear them, or to give them a slight hurt, and therefore one is killed, this is murder; for he had an ill intent, though that intent extended not to death. . . ." The act supposed was unlawful; and the actor knew it might cause grievous harm or death to some person; and such "wanton indifference to human life" is the equivalent of an evil intent. A few years later Hull's case made it clear that a workman in the lawful act of throwing a timber off a house would be criminally liable for the death of a person struck by the falling timber unless he gave the usual warning to enable anyone within sound of his voice to avoid the danger. "A century later Hale restates the foregoing situation and explains the workman's liability in the phrase 'he did not use due care.'" Foster carried the idea forward, and by the end of the 18th century "the requirement of 'due care under the circumstances,' operating as a limitation on homicide by misadventure, had become an established part of the law of crimes."

The author disapproves the application to criminal cases of the civil negligence standard, defined as "the degree of care which an ordinarily prudent man would use under like circumstances"; because, "to make criminal liability for manslaughter coincident with civil liability for negligence would be too harsh. It would raise the threat of criminal liability upon every member of the community, anyone of whom might at any time find himself in the circumstance of having committed an act of ordinary negligence." A "higher degree" of negligence is properly required for criminal liability. Courts have portrayed this "higher degree" of negligence through the media of such "vituperative epithets"

as: "gross," "culpable," "wilful," "wanton." As words failed of their objectives, they resorted to phrases: "recklessness of conduct, gross or wanton carelessness"; "negligence that borders on recklessness"; "reckless needlessness of consequences"; "wanton or reckless disregard of the rights and safety of others."

In the effort to approach unity in this variety of judicial wordage, the author suggests the following formula for criminal negligence: "(1) Criminal negligence is conduct creating such an unreasonable risk of harm to life, safety, property or other interest for the unintentional invasion of which the law prescribes punishment, as to be recklessly disregardful of such interest. The standard of conduct to be applied is that of a reasonable man under like circumstances. (2) Criminally negligent conduct may be either: (a) An act which the actor as a reasonable man should realize as involving under the circumstances a reckless disregard of an interest of others, or (b) A failure to perform a legal duty which the actor as a reasonable man should realize amounts to a reckless disregard for human life and safety under the circumstances."[1]

"It is believed," says the author, "that this concept [of conduct recklessly disregardful of an interest of others] most nearly coincides with the feelings of the ordinary judge or jury as to that negligence which merits punishment for crime. . . . If the Courts would consistently use this word or phrase, would they not in time build up a concept for it in the criminal law which would tend to clarify and stabilize the law?"

But it will not do, the author continues, "to let the jury have the case with no aid other than their own understanding of the meaning of recklessness. Ways of supplementing their knowledge of the concept, of limiting the length to which they might be inclined to go in individual cases, must be worked out." By way of supplementary aid he suggests that the judge start out by defining civil negligence and go forward to describe the "higher degree" of the same kind of negligence as criminal. "In all negligence cases, civil and criminal, liability is based upon the creation of an unreasonable risk which results in an unintentional injury. A factor in determining whether the risk is unreasonable in a particular case is the utility of the act which engenders the risk. When the danger to the interest of others outweighs the utility of the act the risk becomes unreasonable and civil liability for negligence occurs. When conduct is such that it involves a risk to others which is not merely in excess of its utility but is *out of all proportion thereto,* it becomes 'recklessly disregardful of the interests of others' and criminal liability attaches, if an injury results therefrom

[1] P. 31.

Frequently, it is fairly easy to determine that the risk, when weighed against the social utility of the act, is so out of proportion thereto, and creates such a high degree of probability of substantial harm without legitimate benefit, as to constitute recklessness. Numerous cases, however, fall within a twilight zone where it is difficult to tell from the factual situation whether there is ordinary negligence or the 'substantially higher degree' necessary for the act to merit punishment as a crime. In such cases both judge and jury gain enlightenment by comparing the facts of the case at issue with somewhat similar circumstances in hypothetical situations."[2]

An "even higher degree" of negligence is necessary, the author says, to go beyond assault and battery and manslaughter and turn the criminal act into murder. He rejects Holmes' theory permitting a conviction "if the accused had *knowledge of circumstances* which would lead a reasonable man to understand the danger," and accepts the theory of Stephen permitting a conviction only if the particular action took a further mental step to draw the conclusion of danger from the given circumstances. He makes his meaning clearer through the following scale of conduct:

(a) Conduct involving the "ordinary negligence" requisite for civil liability.
(b) Conduct constituting the "higher degree of negligence" called recklessness required for assault and battery and manslaughter.
(c) Conduct embracing the "still higher degree of negligence" called wantonness and indicating the "abandoned and malignant heart" required for murder.
(d) Conduct involving consequences "substantially certain" to follow from the act. Such consequences are "intended" regardless of desire that they occur.
(e) Conduct involving consequences desired by the actor.[3]

The kind of negligent conduct requisite for murder, he concludes, "is best described as 'wanton.' Wanton conduct is behavior involving known danger of such extremely high degree as to indicate that the actor is arrogantly reckless toward the lives and safety of others,—that he has a 'depraved mind.' Such behavior is to be distinguished from intentional misconduct, but when the degree of known danger reaches the point where injury is substantially certain to occur the act becomes intentional as a matter of law. Acts which have been held sufficiently wanton to merit a conviction of murder include shooting into a train, into a crowd, into a dwelling house, or into an automobile containing passengers. In such cases the risk is very great. From the standpoint of societal harm, some of them contain as much danger as though the

[2] P. 48.
[3] P. 65.

misconduct were intentional. In addition, the mental attitude of the defendant is reprehensible. There is little difference between a positive design to kill and the commission of an act so wanton as to indicate that the actor does not *care* whether or not he kills."[4]

On the whole, the author gives a faithful exposition of the transition steps in the development of criminal negligence, an accurate exposition of the cases illustrating these successive steps, and a persuasive exposition of his formula for clarifying the existing confusion in judicial phraseology.

ALBERT COATES

The University of North Carolina

A Preface to Peace. By Harold Callender. New York: Alfred A. Knopf. 1944. Pp. xi, 288. $3.00.

The author of this instructive book dealing with recent American foreign policy is an internationally known foreign correspondent of the New York Times. The book contains much more than a set of organically connected newspaper reports. The author in his study evaluates with sober optimism almost all the significant events and factors which influenced international intercourse during the last four years. He does not disregard the influence of uncontrollable social forces restricting the everlasting craving of nations to direct history. In the opinion of Mr. Callender, (a) a permanent peace among nations is in the realm of practical possibility, (b) it can be achieved only with the active cooperation of the United States, and (c) the process of uniting the United Nations fully in order to achieve permanent peace will require considerable time, patience and far greater statesmanship than displayed in 1918-1920.

The book opens with a very interesting general analysis of the political factors affecting the cooperation of nations. In fact, the volume is focused on political problems in the narrower sense, economic factors are almost disregarded. However, this narrower task is excellently performed. The author describes with sincerity the short-sighted egoism of large and small democracies before the Second World War. He points to the dangers of playing the role of a great power but refusing responsibility and commitments related to the course of affairs of the community of nations. There is a detailed discussion of the relationships between the United States and Great Britain, on the one hand, and between western democracies and the Soviet Union on the other hand. The chapter discussing the internal conflicts of the fermenting French democracy is of permanent value.

[4] P. 68.

The volume can be recommended without qualification to people who want to read a lively volume discussing the political prerequisites to a peaceful cooperation of nations.

ERVIN HEXNER

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What Is the Verdict? By Fred L. Gross, former President of the New York State Bar Association. New York: The Macmillan Co. 1944. Pp. iv, 263. $2.50.

This author has written not

". . . to discourse upon the philosophy of the law or to indulge in the advocacy of reform of the law . . . (but) with the precarious hope of entertaining, and perhaps occasionally amusing, the reader by escorting him through a series of constructed tragedies and comedies comparable to actual everyday courtroom experiences.

"None of the narratives which follow is a report of an actual lawsuit. Names and places are purely fabrications. All the characters are fictitious. The supplied footnotes, however, make available comparison of actualities whereby the factual possibilities of the stories may be tested. The footnotes also will serve as assurances that the principles of law which are applied in the narratives are not merely inventions to fit the occasion."

The author shows in his preface a somewhat cynical attitude in justification of the divergence of law from justice. The too frequent failure of law makers and of those interpreting and administering law in the courts to strive for the highest possible approximation of the generally accepted standards of morality and ethics of the community (nation or state, according to the legislature or court, national or state, making the law or trying the case) cannot so easily be excused or justified as Mr. Gross assumes and states. The fact that we have no absolute standard or test for recognizing or for attaining perfect justice does not mean that a court should not strive to interpret and apply every statutory or common law, rule of procedure or of substantive law, so as to reach decisions as nearly as possible in accord with the dominant ideas of right and justice in the state or nation involved.

The author's idea that any effort to decide legal controversies "in accordance with perfect justice" is useless because standards of justice vary, would seem to advocate or justify the repudiation of all ideals since no ideal is ever fully attained. As for arguing that courts need not strive for perfect justice in deciding legal controversies because "the decision of each controversy would depend accidentally upon the ethical standards of the judge or jury by whom the case is heard," the

author might well be asked whose ethical standards he thinks judges and juries generally use if not their own and how "accidentally"?

Let's have done with the old pretense, so long over-used by too many lawyers, that most, if not all, rules of law are, or can be made, so clear, definite and certain as to be capable of being almost automatically and perfectly applied by judge and jury to almost any set of circumstances covered by them and in such ways as to give no effect to personal beliefs, backgrounds and prejudices of judge and jury. How long and how frequently does this old "government-of-laws-and-not-of-men" fallacy have to be exploded? Woodrow Wilson said many years ago: "No government is a government of laws but all governments are governments of the men who operate them." This is as true of courts as of legislatures, executives and administrative boards and commissions. Judges are just as human as Presidents, Senators, Congressmen, Governors, Mayors or any other governmental officers. Let's do away with this idea of divine right and ability of judges to hold the scales of justice so exactly as to be able to dispense with what the people of the state and the nation think of court decisions!

Mr. Gross's comparison of the administration of justice to a game such as baseball does not appeal to this reviewer. That conception points to one of the outstanding weaknesses of the legal profession. According to the rules of this court game, each lawyer is to use all his knowledge of law and all his argumentative skill in claiming everything for his side of the case, and the final result of this clash of skilled gamesters is supposed, by some magic never very clearly explained, to approximate the ideals of state and national Bar associations, even if it frequently shocks the sense of justice of the community.

Again, the worship of standardization and of certainty in the law has led to putting too little emphasis on doing justice in specific cases. Courts should devote themselves to doing justice in each case and let grow out of these decisions such uniformity and certainty as naturally flow from them. Of the two objectives of lawmaking and of judicial administration, certainty and justice, the greatest of these is justice; and it should greatly overshadow and dominate all legislation and all court proceedings.

The cases constructed by the author of this volume are skillfully put together and do illustrate very well some of the many and various ways in which miscarriages of justice and lesser mistakes may arise in court proceedings and in the combinations of circumstances leading up to such proceedings. The style is sometimes verbose, effusive, and naïve; and the critical reader may at times feel that he is being subjected to explanations of the obvious and emphasis on unimportant details. But the very particularity and carefulness of explanation does

undoubtedly make the stories clear to a wider range of readers, some of whom lack almost all knowledge of law. No one should be prevented from reading this book by the fear, all too common among laymen, that law is too technical to be understood by the general reader and that special legal training or experience is necessary to the understanding of any court trials.

The footnotes seem more than adequate and furnish ample opportunity and aid for any interested reader to look up the statutes and decisions on which the statements and explanations of law are based.

In short, in spite of the conventional and over-rationalized defense of law and lawyers in the foreword or preface, this little volume offers to a wide range of general readers with almost no knowledge of law, a varied set of cases most clearly and fully related and explained. Many readers who could not appreciate or enjoy Borchard's CONVICTING THE INNOCENT may read WHAT IS THE VERDICT with full understanding and pleasure.

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