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BOOK REVIEWS

Mr. Justice Sutherland: A Man Against the State. By Joel Francis Paschal. Princeton, New Jersey: Princeton University Press, 1951. Pp. xii, 267. \$4.00.

Charles Evans Hughes and the Supreme Court. By Samuel Hendel. New York: King's Crown Press, Columbia University, 1951. Pp. xii, 337. \$4.50.

What was once viewed as a heterodox and somewhat profane suggestion is now recognized as a commonplace truism: that under the guise of legal form the Supreme Court of the United States exercises far-reaching political, social and economic control. Even under the new dispensation, characterized by judicial self-restraint in passing upon the validity of legislative action in the field of economic regulation, constitutionalism continues to play a dominant role in the historic processes of government. Nor is the public any longer entirely innocent about the functioning of the judicial process in constitutional cases. They understand now better than ever before that "judicial decisions are not babies brought by constitutional storks, but are borne out of the travail of economic circumstance."¹ It is not surprising, therefore, that attempts to analyze and explain the judicial statesmanship of a past period of our history by reference to the social, economic and constitutional philosophy of its outstanding jurists not only afford peculiar fascination to students of law and politics but hold the interest of an increasing number of general readers. This is especially so when the subject of a judicial biography happens to be of the intellectual calibre and attainments of the late Chief Justice Hughes or of the late Mr. Justice Sutherland.

Serving upon the Supreme Court from his appointment in 1922 by President Harding until his retirement in 1938, shortly after the defeat of President Roosevelt's ill-fated program for court reorganization, Justice Sutherland was the most articulate and persuasive spokesman for the so-called "right-wing" of the Court during this fateful and turbulent period. He was, in truth, its intellectual leader. His opinions were forceful but judicious, hard-hitting but urbane. While most of Sutherland's convictions ran counter to the prevailing social and constitutional thinking of the latter portion of his judicial service, it is inaccurate to classify him as either a servitor of vested interests or a hidebound protagonist of the status quo. During his twelve years of service as a United States Senator from Utah, Sutherland waged a long fight for

¹ LERNER, IDEAS FOR THE ICE AGE 259 (1941).

improved conditions for American seamen, sought to bring about reforms in federal judicial procedure, advocated the Postal Savings Bank Bill, and struggled unceasingly to secure an adequate Workmen's Compensation statute. Three well-known instances during Sutherland's service on the Supreme Court will serve to illustrate his occasional championship of innovation. His opinion in *Euclid v. Ambler*,² which sustained the constitutionality of zoning, was an enlightened discussion of the legal justification for this form of social control of property rights and interests. His opinion in *Funk v. United States*,³ which upheld the competence of a wife to testify in behalf of her husband in a criminal prosecution when the common-law rule was otherwise, was a notably liberal exposition of the view that outworn rules of evidence must be adapted and recast to serve the needs of a changing civilization. In *United States v. Curtiss-Wright Export Corporation*⁴ Sutherland succeeded in winning the approval of his colleagues for the proposition that the power of the federal government in the field of foreign relations does not depend for its existence on the Constitution, but is an inherent power arising by virtue of the United States' membership in the family of nations; its exercise is hence not subject to constitutional restraints.

All these and many other interesting matters are brought out in Mr. Paschal's scholarly, penetrating and objective study of Justice Sutherland's career as a politician and jurist. It is a book which should appeal to both lawyers and laymen because of the insight it gives into Sutherland's social, economic and legal philosophy, as exemplified by his record in the Senate and his opinions and votes in leading constitutional cases. Mr. Paschal sketches with admirable clarity his subject's frontier background, his struggles for an education, the deep impression made upon his thinking by certain of his teachers, his early and complete acceptance of the philosophy of Herbert Spencer, his beginning ventures into Utah politics, his short service in the House of Representatives and his longer career in the Senate, his important role as adviser to Warren G. Harding in the presidential campaign of 1920, and finally his long service as a member of the high court. Against those governmental innovations and constitutional heresies which did violence to his cherished tenets, Sutherland waged vigorous warfare. But the essential kindness of his personality is indicated by the fact that he did not allow the fervor with which he maintained his convictions to dampen the warmth of his personal relations with his associates in the political arena or with his brethren on the bench.

Steeped in the Spencerian philosophy of individualism and *laissez faire*, Sutherland found his deeply rooted beliefs rudely challenged dur-

² 272 U. S. 365 (1926).

³ 290 U. S. 371 (1933).

⁴ 299 U. S. 304 (1936).

ing virtually the entire period of his political and judicial life. Mr. Paschal makes the point that one reason why Sutherland is important is that his career illuminates the problem of the theorist as judge. He shrewdly observes that

“Sutherland, whatever his knowledge of political theory, suffered from the familiar difficulty of not knowing enough. He was a devoted student of the philosophical intricacies of nineteenth century individualism but had little interest in other systems. His exclusive preoccupation with but a segment of man’s ideological experience rendered his intellectually parochial. He was so immersed in the Spencerian philosophy that he had no power to criticize it judiciously, no measuring stick with which to approach it selectively, no vantage point from which to see how much of Spencer was merely the expression of an age. In short, he had not the capacity for transcending his own experience.”

Professor Hendel’s careful and judicious study of the judicial career of Charles Evans Hughes is a book of a considerably different sort. It is not a biography in the conventional sense of that term and is not intended to be. A certain amount of biographical material is necessarily included in it but merely for the purpose of setting in its proper perspective Hughes’ service on the Supreme Court, first as Associate Justice from 1910 to 1916 and finally as Chief Justice from 1930 to his retirement in 1941, at the age of seventy-nine. Mr. Hendel’s book is limited to an analysis and evaluation of the important constitutional issues that came before the Court during these two periods and of the part which Hughes played in their solution. The first phase of Hughes’ judicial service coincided with a considerable part of the New Freedom of Woodrow Wilson and preceded America’s entry into the first world war. The second coincided with the Roosevelt New Deal and preceded America’s entry into the second world war. The author rightly observes that both these periods were marked by “legislative innovations involving great extensions of governmental power over the economy and challenging traditional conceptions of the rights of the states and of individuals. The latter was particularly a period of great crisis for the nation and produced a fundamental challenge to the Court itself.”

Mr. Hendel’s presentation of the important constitutional cases coming before the Court during these two periods is characterized by accuracy, objectivity and readability. The facts are expertly summarized and the issues are clearly outlined. Taken in conjunction with the author’s critical analysis of Hughes’ judicial techniques and constitutional philosophy, these case discussions supply the reader with an informative survey of an important segment of the constitutional history of the United States. The study can scarcely be called a “popular” book to be read as a matter of general interest, but anyone who is con-

cerned with the recurring problems incidental to America's most original contribution to the science and art of government—the institution of judicial review—will find it well worth reading.

Mr. Hendel wisely concludes that it is a tribute to the leadership of Hughes during the court fight that he never permitted the sometimes bitter differences within the Court to disrupt it. He sought above all else to maintain the dignity and prestige of the Court. When the pressure for change in constitutional interpretation became insistent, he reluctantly went along. "He stood thus," in the author's view, "as a kind of heroic and, in a sense, tragic figure, torn between the old and the new, seeking at first to stem the tide but then relentlessly caught up and moving with it."

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Legal Aid in the United States. By Emery A. Brownell. Rochester, N. Y.: The Lawyers Cooperative Publishing Company, 1951. Pp. xxiv, 333. \$4.50.

Because of the extensive nature of this report on legal aid in the United States, and the careful evaluation which is made of legal aid services available today, the publication provides the framework for observing one of the major areas in which special needs of indigent people have not yet been fully met. Through various types of programs, society has recognized its responsibility for persons who must have provided for them through public taxation or voluntary contributions the essentials of daily living. These essentials are made available not only through welfare programs but also through provision for meeting basic educational and recreational and health needs. The many occasions upon which an individual needs legal consultation have not been so generally recognized in planning for community services nor, in all too many communities, provided for with any degree of adequacy for persons unable to pay for needed legal services. In every state it is essential that services be made available for the protection of the individual and his family from a legal point of view. To do this humanely and constructively is the challenge accepted by legal aid agencies.

This current publication is the third in a series of reports on the development of legal aid in the United States. It follows "Justice and the Poor" by Reginald Heber Smith, issued in 1919, and "Growth of Legal Aid Work in the United States," by John S. Bradway and Reginald Heber Smith, issued as a U. S. Department of Labor Bulletin in

1936. Mr. Brownell, the author of the present volume, visited all legal aid offices in the United States and had the advice of experts in the field in preparation of this authoritative report. The fact that legal aid services are now being provided for more than 300,000 persons each year indicates the major importance of this area where law and social services meet on a common ground.

The comprehensive nature of the report is indicated by the chapter titles as follows: "Justice and the Poor," "Legal Aid Today," "What Legal Services Are Needed," "Who Needs Legal Aid?" "Legal Aid for Civil Cases," "Legal Aid for Criminal Cases," "The National Legal Aid Association," "Service Now Available," "Who Renders the Service?" "Who Bears the Cost?" "Next Steps." Legal aid is defined as "the organized effort of the bar and the community to provide the services of lawyers free, or for a token charge, to persons who cannot afford to pay an attorney's fee or whose cases are unremunerative on a contingent fee basis."

Two major impressions are given by careful review of the text. One is the fact that even the established legal aid facilities are meeting only slightly more than half of the full need of their communities, based upon ten people per thousand population in a community, and even so, the existing coverage is far short of the 20 per cent of the population estimated to require legal aid service. The other striking point is that approximately three-fourths of the problems handled require consultation service only or some referral to another service. The great volume of the work is handled through a single visit by the individual to the office.

The study reflects the need for increased understanding on the part of the general public of the role of legal services in contemporary life, services which to such a large extent are not directly connected with courts and court action. The number of cases served in communities which have legal aid offices indicates that there has not been sufficient appreciation on the part of the social agencies of the ways in which legal aid may supplement and strengthen the individual social agency's help to the family or of the problems which can be more readily solved through legal consultation than other types of service. Here in the Southeast the lack of legal aid facilities is particularly striking and calls for careful study directed toward the most effective means of providing legal aid where needed.

This important volume clearly presents the current picture, the needs, and the basic principles which should be followed in the establishment of legal aid facilities. The fact that such offices should be carefully integrated into the community is stressed by the author and is certainly

in line with the best thinking regarding other types of community facilities and services.

This study of legal aid in the United States represents a major contribution to social welfare as well as to legal practice. It should be on the required reading list not only for lawyers and law students but also for social workers in both public and voluntary agencies and can be read with profit by civic leaders concerned with the development of a comprehensive pattern of community services.

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Sex and the Law. Morris Ploscowe. New York: Prentice-Hall, Inc., 1951. Pp. vii, 310.

Sex and the Law is in no sense a purely legalistic treatise. At the same time there is a clear presentation of the laws bearing on practically every aspect of sexual behavior shown in the institution of marriage and in non-marital situations, including normal and legal expression of the sex drive, as well as the various aberrant and, or, illegal expressions of it. This, itself, is a noteworthy contribution. Over and beyond this is an excellent appraisal of the influences of the ecclesiastical laws, the common law, and of social concepts in the formulation of our present laws. There is definite criticism of existing laws from the standpoints of their fairness to defendants, their adequacy in securing socially desirable results, and the degree to which they are actually enforced with reasons for laxity of enforcement in cases where it exists, and the lack of uniformity of laws within the various states.

There is repeated, well-placed emphasis upon the disparity between high ideals back of the "law's interest in the conservation of marriage and the stability of family life," and the actual protection the family is given by such laws, when applied, as well as the frequent laxity in their application.

The author clearly recognizes the importance of the courts' using every available scientific aid in the solution of the problems brought before it. Thus in his discussion of divorce—the ease with which it may be obtained in some jurisdictions, and, at the same time, the necessity for its availability in certain domestic situations he says: "Social case work, probation, psychiatry, and marriage counseling may be able to provide husbands and wives with answers to their problems which they themselves have not been able to find. These expert services may be able to rehabilitate marriages which appear to have broken down completely. . . . In our opinion, divorces should only be granted to hus-

bands and wives after a thoroughgoing attempt has been made by a panel of experts to adjust the differences between them."

That the author is cognizant of the psychological implications in the attitudes represented by the laws and their application is many times apparent in this book. A clear cut example is found in relation to his position that the law bearing upon the status of illegitimate children must go further than the establishment of paternity. "It must recognize what is amply demonstrated by modern psychology that rejection is one of the surest ways of twisting personalities and creating disturbed individuals."

There is a similar emphasis for the need of the assistance of experts in the careful planning of problems of correction and rehabilitation for sex offenders. In connection with long term sentences, special stress is placed upon the necessity of differentiation between the sex offenders who are primarily public nuisances, such as exhibitionists, and the smaller group who are actually dangerous, either to life and health, as the sadists, and those who use force to secure sexual gratification and those who are dangerous to the development of normal sex habits and attitudes. In this latter group he places the older sex deviants who engage in various forms of sexual activity with children.

Throughout, one is impressed by an unusual degree of objectivity and understanding in the discussion of such problems as rape, homosexuality, sodomy, prostitution and other forms of sexual expression so seldom approached in a non-emotional manner. One is also impressed by the comprehensive social approach to all of these problems and the clear cut definite suggestions for improving the laws and their administration.

This reviewer is convinced that this book is so clearly, logically, convincingly, and authoritatively written that were it carefully read by every literate person in this country and especially by every practicing lawyer, every judge, and every state and federal legislator, there would result a degree of understanding that would either demand or sanction most, if not all, the changes suggested by the author. In addition, it is his belief that there would result a general tendency toward a greater degree of objectivity in attitude toward undersirable sexual behavior.

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