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Book Reviews

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BOOK REVIEWS

The Art of Advocacy. By Lloyd Paul Stryker. New York: Simon and Schuster, 1954. Pp. 306. $5.00.

This book is an excellent plea for the art of advocacy. It is interestingly written by one who had something to tell. Mr. Stryker demonstrates a keen insight into our system of jurisprudence and draws from a rich background of learning and experience to develop a volume designed to inspire the lawyer and would-be lawyer to achieve proficiency in the Art of Advocacy. For the lay reader the author seeks to create and increase appreciation for the advocate and his art.

The work is an outgrowth of a series of lectures by the author before the Yale Law School. From these materials Mr. Stryker in Part One moves through *The Trial* from the arrival of a new case to the closing speech. Addressing himself to the student lawyer, he makes a plea for the advocate and his art, combining materials to inspire with materials to instruct.

Although recognizing that for the advocate there is no substitute for experience, the author attempts to pass on to his reader helpful instruction. For those who would learn by methods less expensive to their clients than experience, he has many suggestions. At no time, however, does his work resemble a manual of techniques. The tone is higher. It is inspirational.

Mr. Stryker's language and style leaves the reader with no doubt that he has been with a master advocate. Illustrative is his description of a cross examination of a witness by John McIntyre, one of his teachers in the school of experience:

> "He laid his questions on with a lash. They were as sharp and pointed as a dart, as ensnarling as a harpoon, as lethal as a rifle, and as businesslike as a machine gun."

The author calls attention to some of the many imponderables that go to make up a jury verdict and gives helpful suggestions on how to handle them to advantage. Every lawyer worthy of the privilege to practice in court is aware that jury verdicts are influenced by many seemingly insignificant happenings and occurrences during the course of the trial. The good trial lawyer must become a master at recognizing such incidents and occurrences and must utilize them to bring about a favorable verdict.

Mr. Stryker does not overlook the importance to the advocate of

a knowledge of the law. It is believed that others making a specialty in trial work have made this mistake. Such neglect accounts in part for the low state of advocacy in this country so deplored by the author.

To North Carolina lawyers, the great majority of whom practice in small towns and county seats, this book is a valuable contribution. Although Mr. Stryker follows the New York practice in moving through *The Trial,* his inspirational instruction on the art of cross-examination and the effective use of the closing speech will find practical application by North Carolina lawyers.

The author's concern for the state of advocacy now existing is more than an aged person's lament of changing conditions. It is a constructive criticism of our modern institutions of legal education and lawyer training. Although the modern law schools have a reputation for preparing lawyers only for practice in the appellate courts, Mr. Stryker finds a low state of advocacy here also. By using illustrations from his personal experience and by drawing from materials of that master of appellate practice, John W. Davis, he gives a lesson in appellate advocacy. These lessons are worthy of study by all who practice in the appellate courts. Oral argument in the appellate courts can be of great assistance to the court. If Mr. Davis' decalogue for arguments were followed by the advocate, no appellate court would consider changing its rules to eliminate the oral argument.

Mr. Stryker quotes from the late Justice Robert H. Jackson to point up the importance of the advocate in our system of government:

> "In this Country the administration of justice is based on law *practice.* Paper rights are worth when threatened just what some lawyer makes them worth. Civil liberties are those which some lawyer respected by his neighbor will *stand up* to defend." (Italics ours.)

As for the ethics of the advocate, he must be one worthy of absolute confidence. He must never forget that he is not only the servant of his client but also the friend and officer of the court.

To the real lawyer who will not be stopped when the controversy goes to court, this book is a valuable contribution.

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Supreme Court and Supreme Law: An Interpretation. Edited by Edmond Cahn. Bloomington: Indiana University Press, 1954. Pp. ix, 250. $4.00.

How to appraise the results of 150 years in the history of an idea, how to make value judgments of the effectiveness of an institution or of a doctrine in the present American scene or at some period in the past—these were the difficult questions which faced Professor Edmond Cahn and his collaborators in their meetings at New York University School of Law in 1953 by way of observing the 150th anniversary of *Marbury v. Madison.* As stated by Mr. Cahn, the editor of *Supreme Court and Supreme Law,* the questions to which he and his collaborators addressed themselves were: "What practical, working difference does judicial review make in the contempory American scene? Has the Supreme Court exercised its power to determine constitutionality too extensively or too narrowly, with wisdom or imprudently? By passing on the validity of laws and executive actions, in what directions does the Court turn the dynamic force of the Constitution?" (p. vii)

The experts gathered to find answers to these questions, "to take stock of the institution of judicial review in its major functioning aspects," are Edmond Cahn, Professor of Jurisprudence and of Constitutional Law at New York University and author of *The Sense of Injustice;* Ralph Bischoff, Paul Freund, John P. Frank and Willard Hurst, members of the faculties of the Law Schools of New York University, Harvard, Yale and Wisconsin, respectively, and Charles P. Curtis, member of the Boston Bar and author of *Lions under the Throne.* These men are especially qualified for this salutary job of stock-taking concerning the institution of judicial review in those aspects most important for the functioning of the government of the United States under the Constitution, involving, as stock-taking does, an appreciation of the importance of the past in arriving at an understanding of the present and a projection of the future.

The volume is a collection of five leading articles: (1) the introduction by Professor Cahn, An American Contribution, (2) Review and Federalism by Professor Freund, (3) Review and Basic Liberties by Professor Frank, (4) Review and the Distribution of National Powers by Professor Hurst and (5) Review and Majority Rule by Mr. Curtis. The introductory article by Professor Cahn is immediately followed by a series of short papers and discussions, taken verbatim from the proceedings of the Conference, on two practical procedural problems: (1) Conditions and Scope of Constitutional Review, wherein are discussed Status to Challenge Constitutionality, Political Questions, and Review of Facts in Constitutional Cases; (2) The Process

of Constitutional Construction, wherein are discussed The Role of History, The Role of Constitutional Text, and The Role of Official Precedents. The volume concludes with notes to the various articles and papers, a list of cases referred to and a good index.

Mr. Cahn's introduction is a philosophical essay on *Marbury v. Madison* and the doctrine of judicial review as the American solution to a written constitution. Historically, according to Mr. Cahn, the theory of a written constitution was that it was permanent and immutable and inspired. John Locke's *The Fundamental Constitutions of Carolina—1669* is used by way of illustration, with its conclusion that "These fundamental constitutions, in number a hundred and twenty, and every part thereof, shall be and remain the sacred and unalterable form and rule of government of Carolina forever."

For this concept, *Marbury v. Madison* substituted a theory of a written constitution as an effective instrument of government, adaptable to the changes and developments of the social order by the judgment of the courts. This fundamental change of emphasis, not new with John Marshall, was consummated by him in *Marbury v. Madison.* The final paragraph of Mr. Cahn's essay, summarizing this thesis, calls for quotation:

> "*Marbury v. Madison* has proved to be one of those very special occurrences that mark an epoch in the life of the republic. Culminating the great achievements of the Constitutional Period, it accomplished the transition from perpetuity to efficacy, from immutability to adaptation, and from heavenly to judicial sanctions. Finally, it introduced an unending colloquy between the Supreme Court and the people of the United States, in which the Court continually asserts, 'You live under the Constitution but the Constitution is what *we* say it is,' and the people incessantly reply, 'As long as your version of the Constitution enables us to live with pride in what *we* consider a free and just society, you may continue exercising this august, awesome, and altogether revocable authority.'" (p. 25)

Review and Federalism deals with the Supreme Court's function in our federal system as the scales which balance the competing interests of state and nation in various areas of our economy and our society, in allocating certain activities to the states and others to the nation, in deciding what interests should prevail where state and nation claim to regulate or tax in the same area, in short, in maintaining the United States as a nation under a federal constitution. Professor Freund concludes that the Supreme Court has done well in accommo-

dating the interests of the states and the national government, and especially in the review of acts of Congress under the commerce power. Professor Freund makes a suggestion that might be in improvement on judicial review in the field of state taxation of interstate enterprise, *i.e.*, Congress might set up a special tribunal with rule making powers to determine the applicability of state taxation of interstate enterprise.

In the essay on Review and Basic Liberties, John Frank finds dissatisfaction with what the Supreme Court has done in protecting civil liberties against restraining legislation by Congress. "At best, I repeat, judicial review is, so far as civil liberty is concerned, a near failure." (p. 131) Mr. Frank makes several proposals, all within the Court's purview, by which the protection afforded basic liberties might be improved. He suggests that the fact that the Supreme Court exists and is present in Washington, has had a restraining influence on proposed anti-civil rights legislation. Members of Congress, like most of their constituents, believe that, when called upon, the Supreme Court will protect the citizen's basic liberties, although the record, as pointed out by Mr. Frank in the cases of judicial review of Acts of Congress, does not seem to justify this firmly fixed belief.

Professor Hurst's provocative essay Review and the Distribution of National Powers (separation of powers) makes clear the very great effect on national policy that the Supreme Court exercises through statutory interpretation, but not so much through judicial review of Acts of Congress. On the other hand, it is pointed out that in many respects, such as the significant problem of civil control of the military, judicial review will have little effect compared with excutive decision, as in President Truman's recall of General MacArthur, for example. Professor Hurst's conclusion that the Supreme Court's influence on policy making and policy execution is not very important may come as a surprise to many, but Professor Hurst, excellent historian that he is, makes a convincing case. He sees judicial review as safeguarding the position of the individual in the application of law, rather than in the surveillance of general policy making. As in Mr. Frank's essay, there is an emphasis on the protection of civil liberties by the courts and a doubt as to the efficacy of the Supreme Court in dealing with restraining legislation by Congress or in restraining the practices of Congressional investigating committees.

The essay by Mr. Curtis, Review and Majority Rule, is a companion piece to Professor Cahn's philosophical essay on the origins and nature of judicial review. Mr. Curtis further develops the thesis that the Court is the agency that permits us to change and grow while

living under a written constitution. *"Marbury v. Madison* opened the way for the Court to take upon itself the function of interpreting and declaring our immemorial immanent law." (p. 192) When the Court finds this "immanent component in our constitutional law" (p. 184), its decisions become the implicit will and conscience of the majority. All this echoes back to natural law and natural rights.

In the shorter papers and discussions, there is some of the keenest observation and criticism of judicial review. But this remarkable group of essays, papers and discussions must be read to be appreciated. This reviewer would urge the reading. Professor Cahn and his five collaborators have performed that difficult task of interpretation and evaluation of an institution and doctrine with which most American citizens have a speaking acquaintance, but which is understood by so few.

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