BOOK REVIEWS

FIFTY-FIVE MEN. By Fred Rodell.[1] New York: Stackpole Sons, 1936. Pp. 277. $2.50.

Reviewed by Harold J. Laski.†

THIS book performs a very difficult task in wholly admirable fashion. From the complicated records of the Philadelphia Convention, above all on the basis of Madison's famous notes, Professor Rodell has set out the way in which the Constitution assumed its shape; and, for good measure, he has added a brief account of the amendments and their purpose. What emerges in the result is a sharply etched portrait of one of the supreme constitutional efforts of modern times. The simple way in which the narrative unfolds itself almost conceals the scholarly art with which it is constructed. Let it therefore be said with emphasis that no brief book on its subject tells better than this one what the men of Philadelphia really set out to do and what did in fact emerge from their labours. It will not, I suspect, command whole-hearted assent, above all from the pundits of patriotism. Professor Rodell's Fathers are human beings of flesh and blood, not less concerned than modern statesmen round a conference table to reach results in which many of them had a direct and solid interest. They are not the bloodless dancers of a wraith-like ballet of categories concerned only with the maintenance of pure forms. They did not conceive themselves as the architects of an eternal structure. They were dealing as practical minded men of affairs with a body of immediate and concrete problems which they attacked from a special angle of vision. Having made the compromises inherent in their task, they left the adjustment of later pressures to the men who would be concerned with their impact.

What emerges from Professor Rodell's portrait? Above all, I think, two things. In the first place, the founders were building a national government. Granted all the defences they accepted for the rights of the separate states, they had no doubt at all that they were constructing a national system concerned to protect national interests, and to develop them, and, so far forth, with the power to transcend state interests and to control these on behalf of the nation as a whole. Had they failed to do this the Philadelphia convention would have been a fruitless achievement. No doubt, in the ebb and flow of discussion, the incidence of emphasis about the meaning of the powers conferred shifts now in one direction and now in another. But it is evident that if the convention did not mean the definite victory of nationalism over parochialism it had no meaning. After all, it was for that end, and for no other end, that it had become urgent to revise the relationship between the different states.

In the second place, they were deeply concerned to place the interests of property beyond the reach of attack from popular vote. They did not be-

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lieve in a democracy whose will should have unlimited authority over the disposition of affairs. The Fathers, as Professor Rodell rightly insists, had a healthy respect for the man with a stake in the country. They did not want him to be voted down by the envy, the jealousy, even the hate, they felt in their bones that the poor in any society must have for the rich. They therefore put into the Constitution every device they dared to insert to effect the protection of property. They felt, with Madison, that the struggle over the limits of the rights of property is the one durable source of faction in society. They did not want the mere force of numbers ever to be able, of itself, to control the sovereign power of the state.

In the century and a half that has passed since Philadelphia a new world has come into being. It is of the essence of Professor Rodell's analysis to insist that no one can know what the Fathers would have thought of that world. No one, accordingly, can rightfully interpret the "meaning" of the Constitution in terms of the purpose of its founders. Those who do so, whether they are members of the Supreme Court, or members of a political party, are merely attributing to them ideas they themselves wish to see operative. The test of constitutionality cannot be set on the basis of the problems confronted in 1787, simply because neither those problems, nor any comparable to them, exist. The test must clearly be the wisdom of the legislation proposed in its relation to what a century and a half of tradition has made of the Constitution. If that does not permit effective governance in the United States, then the case for profound constitutional change becomes of decisive importance.

Professor Rodell, rightly, makes the pivot of the whole position the place of the Supreme Court in the operation of the Constitution. It is, as he points out, the one check on popular action that now remains. For what purpose is it to operate the authority it possesses? Is it to prohibit as unconstitutional legislation it happens to think unwise? Is it to find ways and means of adapting the canons of constitutionality to the new needs of a new time? If it is entitled to do the first, what is its title to set its view of legislation against that of the President and Congress? If it is entitled to do the second, what canons of constitutionality is it to adopt? Certainly, if it does the first, it becomes simply a legislative chamber the views of which are a function of its accidental composition; and such a chamber cannot long run counter to popular opinion and retain the respect which maintains authority. If it performs the second task, the technique of adaptation must proceed along a groove of principles common to the court as a whole. For without that position the court cannot maintain confidence in its impartiality; it will, sooner or later, leave the impression that its members choose their postulates in order to reach ends upon which they have already decided. And if the ends upon which a majority of the court decides are incompatible with those sought by the President and Congress, in the long run the court will have to give way.

This is, of course, to raise issues which go far beyond the ambit of Professor Rodell's survey. His book will have amply served his purpose if it convinces the student of two things. (1) The Fathers had a philosophy of

government which, right or wrong, was suited to, as it was born of, the circumstances of their time. No one is entitled to make that philosophy a limitation upon the habits of the American people today. They are as free to remake the purposes of their institutions as they were to decide, in 1776, to free themselves from British rule. (2) The use of that philosophy in the present crisis as a weapon is a futile historical exercise. It is as valid as the use of Aristotle to prove that the case for slavery has been made out. The conditions which went to the making of that philosophy are so different from those which led to its acceptance as to make the repetition of that case an essay in ignorant antiquarianism which no one can accept who knows at all realistically the motivation of political philosophies. I hope that Professor Rodell's book will be widely read. If it does no more than drive home these two fundamental lessons, it will not have been written in vain.

Reviewed by Henry Steele Commager‡

Fifty-Five Men is an attempt to retell the story of the making of the Constitution in terms at once realistic and simple. With the exception of one brief chapter on the ratification of the Constitution and one chapter of provocative surmise on "What Would the Founding Fathers Think Today", Mr. Rodell has confined himself entirely to what went on in the Federal Convention of 1787. He has drawn his material from Madison's notes, and his brief text is generously sprinkled with appropriate quotations from that inexhaustible source. The book is designed, as far as can be discovered, to prove that the Founding Fathers were concerned primarily with the protection of property interests against an up-start democracy, and that they constructed a government with this in view. Though this thesis monopolizes a large part of the volume, some attention is given to the special problems of representation and of the nature of the executive.

It is not without interest to note the character of the book as indicated by the publisher's jacket—with, we may assume, the approval of the author. "Were the Founding Fathers Gods or Men" we are asked, and we may wonder whether the book is designed to answer this preposterous question, to annihilate this flimsy straw-man. "Were these Fathers omniscient, benevolent men, concerned solely with guaranteeing our liberties" we are asked further, and quickly assured that, "upon these questions this book gives us not fables but hard-bitten facts. Here, after 150 years, is the popular, dramatic story of just how much democracy the Founding Fathers intended us to have."

Everything about this introductory blurb is an affront. It will not be supposed that Mr. Rodell intends to devote a book to proving that the Fathers of the Constitution were not omniscient, and it may be wondered whether there is any purpose in discovering whether they were or were not benevolent. And as to the query whether the Fathers were "concerned solely with guaranteeing our liberties" that is a leading question and properly objectionable—irrelevant, immaterial, and tending to confuse and to prej-

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udice the issue. Nor, it may be added, have we had to wait 150 years for a consideration of the attitude of the Fathers toward democracy or for an analysis of what the publishers call, preposterously, the "much-neglected notes" of James Madison.

Publisher's advertisements are notoriously misleading, and it might be proper to dismiss this as merely an extreme example of bad taste, were it not for the fact that here the promise of the advertisement is, distressingly enough, fulfilled in the text. For, Mr. Rodell has actually written a book about the making of the Constitution in which the chief emphasis is upon the relation of the Constitution to Democracy. He has actually written a book which confines itself almost entirely to the annihilation of straw men and which fails completely to substitute real men.

Everything about this book is unfortunate. It is written in a vacuum, without background or foreground, without any understanding of the real function of the Constitutional Convention or the real achievement of the men who drafted the Constitution. It is based upon source material, but that basis is shockingly narrow and the material itself is handled uncritically. It presents conclusions which are, for the most part, either irrelevant or misleading.

Mr. Rodell has made the discovery that government is organized to protect property as well as to protect life and liberty—a discovery that was a familiar axiom to political thinkers of the seventeenth and eighteenth centuries in England and America. He applies this idea to the work of the Federal Convention, and fails to realize that as a standard of measurement it is irrelevant. Everyone, after all, agreed that one of the functions of government was to protect property; the problem that vexed statesmen on both sides of the Atlantic in the Revolutionary era was that of deciding which government, local or national, was the proper one to exercise this authority in specific cases. Everyone agreed that some government had to regulate commerce, control money, lay taxes, administer lands, and so forth. But should these powers be exercised by the Parliament at Westminister or by the legislatures in the American colonies? Should these powers be exercised by a central government in the United States or by the States? The question was one of division of power, and the task which faced the Fathers of the Constitution was the supremely difficult one of drawing with wisdom and common sense the best line of division.

Mr. Rodell, indeed, has succeeded in missing the most obvious fact about the Federal Constitution, namely that it is a *Federal* Constitution. He has managed to miss the fact that the Convention which drafted the Constitution was a *Federal* Convention. He has managed to write a book about the Convention and the Constitution without once considering, in any intelligent fashion, the question of Federalism, without once realizing what it was the Fathers of the Convention were trying to do. It was because British statesmen had been unable to distinguish properly between central and local authority that the Revolution came; it was because the division of power between central and state authorities under the Articles of Confederation was faulty that the Confederation broke down. The task that faced the members of

the Philadelphia Convention was that of devising a workable federal system, of allocating to the national government those powers properly of a general nature and leaving to the state governments those powers properly of a local nature. This problem was solved—not perfectly, as the Civil War is witness—but intelligently. It was solved in part because the members of the Convention had behind them the experience of the colonies in the British Empire and of the States under the Confederation, in part because they were remarkably wise and remarkably realistic, in part because it was to the interest of the groups that they represented to have it solved.

But this supremely great achievement—the solution of the problem of federalism—is nowhere mentioned in Mr. Rodell's book. What Mr. Rodell is concerned with is the attitude of the Fathers towards democracy, not toward federalism, and the major part of his book is given over to a consideration of this immaterial question. It should not be necessary to emphasize that that question is both immaterial and irrelevant. The business of the delegates to the Convention was not to construct a government that was either democratic or undemocratic. It was to construct a system of relationships between governments. Except in a few instances—not unimportant ones to be sure —the question of democracy didn't enter into the problem any more than the question of democracy enters into the problem of the organization of a League of Nations today. Almost everything that affected what we think of as democracy—suffrage, representation, social legislation, education, and so forth, was under the control of the States and was left there.

This is not to argue that the Fathers of the Constitution were democratic. A correct answer to that question demands first a definition of democracy and a realization of the changing meaning of the term. On the whole it may be admitted that, even by the standards of the eighteenth century, the Fathers of the Constitution were not democratic. It may be admitted that they did not desire a democratic form of government or of society. But the proof of that must be found not in an examination of the Federal Constitution, but in an examination of State Constitutions and State Laws.

This initial and grotesque misconception of the purpose of the Convention and the meaning of the Constitution permeates and vitiates the whole of Mr. Rodell's book. But even though most of Mr. Rodell's energy is dissipated in following this false scent, he does necessarily give some attention to the work of the Convention. His account of the debates is, as he assures us, based upon Madison's Notes, and embodies 'hard-bitten facts'. But facts, as Carl Becker never tires of reminding us, are curious things. One trouble with them is that there are so many of them; another trouble is that facts by themselves are meaningless—they must be selected and they must be interpreted. Mr. Rodell's facts are right enough, but his selection and his interpretation are open to serious objections.

In the beginning, for example, Mr. Rodell assures us that the members of the Convention "had been sent by their states only to make a few changes in the flimsy Articles of Confederation", and he returns to this charge again and again. There is much foundation for the assertion. The resolution of Congress did call a convention for "the sole and express purpose of revising

the Articles of Confederation". Does this mean that the States authorized their delegates to make only "a few changes" or, as Mr. Rodell elsewhere says, "a few minor changes"? An examination of the instructions to the delegates leads to a different conclusion. The delegates from South Carolina, for example, were authorized to join with others in "devising . . . all such Alterations, Clauses, Articles and Provisions as may be thought necessary to render the Federal Constitution entirely adequate to the actual Situation and future good government of the confederated States."[1] The delegates from New Hampshire were instructed "to discuss and decide upon the most effectual means to remedy the defects in our federal Union; and to procure and secure the enlarged purposes which it was intended to effect."[2]

The difficulty with so many of Mr. Rodell's generalizations is that they tell only a half-truth or that they leave a mistaken impression upon the mind of the unwary reader. It is Mr. Rodell's thesis, for example, that the States under the Articles of Confederation, retained their independence, but that this independence was surrendered by the delegates at Philadelphia. To substantiate this, he points out, "the committee also took a few more shots at what little was left of state independence. Each state was ordered to give 'full faith and credit' to the laws and court decisions of every other State." Precisely. But Mr. Rodell fails to point out the two really interesting things about this famous Full Faith and Credit clause: first, that it was copied directly from the Articles of Confederation—those Articles which Mr. Rodell wishes to contrast with the Constitution, and second, that it presupposed a system of relationships between states on the basis of international law and comity.

Or again, we are assured that the decision of the Convention to refer the finished Constitution to state ratifying conventions rather than to the State legislatures was inspired by a fear of the State legislatures and by a belief that the people would more readily accept the new document. These considerations may have been effective, but it is a little disconcerting that Mr. Rodell does not mention the real and logical reason. That reason is the obvious one that reference to state legislatures would have been highly improper because only conventions, holding authority directly from the people, could properly accept a fundamental law.

Or again, in the brief and superficial discussion of ratification, Mr. Rodell tells us that "lined up on one side were the business men and the manufacturers, the men with . . . money to invest . . . Fighting against these men, and against the Constitution, were the poor, the small farmers, the men who worked with their hands." There is, of course, some truth in this —though it would be interesting to know who were the 'manufacturers' in the United States of 1788. But the generalization is so broad, so simple, as to be downright misleading. Any student who has read Libby's study of the geographical distribution of the vote on the Constitution,[3] any student

1. TAUSILL, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (1927) 56.

2. *Id.* at 78.

3. LIBBY, THE GEOGRAPHICAL DISTRIBUTION OF THE VOTE ON THE FEDERAL CONSTITUTION (1894).

who remembers the support of the Constitution from the farmers of western Massachusetts and western Virginia, knows that this generalization needs a great deal of qualification.

To emphasize the human and fallible qualities of the Fathers of the Constitution, to emphasize the economic considerations behind the debates and compromises of the Constitution, is a laudable purpose. But that purpose is not served by such an approach and such an interpretation as Mr. Rodell has given us. The Constitutional Convention cannot be understood in a vacuum; it must be understood and interpreted against the background of British federalism, the Revolution, and the Confederation. It is not to be understood or interpreted as an effort either to achieve or to control or to obstruct democracy; it must be understood as an effort to erect a federal system. Mr. Rodell's book will do more to obfuscate the real character of the Constitution than will a dozen sentimental books by filiopietistic authors who regard the Fathers as "Gods rather than Men".

THE PRINCIPLES OF CONTRACT, Tenth Edition. By Sir Frederick Pollock.[1] London: Stevens & Sons, Ltd., 1936. Pp. lxiii, 762. $8.00.

As the author says in his preface to this new edition, no great novelty is to be expected in it. There are, however, some additions and changes. Under the heading of acceptance of conditions annexed by reference, there is a somewhat elaborate treatment of the duties which are assumed to exist with reference to those who deal with public service companies. American writers would doubtless mainly classify these duties as relational and imposed by law irrespective of assent, rather than endeavor to treat them under the heading of contracts.

There is also some treatment of an Act passed in 1935, which abolishes married women's common law disability to hold and deal with property, and, thereby, as regards future settlements, also abolishes in effect the doctrine of separate estate with its safeguard of restraint on anticipation.[2] The Restatement of Contracts is referred to in the preface, but it is said to be remote from the needs of English lawyers. There are, however, some references to it in the body of the book.

Changes are found in various places throughout the book, but none of them of considerable moment. It has always been a cause for regret that the author does not consider more fully the duties and conditions arising in the course of the performance of a contract. Especially, the comparatively modern doctrines relating to repudiation and anticipatory breach are treated but slightly. The author makes no clear statement of all the consequences of electing the alternatives allowed in case of anticipatory breach, but perhaps the implication from certain statements[3] is that if the injured party does not

1. Of Lincoln's Inn.

2. THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, 25 & 26 GEO. V., c. 30.

3. P. 269.

elect to treat the repudiation as a breach, he remains subject to the necessity, on his part, of performance or of readiness and willingness to perform, in order either to acquire a right of action or a freedom from liability, these being the consequences stated by Cockburn, C. J., in *Frost v. Knight.*[4] On the next page,[5] however, it is stated that when a promisor's performance is prevented, it is to that extent excused and that there is also a cause of action. No observation is made of the possible contradiction that this involves with the consequences stated in *Frost v. Knight,* if by prevention the author means to include cases where there is no physical interference but merely an inducement to refrain from performance by a manifestation either that there will be such interference in the future or that no return performance will be given. That the English law allowed an excuse in such cases prior to the development of the doctrine of anticipatory breach, when the injured party was a plaintiff as well as when he was a defendant, was clear enough from the cases of *Ripley v. M'Clure*[6] and *Cort v. Ambergate Ry.*[7] Neither of these cases is here cited. Whether this principle remained applicable in case of an anticipatory repudiation which the promisee did not elect to treat as a breach, seemed more than doubtful after the decision of *Frost v. Knight,* until 1923. In that year, the House of Lords in *British & Beningtons, Ltd. v. North Western Cachar Tea Co.*[8] apparently overruled, though this is not in terms stated, decisions holding that the injured party still remains bound to perform, unless he elects to treat the repudiation as a breach. This important decision is cited by the author, but only for a wholly different point.

Another important recent decision, entirely omitted, is *British Russian Gazette, Ltd. v. Associated Newspapers, Ltd.,*[9] which finally disposes of the many statements in the earlier books that an accord unexecuted is invalid. The previous decisions and statements are said no longer to be of any authority beyond establishing that an accord is not a defense to the earlier claim, unless itself accepted as satisfaction.

The index of the work, like the indices of many English law books, strikes an American lawyer as too meagre. For instance, it does not contain the words "anticipatory breach", "repudiation" or "accord and satisfaction", though all these terms are used in the text.

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4. L. R. 7 Ex. 111 (1872).
5. P. 270.
6. 4 Ex. 345 (1849).
7. 17 Q. B. 127 (1851).
8. [1923] A. C. 48.
9. [1933] 2 K. B. 616.

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SECURITY AGAINST SICKNESS. By I. S. Falk.[1] New York: Doubleday Doran, 1936. Pp. 433. $4.00.

IN this book Dr. Falk—doctor of public health, and consequently a "layman" or a "sociological meddler" from the point of view of organized medicine—has written the most thorough and convincing brief for health insurance that has yet appeared. He writes out of the almost unrivalled background of his work as staff director of the Committee on the Costs of Medical Care, and later as a member of the technical staff of the Milbank Memorial Fund. He covers with sufficient fullness every dimension of his subject—except the dimension of social and political conflict which health insurance is now entering, four years after Dr. Fishbein, editor of the Journal of the American Medical Association, denounced the mild majority report of the Committee on the Costs of Medical Care (signed by its chairman, Dr. Ray Lyman Wilbur, past president of the A.M.A. and Secretary of the Interior under Hoover, and a majority of the medical members of the Committee) as the work of "socialists, communists, inciting to revolution."

Dr. Falk is neither naive nor timorous. He knows that very little happens in our society merely because it is just and sensible. Progress occurs only when there is developed a sufficiently intelligent and powerful mobilization of economic and political pressure to achieve the desired result. But Falk is not a politician, nor a crusader. Purely as a technician, he has described what would be just, functional, and sensible with respect to the organization of the health services. Now let Dr. Fishbein cry havoc and let loose the medical dogs of war. Now it's the turn of the crusaders like John A. Kingsbury, whose vigorous advocacy of health insurance brought about his dismissal from the secretaryship of the Milbank Fund; they will find Falk's book invaluable. They can wield Falk against Fishbein, which is much like using an axe on a mosquito.

It is really a triangular fight, involving the lay patient, the doctor, and the state. Sir Arthur Newsholme makes this clear in a classic statement:[2]

> "Civilized communities have arrived at two decisions, from which there will be no retreat, though their full realization in experience has nowhere been achieved.
>
> "In the first place, the health of every individual is a social concern and responsibility; and secondly, as following from this, medical care in its widest sense for every individual is an essential condition of maximum efficiency and happiness in a civilized community."

And the irony of the situation in America today is that all the parties at interest would be immensely advantaged by a functional reorganization of our health services; further, that without adding appreciably to our present medical budget—about four percent of the national income—we could provide adequate medical care for the millions of the population who don't get it now, make a huge cut in the tax burden spent for sick dependency, and save

1. Research Associate, Milbank Memorial Fund.
2. See MEDICINE AND THE STATE (1932) c. 1.

at least six billions a year in terms of life capital and preventable working-time losses to industry, all that, and still pay the doctors more than they are getting today—more even than they got in 1928, when thirty-three per-cent of them netted less than $2,500 a year.

While advocating the economies and efficiencies of group practice, as logically entailed by the essentially "collectivist" nature of the modern science and art of medicine, Falk urges that the horse of group insurance payment, organized on a national compulsory scale, should precede the cart of group practice. An evolutionary, voluntary group payment and group practice development along the lines recommended by the majority report of the Committee on the Costs of Medical Care might lead, he thinks, only into a morass of debased commercial contract practice. Says Falk: "Instead of organizing for the payment of medical costs after having achieved improvement of practice, society must organize for payment in order to achieve improvement in service."[3]

So much for Falk's theoretical solution of our medical difficulties. The problems of legal rights and political tactics are something else again. The health services, today, are caught in an Alice-in-Wonderland maze of mutually contradictory "rights." Members of the legal profession who read this review are invited to try tugging at any one or all of the loose strings that emerge from this maze and see how the tangled skein knots and tightens.

1. *The physician:* He has the right to sell his training and skill for as much as he can get in the market and to insist that the philanthropic and publicly financed health agencies limit themselves strictly to matters of sanitation, public hygiene, and the service of the indigent. He has the right to crusade against the lesser tribes of healers without the law—the quacks, the cultists, the nostrum-makers; he also has the right to denounce fairly or unfairly the "sociological meddlers" like Falk who have ventured to suggest new ways and means of organizing and paying for medical care.

These rights are coupled with duties, the chief of which is the traditional duty of the physician to deliver medical service whether or not he is paid for it; this duty is balanced by the right to tax his rich patients for the unpaid or partly paid service he gives to the poor. He has also his duty to his colleagues, which is defined in the medical code of ethics and enforced by his professional organization—a kind of state within the state. The physician may not advertise either truthfully or otherwise in his own behalf, and he may denounce nostrum-makers for advertising at the same time that the activities of the organized profession are largely financed by the advertising expenditures of the same, or closely affiliated nostrum-makers in the *Journal of the American Medical Association.* Organized medicine also has the "right," affirmed in clause 7 of the official code of ethics, to combat forms of group medical practice which *in its judgment* are "contrary to sound public policy" and to expel from membership in the American Medical Association any physician who engages in such forms of practice. But since the law does not make membership in the A. M. A. a condition of the legal right to practice, the offending physicians engaging in group practice have the right to make

3. P. 333.

their own judgment of their own and the public interest, advertise for patients, and serve them.

2. *The patient:* With respect to the use, disuse, and abuse of the health services our rugged American layman has almost unlimited liberties and rights. There are no class distinctions. In the words of Anatole France, every man "labors in the face of the majestic equality of the laws which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." It is true, of course, that in practically all private and semi-private hospitals the ward, semi-private and private patients are rigidly segregated and the appropriate differentials in the quality of quarters, food, and of the quantity, at least, of medical and nursing attentions are fully maintained. But then, if the patient objects to these discriminations he has the right not to go to the hospital at all—not, at least, until a neighbor feels she has the right and duty to call the ambulance. The ward physician then has the right to scold the patient roundly for failing to obtain diagnosis and treatment sooner—he has a ruptured appendix and at best can make only a partial recovery. Such scolding is of course, unjust; the patient had a perfect right to consult the chiropractor who almost broke his back, to dose himself with useless or harmful patent medicines, to be ashamed to call his regular physician whose past bills were unpaid. (The physician in any case would have had the right to say he was too busy to attend him). Our patient, however, is secure in his ultimate rights. If he dies the state will bury him and take care of his dependents after a fashion. And if he leaves the hospital to become one of the unemployable chronic sick, the state will also take care of him and them—after a fashion calculated to stabilize that unemployability and to impair appreciably the vitality of future generations. Surely nothing must be done to dim the splendor of these rights, to impugn these hard-won liberties. As things stand, the patient has the right to do, or fail to do, almost anything except shoot himself—that's against the law. But he can easily get an equivalent result in any one of a hundred ways, either for himself or for his dependents. For example, he can decline, in behalf of himself and his children, immunization against contagious disease and the American League for Medical Freedom will support him in this right to the end that such fully demonstrated preventive measures may not be extended to more than five percent of our population, as at present. He can also neglect a gonorrheal or syphilitic infection and communicate it to others.

3. *The sociologists, economists, and public health workers:* Representing this group, Dr. Falk has the right to prove up to the hilt, as he does, that, all "rights" aside, the existing organization of medical care is chaotic, wasteful, and lags far behind the progress made in almost every other civilized country. He has the right to point out that we spend, for urban and rural public health work from one-third to one-seventh as much as it would pay us to spend. He has the right to show that unmet medical need exists in huge volume and that our neglect of this need costs us, as Dr. Ray Lyman Wilbur has also testified, "more than we can afford." He has the right to demonstrate the plain common sense of applying the insurance principle to the payment of medical costs, since no family with an income of less than $5,000

a year can otherwise protect itself against the unequal incidence and cost of disabling illness. He has the right to point out, as he does, that organized medicine, specifically, the Journal of the American Medical Association, has misrepresented the English and European experience with health insurance.

In short, Dr. Falk had the right to do his job honestly and well, and has fully exercised that right. It's a free country. Long may she wave.

JAMES RORTY†

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CRIME AND JUSTICE. By Sheldon Glueck.[1] Boston: Little, Brown & Co., 1936. Pp. viii, 349. $3.00.

IN the spring of 1935 Professor Glueck of the Harvard Law School delivered eight lectures before a lay audience in the Lowell Institute, Boston. They are here published as a book for the benefit of an audience which we hope will be as large as possible, for the volume is rich in substance and provocative in form. Unfortunately, the title is somewhat colorless. "The Diseases of Criminal Justice" would have been more descriptive, for the author has "stressed the ills of criminal justice in the belief that by studying the diseased organs we may be able to obtain some light on the destructive forces at work and perhaps some hints as to the therapeutic and prophylactic measures that are indicated."[2] The result of this approach is that the first six chapters present a Rembrandtesque picture of American criminal justice, mostly shadows with a few bright highlights, while the last two chapters offer suggestions for reform.

The comprehensive and therefore necessarily sketchy character of the book may be gleaned from a rapid summary of its contents. In a chapter on "The Climate of Justice" Professor Glueck treats the relativity of the concept of crime and the complexity of the task of justice, owing to the growing chasm between the mores in law and administration and the findings of scientific research, the social problem created by a machine age, and the growing disrespect for traditional symbols and agencies of authority—all more or less interrelated. Then follows a chapter containing thumbnail sketches of the police department, the city prosecutor's office, the courts and penal institutions. In "The Lameness of Justice" we find an appraisal of the obstacles existing in a complicated criminal procedure, weak juries, skepticism toward extra-legal scientific knowledge and tools, the character of trials, the concept of responsibility, and conflicting ideas of punishment which make the law a bizarre body, full of vestigial organs whose functions have disappeared but which cannot be bred out or cut out, because of reverence coupled with indifference. A good analysis of the difficulties involved in appraising the amount of crime found in this country opens the chapter on "The Blindness of Justice."

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2. Introduction.

The scarcity of reliable data and the inadequacy of record systems are mentioned and the effect of this deficiency on administrative practices are described, especially as they refer to the exercise of judicial discretion, which has been growing in response to the humanitarian as well as the scientific attacks upon the traditional criminal law. The chapter on "The Knights of Justice" returns again to the agencies of justice but stresses personnel instead of external forms. The policeman, the magistrate, clerk, bailiffs, bail bondsmen, jurors, probation and parole officers, and prison guards are characterized, the author making effective use of the data gathered through local and state surveys of criminal justice. In "The Pawns of Justice" the criminal is discussed and our knowledge of his characteristics and the causes of his offenses is assayed, the author concluding that despite numerous etiological researches, we as yet know very little about crime causation. In this chapter the results of Professor and Mrs. Glueck's own researches are given in brief and serve as the basis for the conclusion that many offenders at least begin their careers in youth and come from homes and neighborhoods which exert deleterious influences on minds and bodies in the making.

The last two chapters, on "The Prospects of Justice" and "The Horizon of Justice," contain Professor Glueck's program of reform. Assuming that therapeutic measures can cure or at least mitigate the diseases of justice, he pleads for a scientific attitude toward law and its administration, argues for the preparation of a "realistic" criminal code based on the principle of social protection; the separation of the guilt-finding and the sentencing functions with the latter entrusted to a board of experts; the periodic review of sentences, and for safeguards against arbitrary sentences. The administrative machinery to achieve these varied ends, he suggests, should be centralized in a Department of Justice in each state, with bureaus integrating, controlling, or supervising the police, the courts, and the penal agencies.

Through the entire book the recurrent idea is better personnel: "All roads of reform lead ultimately to the Rome of a greatly improved personnel."[3] But such personnel depends on revolutionary changes in public attitudes toward government and its services, and it may well be that by the time attitudes are formed which are favorable to the idea of professional instead of political public servants, some of the other broad preventive measures suggested by the author will be on the point of realization, especially those growing out of the economic adjustments which he rightly stresses as fundamental.

For those "professionally interested" Professor Glueck has added copious footnotes in an appendix. Even without them, the excellent review which the book presents of data familiar to most professional students of criminal justice would be of interest to them as it should be stimulating and provocative to the lay audience for whom the book was written.

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3. P. 253.

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DAS ENGLISCHE KONKURSRECHT. By Felix Eckstein. Berlin: Walter de Gruyter, 1935. Pp. xv, 351.

THE author of this monograph does not lay any claim to originality or profundity of research, but he has none the less shown great skill in achieving his object, which was to present to German readers an account of the main features of the English law of bankruptcy in a form which would enable them to understand its somewhat complicated provisions. The general structure of the law of insolvency varies in some degree even in the case of legal systems which have a common origin, but the differences of rule which exist as between the German and the English law of bankruptcy are in many respects of a fundamental character. The main reason for this lies in the fact that certain features of the English Bankruptcy Act of 1914[1] are absent from the German "Konkursordnung," notably the provisions for the discharge of a bankrupt, and further that bankruptcy is, in English law, confined to individuals and does not extend, as in the case of the "Konkurs," to corporations. These distinctions, when coupled to others of a less fundamental character, are prone to make it a difficult task for a lawyer trained in one of the two systems to attune his mind so as to appreciate the inner workings of the other. Herein lies the chief merit of Dr. Eckstein's very careful survey of the English law: he writes for German lawyers and when the occasion calls for it the English law stands out in relief against the background of the German rules which relate to a similar situation.

The value of descriptive work of this kind has been challenged by some comparative lawyers. It is, perhaps, true that this form of comparative research is not considered to rank very high and that it sometimes fails to lead to any result which can be regarded as of importance in relation to the advancement of legal science. But the comparative method of research calls for much preliminary work before it can be brought fully into operation and those who undertake the laborious and thankless task of providing the necessary material for comparison can at the very least claim a place among those who were described by Huxley as the "indispensable hodmen of science." It must not be thought, in particular, that Dr. Eckstein's efforts are purely of a pedestrian character. They go beyond mere patient investigation, as witness his admirable analysis of the intricate situation which occurs when the rule in *Ex parte Waring*[2] comes into play. His adverse criticism of the rule is one with which the reviewer finds himself in complete agreement.

The statement of the law in the text is marked by lucidity and, generally speaking, by accuracy, though, as is perhaps inevitable in a summary of this nature, compression has occasionally resulted in an under-estimate of the difficulties arising in connection with certain of the propositions advanced by the author. It should be added that there is hardly a topic, however minute, which is not dealt with, and it is evident that Dr. Eckstein has spared no effort to make his treatise as complete as is reasonably possible

1. 4 & 5 GEO. V, c. 59.
2. 19 Ves. 345 (Ch. 1815).

when dealing with so vast and complicated a subject. The sections relating to the bankruptcy of married women must now be regarded as obsolete in view of the changes introduced by the Law Reform (Married Women and Tortfeasors) Act, 1935.[3]

If a knowledge of the law of other countries is—as the reviewer believes—an important element in the prevention of international discord, Dr. Eckstein has made a valuable contribution to the cause of a better understanding among the nations.

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3. *25 & 26* GEO. V, c. *30.*

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