

# REVIEWS

CORPORATE EXECUTIVES' COMPENSATION. By George T. Washington. New York: The Ronald Press Company, 1942. Pp. xii, 519. \$7.00.

THE subject matter of Professor Washington's book is a good deal broader than one might infer from the title. The problems of executive compensation as he conceives them are not limited to such questions as the extent to which compensation provisions are likely to be disapproved by the courts either because the remuneration is deemed excessive or because the methods by which compensation has been voted are considered improper. They include also problems of drafting the compensation contract, problems of taxability both of the remunerated executive and of the corporation which is seeking to deduct the amount of the remuneration from its taxable income, problems of officers' and directors' rights to indemnity against expenses incurred in defending themselves against charges of misconduct, and problems relating to the validity, construction, and draftsmanship of indemnity agreements. These indemnity problems are considered with special reference to the provisions of the Federal Securities Act and of Sections 27a and 61a of the General Corporation Law of New York.

In his introductory chapter, the author describes his objective in the following language:

"The purpose of this book is to study, against the background of our law of corporations, with its emphasis on traditional economic patterns, the system of managerial rewards that has grown up in this country during the last three or four decades. We will also study the impact of the regulatory and tax policies of the federal government. There will be no attempt to suggest ready-made plans of compensation: the needs of individual enterprises are too various. The discussion which follows is intended to give, in as simple and direct a fashion as the subject matter permits, a short treatment of the chief legal and practical problems encountered in the drafting and adoption of plans for managerial compensation. This may serve as a starting point for corporate managers and their advisers in considering the needs of a particular company. It may also prove useful to investors, government officials, and others interested in modern business."

As one reads on, it becomes apparent that the book is addressed primarily to corporate managers and their legal advisers. It is not that Professor Washington is unsympathetic with demands that the law of managerial compensation be developed in ways which will encourage adherence to strict standards of fiduciary obligation. For example, he expresses complete agreement with Mr. Justice Stone's castigation of the conduct of the officer-directors of the American Tobacco Company with respect to the stock bonus which was under attack in *Rogers v. Guaranty Trust Company*.<sup>1</sup> In his chapters on indemnity agreements he questions the propriety as well as the legality of

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1. 288 U. S. 123 (1933).

the blanket-type indemnity agreements which have been adopted by many corporations in recent years.

Nevertheless, such discussions as the book contains about legal, social and economic policy and the need for protecting shareholders and others against managerial self-interest are carried on in a minor key. Professor Washington is chiefly concerned with giving advice to corporation lawyers as to how to give legally sound advice to corporate executives. To say this is not to criticize his book adversely. The principal demand for a book dealing with the legal aspects of corporate executives' compensation comes from executives and their attorneys, and this book, like most law books, is written to sell and not simply as a piece of academic research. Moreover, the author's advice is excellent. The unwise extremes to which some lawyers have encouraged their clients to go in devising unfair compensation plans and indemnity agreements, in permitting interested directors to determine their own compensation and in concealing the results from shareholders, indicate that many corporation lawyers are in need of the author's counsel of moderation as well as of his thorough grasp of the more technical aspects of the subject.

On the other hand, those of us who are interested in the subject from the point of view of public rather than private interest would have welcomed a fuller consideration of certain aspects of the problem. For example, Professor Washington expresses the view that the cases are comparatively few in which management has made use of special rewards other than fixed salaries "in order to obtain rewards of a nature and extent not readily understood by the shareholders or by the public." How can he know? There may be few litigated cases in which the existence of such a motive is apparent on the face of the record. But what of the unlitigated cases? A management which is trying "to obtain rewards of an extent not readily understood" will be likely to do everything possible to cover its tracks so effectively as to make discovery and legal attack by litigious shareholders extremely difficult. Paucity of litigated cases is therefore an unreliable index of what has been going on. To anyone who is concerned about the adequacy of our present judicial and statutory controls over salaries and bonuses, the question whether the type of behavior to which the author refers has been rare or fairly common is important enough to deserve fuller treatment, even though it may be impossible to answer the question categorically.

Again, what of the point made by Berle and Means that "the traditional logic of profits"—as distinct from the traditional logic of property—"would indicate that *if profits must be distributed either to the owners or to the control* only a fair return to capital should be distributed to the 'owners' while the remainder should go to the control as an inducement to the most efficient ultimate management."<sup>2</sup> How far is this theory, or an inarticulate groping after this theory, a motivating factor in inducing management to seek a large slice of profits even where the profits are largely monopoly or windfall profits rather than profits due to efficiency? Are we dealing in these compensation cases merely with disputes as to what managers are worth to their corporations, complicated by the fact that in many cases the managers are in effect judges in their own causes, or are we dealing with something more funda-

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2. THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) 344.

mental—a belief, or at least a vague feeling on the part of management, that it is hiring capital rather than that absentee capitalists are hiring it?

On the other hand, is there not substantial evidence of a growing popular feeling that million-dollar bonuses are wrong, not so much because the money ought to go to the shareholders as because it is felt to be indecent to charge so much for managing an enterprise which is in essence, if not in literal legal theory, engaged in performing a public service? Do legal rules which permit the payment of such bonuses and then subject the recipient of them to drastic taxation adequately satisfy this popular feeling—particularly in time of war? If additional controls are needed, should not the objective be to prevent payment of excessive compensation rather than to encourage litigation to compel restitution? Are not these and other like questions apt to be in the background, if not in the foreground, of the minds of those judges who are sensitive to the intellectual and emotional climate of our era? A line here and there in Professor Washington's book indicates that he is not unaware of these problems; but for him, as for a lawyer who is engaged in advising a client rather than in philosophizing, they are on the fringes of his subject rather than at or near its core.

The most valuable part of the book, for practitioner and academic student alike, is that relating to indemnity and indemnity agreements. Here Professor Washington is examining a process of rule-making, legislative, judicial, and contractual, which is just beginning to emerge from the embryonic stage. It is on the subject of indemnity agreements especially that his counsels to corporation lawyers are counsels of caution. He is, to be sure, justifiably critical of judicial decisions which deny the existence of any corporate power to indemnify or reimburse directors for the expenses of defending themselves against charges of official misconduct even where the directors have been completely exonerated by a judicial decision in their favor on the merits. On the other hand, he insists that, generally speaking, claims for indemnity should be made in the court in which the suit against the directors has been tried, and if not made there, when there was an opportunity, should be treated as having been abandoned.

If all trial courts were ready to exercise the powers which the author, like the reviewer, believes they should exercise, there would be little need for permitting the corporation itself to determine the question of reimbursement or for permitting the question to be litigated in a separate action. Most suits against directors are shareholders' suits, with the corporation present in court as a party. To compel the corporate principal to reimburse the directors in such a case, where they have established their innocence, should be within the powers of a court of equity. Nevertheless, as Professor Washington points out, there are suits to which the corporation is not necessarily a party—suits arising under Section 11 of the Securities Act, for example—in which the directors' successful defense may reasonably be deemed to entitle them to reimbursement. The trial court would be helpless in such a situation.

In view of this fact and of the doubt whether all trial courts in which directors might be sued are now prepared to decree reimbursement in all appropriate cases, even where the corporation is in court, one can hardly deny that the present movement for inserting reimbursement or indemnity provisions in corporate bylaws has considerable justification. Nevertheless, as

Professor Washington abundantly demonstrates, it is difficult to draft by-laws on the subject which are neither undesirably narrow, undesirably broad, nor undesirably vague. Perhaps, as the author suggests at the end of his chapter on the New York indemnity statutes, it might be desirable to enact a statute "in which the principles of adequate bargaining"—now dealt with rather ineptly in Section 27a of the New York Act—"and judicial supervision"—now dealt with in Section 61a of the New York Act—"will both be utilized." This implies that he would, if he were a legislator, be inclined to explore the practicability of legislation which would subject either indemnity agreements or action taken pursuant to such agreements, or both, to judicial scrutiny. The reviewer wishes that he had made some preliminary surveys on the subject in this book. But it would be unreasonable to quarrel with him for concerning himself with the law as it is rather than with the law as it might be.

E. MERRICK DODD †

MILITARY LAW AND DEFENSE LEGISLATION. By A. Arthur Schiller. St. Paul: West Publishing Co., 1941. Pp. xxxiv, 647. \$5.00.

THIS is the first attempt at a casebook on military law since Dean (then Colonel) Wigmore's compilation was published shortly after the close of World War I.<sup>1</sup> Both volumes pose at the outset the question of the proper scope of a wartime course on the subject. Is the instruction in military law to be basically a fad for the law professors, on a par with the conditioning of kiddies in the name of civilian defense and the wearing of attractive uniforms by even more attractive female war workers? Is the purpose of the course the education of the civilian lawyer who by reason of overage, dependency, or disability will remain in mufti for the duration? Or is the course designed to impart to the law students about to be called for service a working knowledge of the problems they will have to face once they are on active duty?

I suppose that the proper objective is not over one-third of the second, and not less than two-thirds of the last—in short, essentially utilitarian. Judged by that standard, the compiler's selection of materials is open to very serious question. There is precious little if any utility to the long list of cases tracing the development of the law on the minor's contract of enlistment; only the legal antiquarian has any need to go behind *In re Grimley*.<sup>2</sup> Nor does the emphasis on the cases defining the scope of the local draft boards' powers seem justified. Apart from the fact that the point will concern only few military persons (other than those who want out

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1. A SOURCE-BOOK OF MILITARY LAW AND WAR TIME LEGISLATION (1919).

2. 137 U. S. 147 (1890). Cases like *Commonwealth v. Harrison*, 11 Mass. 63 (1814), SCHILLER 110, are simply historical curiosities on several counts.

from the Army), the basic principles are simple enough to be covered in not over six cases. The space thus saved could profitably have been devoted to martial law, which concerns soldiers and civilians alike, and which is bound to affect a great deal of domestic territory before the bugles sound demobilization in this particular war. (I agree that military government is adequately covered by text materials).<sup>3</sup>

Moreover, it is very doubtful whether the law and practice of courts-martial can be usefully taught by extracting paragraphs from the self-contained *Manual for Courts-Martial* and reprinting them in a casebook (or, if one prefers, a source-book). Apart from the circumstance that the present compilation entirely and inexplicably ignores the Navy's court-martial system, and does not even reprint the Articles for the Government of the Navy in an appendix, it seems to me that the obvious solution is to teach court-martial procedure direct from the applicable Manual (which is easily obtainable from the Government Printing Office), resorting to the casebook source-book simply for the text of apposite opinions on the scope of review, or rulings of The Judge Advocate General on significant points on which the Manuals are silent. That was Wigmore's notion in 1918-19,<sup>4</sup> and I do not think that he was wrong.

The present compiler admits in his preface,<sup>5</sup> what indeed is reflected by his compilation, that the work was hastily prepared. It exhibits a definite lack of familiarity with the material, particularly in the citation of presently inapplicable decisions,<sup>6</sup> and the quotation of matter that had been amended long before the present work went to press.<sup>7</sup> Similarly, the citation of Army Regulations without AR references detracts from the utility of the collection;<sup>8</sup> no doubt law students have access to the CFR and the Federal Register, but headquarters in the field, where military law is actually administered, do not.<sup>9</sup>

This same unfamiliarity with military law in action has, it seems to me, led the compiler to include some cases of extremely doubtful authority without adequately flagging their dangers in footnotes. Thus, *Ex parte Weitz*<sup>10</sup>

3. Notably FM 27-5, MILITARY GOVERNMENT (War Dep't, 1940), and c. 10, FM 27-10, RULES OF LAND WARFARE (War Dep't, 1940).

4. WIGMORE, *op. cit. supra*, note 1, at iii.

5. SCHILLER, v.

6. At SCHILLER 461, n. 59, there is a reference to a JAG opinion treating of the period during which a soldier awaiting trial may be held in arrest—without mentioning that AW 70 as amended in 1920 renders the opinion inapplicable.

7. MCM, par. 35a, as quoted in SCHILLER 469 does not include the 1938 amendment to the Manual which was made to conform the text to the 1937 change in AW 70.

8. See, for example, pp. 122, 240, 244, 563.

9. The following inaccuracies are also to be noted: The statement of *Ex parte Dostal*, 243 Fed. 664 (N. D. Ohio 1917), SCHILLER 118-19, confuses calling the National Guard into federal service with drafting its members into federal service, and thus ignores over a century's development of the militia. Similarly, SCHILLER 227, n. 80, confuses National Guard, National Guard of the United States, and wartime State Guards.

10. 256 Fed. 58 (D. Mass. 1919), SCHILLER 441.

is cited as though it were still law; actually, it was based upon a decision that was subsequently reversed, and it is now extremely doubtful on its facts.<sup>11</sup> The present limits of the jurisdiction over spies are left to depend on the *Waberski*<sup>12</sup> and *Wessels*<sup>13</sup> cases, without any indication that Attorney General Gregory's opinion in the first case was in effect overruled by his successor, and that the appeal in the second was dismissed by stipulation because the court-martial proceedings had been discontinued *at the instance of the Department of Justice*, representing the appellee! These matters had been disclosed in print before the present volume went to press.<sup>14</sup> And once more proceeding on the premise that the utilitarian approach is desired, it seems distinctly unfortunate to set out *Ex parte McKiltrich v. Brown*<sup>15</sup> without mentioning that the case for the civil authorities went virtually unargued, with the consequence that the court was unaware of, and hence did not discuss, the controlling provisions of the National Defense Act.<sup>16</sup>

Professor Schiller has prepared a useful collection of cases, one that will be a valuable addition to any library of military law. It is distinctly not a bad book. But a little more study, a little more soaking in the sources, would have made it a very much better book, and a more useful and reliable guide for the novice.

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THE SOCIOLOGY OF LAW. By Georges Gurvitch. New York: Philosophical Library, 1942. Pp. xx, 309. \$3.75.

THIS is a brilliant book, in which nearly all the significant theories correlating law and fundamental social phenomena are discussed, and in which a comprehensive and original sociological theory of law is developed. Different kinds of law are correlated with the various types of social relations. Such "frameworks of law" as trade-union law or family law are correlated

11. The decision was based on *Ex parte Mikell*, 253 Fed. 817 (D. S. C. 1918), which was reversed. *Hines v. Mikell*, 259 Fed. 28 (C. C. A. 4th, 1919), *cert. denied*, 250 U. S. 645 (1919). Moreover, the *Weitz* case involved the interpretation of "in the field" in AW 2(d). It thus has no application outside the United States; compare the first clause of AW 2(d). And while Massachusetts may not have been "in the field" in 1918, who will venture to suggest that it will not be "in the field" in 1942 *et seq.*?

12. 31 Op. Att'y Gen. 356 (1918), SCHILLER 508.

13. United States *ex rel.* *Wessels v. McDonald*, 265 Fed. 754 (E. D. N. Y. 1920), SCHILLER 511.

14. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940) §§ 132, 133.

15. 337 Mo. 281, 85 S. W. (2d) 385 (1935), SCHILLER 418, 514.

16. WIENER, *op. cit. supra* note 14, § 141; Wiener, *The Militia Clause of the Constitution* (1940) 54 HARV. L. REV. 181, 213-15. The article last referred to (which cites the preceding reference) is several times noted in the present volume. SCHILLER 25 n. 7, 232 n. 82, 239 n. 86.

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with the various types of social groups, and such "systems of law" as feudal law or bourgeois law, with the various types of "all-inclusive societies." These fundamental problems are examined from a unifying point of view, since the author affirms that all-inclusive societies must be understood as "syntheses and equilibria" of real groups, and these groups as "syntheses and equilibria" of social relations, and that a corresponding relationship exists between the different levels of legal phenomena. A very promising "frame of reference" is thus created.

However, the findings are vitiated by the very unfortunate conception of law which underlies the work—a conception of philosophical, or more precisely, phenomenological origin. Three criteria of law may be distinguished in Gurvitch's somewhat cumbersome definition (p. 59). First, law is a realization of justice. The origins of this fundamental concept may be traced to Aristotle, but few sociologists have thought in these terms. Thus Sumner, when deploring the fact that modern nations had forgotten the ancient concept of *ethos*, or of the standards of right, did not mention law among them. Secondly, law is distinguished from other standards of right by the existence of a "social guarantee" based on "collective recognition of social facts which realize values" (p. 51). Law is thus quite correctly classified as a species of the genus "social regulation." This social guarantee is manifested in sanctions, *i.e.*, in "different sorts of reactions of disapprobation." Gurvitch explicitly states that "constraint," in the sense of "precise measures determined in advance and taken against the delinquent" (pp. 58-59), does not belong among the criteria of law. Thirdly, law is distinguished from other forms of social regulation by its bilateral or even multilateral character, making it "imperative-attributive," *i.e.*, consisting of correlative claims and duties. This is an idea taken from the great Russian-Polish jurist Petrazhitzky.

It is obvious that Gurvitch's departure from the *communis opinio* is contained in the third point. For while the *communis opinio*, which exists despite all variations in wording, quite logically tries to find the specific criterion of law by analyzing the different forms of social guarantee, Gurvitch's approach is rather more heterogeneous. A definition that is logically consistent cannot be "refuted". But it is permissible to discuss how it works. A section in Chapter II, dealing with the "depth-levels" of law, lends itself especially to such treatment. Gurvitch asserts that law is engendered both by "organized and unorganized sociality." This statement becomes somewhat clearer when it is noted that, in Gurvitch's opinion, the State is the organization of the unorganized nation. Furthermore, in his opinion, there are three levels of law depending on the forms of its "acknowledgment": law fixed in advance, flexible law formulated *ad hoc*, and intuitive law (*i.e.*, when the normative fact is directly acknowledged without benefit of any formal procedure, p. 227). Combining the two classifications above, Gurvitch finds six "depth-levels" of law and gives a cursory review of the phenomena which he considers to be jural. In the opinion of the reviewer, three classes of phenomena which are of highly different social significance are here thrown together: phenomena termed law by common opinion (statutes, the practice of courts, customary law, etc.), mores, and

states of public opinion orientated towards law. The second and third points need some elaboration.

In regard to Negroes in the Southern states there is a conflict between constitutional law, based on the principle of the equality of men, and mores, which call for different treatment of men depending on the color of their skin. The Supreme Court's order that the Rock Island Railway Company desist from the practice of providing Negroes holding first class tickets with accommodations which were inferior to those provided for white passengers,<sup>1</sup> could be interpreted as a partial victory of law over mores. But Gurvitch's doctrine leads to a different interpretation. The discrimination against Negroes is a manifestation of the unorganized intuitive law of the white population of the United States (p. 229). Consequently, the decision of the court would mean a victory of "fixed organized law" over "unorganized intuitive law." As he does not maintain that there is a hierarchy of the six "depth-levels" of law, the victory in his doctrine is as unpredictable as in the doctrine of the *communis opinio*, which recognizes that, in conflicts between law and mores, victory is a question of fact.

Gurvitch rejects very positively the conceptual scheme of the *communis opinio*. The concepts of custom and mores, he says, are based on confusion, since they are merely "particular methods of acknowledgment of the different types of social regulation" (jural, moral, religious, aesthetic, and educational, p. 60). Actually, there seems to be a confusion in Gurvitch's ideas. Custom and mores are specific types of "standardized collective behavior," distinguished from technical and purely conventional standards, by their being simultaneously "standards of right," at least in the opinion of those who follow them or try to enforce them. The point is that the existence of a practice does not of itself allow us to "acknowledge" the existence of a standard of right. The process is much more complicated than that assumed by Gurvitch.

Now let us examine the third class of phenomena which Gurvitch regards as law. Speaking of intuitive law, he asserts that "this kind of law . . . drives towards the revision and reform of law." (p. 227). In this somewhat contradictory statement, Gurvitch probably has in mind the influence of widely spread opinions as to desirable changes in law. To consider such opinions as an inherent part of the law is confusing. It would be very difficult to determine, in regard to such opinions, the social guarantee even in the mildest form of disapproval. What actually exists in such cases is disagreement among those who recognize divergent social ideals.

Opinions discussed by Gurvitch under the heading of intuitive law are actually value judgments regarding the fact of the corporate acceptance in a given society of certain standards of right (which by definition are value judgments). Here is perhaps the greatest difference between Gurvitch's doctrine and the *communis opinio*. He considers as belonging to law all value judgments orientated towards law, provided they are "commonly recognized" by a social group. But the method of "acknowledging" such recognition is left unspecified. All the difficulties involved in treating the nebulous con-

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1. Mitchell v. United States, 313 U. S. 80 (1941).



cept of "public opinion" would have appeared if Gurvitch had attempted to elaborate his theory.

Anyone is privileged to define law as he sees fit. But a revolutionary terminology (such as the one Gurvitch has constructed) should be accepted only if it provides a framework for the observation, classification, and understanding of phenomena more convenient than the one commonly used. This reviewer believes that the definition here discussed does not meet these requirements.

Let us proceed as follows. A well defined species of collective behavior has been segregated as part of the general process of social differentiation. This collective behavior in modern society is focused around the activity of courts and analogous agencies and has created the profession of lawyers (with further sub-differentiation) and the science of jurisprudence. Is not this species important enough to be designated by a special term? And has not the term "law" become the "symbol" of this class of socially significant acts, a symbol which immediately evokes the corresponding "referent?" Is it desirable to destroy a well-established symbol-referent structure by applying the symbol to phenomena which are substantially different from those immediately evoked by the symbol? Is it not preferable to look for another term for the designation of that class of thought-objects which Gurvitch discusses under the heading of law? True it is, that in the preface to Gurvitch's book, Roscoe Pound explains, "clearly, sociologists do not mean by law what the lawyer means." And Pound is quite right insofar as Gurvitch and say Ehrlich, are concerned. But many sociological works (among them MacIver's *Society* and the reviewer's *Introduction to the Sociology of Law*), attempt to deal sociologically with that product of social differentiation which comprises the work of judges, lawyers, and jurists.

Gurvitch's unfortunate expansion of the concept of law is conducive to some shortcomings in his systematic treatment of the subject-matter of the sociology of law. Thus, discrimination between reality judgments and normative judgments is lacking, despite the author's explicit recognition of the perils of confusing these concepts. The ambiguity evidently results from the introduction into the framework of laws of normative judgments about law in force. The statement is made that the law of the unorganized nation possesses jural primacy over that of the State or of the economic society. This proposition probably means that unorganized social forces operating in the population of a State decide what the competence of the State is to be; whether it shall be a liberal, a totalitarian or some other kind of State, and what is to be the relationship between the political and economic organization of society. Now is this a reality judgment? Can it be asserted that it is always and everywhere valid—even in societies to which the term nation is hardly applicable, despite a political organization in the form of the State, such as that of the Austrian monarchy in the 18th century? Or is this a normative proposition expressing the desirability of a certain kind of regulation? If the latter is true, the proposition is not sociological, since sociology, discussing value judgments, does not formulate any. Its place would be either in a philosophical theory of law, or in a science of "legal policy" still to be created.

This lengthy criticism should not be considered as invalidating the initial statements of this review. Gurvitch's work is outstanding, and a number of his propositions after careful restatement may play a great part in the advancement of general sociology and the sociology of law. It is because this work is so excellent that its basic concepts should be subjected to careful analysis.

N. S. TIMASHEFF†

DIGEST OF INTERNATIONAL LAW. By Green Haywood Hackworth. Washington: Government Printing Office, 1941. Two vols., vol. 1, pp. 803, \$1.75; vol. 2, pp. 829, \$2.00.

FEW persons realize how great an influence on the development of international law and on the practice of Foreign Offices generally has been exerted by the publication of John Bassett Moore's *Digest of International Law* (8 v. 1906). Through that work the opinions of the United States Government on questions of international law have spread far and wide, and other governments have even been persuaded to alter their standing custom by permitting a discreet publication of a small part of their archives in the field of international law. Moore's *Digest* was much more than a revision of Wharton's *Digest* (3 v. 1886-87). It was a complete rearrangement of the diplomatic correspondence, instructions and dispatches of the United States, of treaties and agreements, decisions of courts, opinions of the Attorney-General, extracts from treatises and monographs, and a considerable portion of the original learning of Judge Moore himself which illuminated every chapter of that indispensable work. It was not only a scientific achievement of the first magnitude—omitting reference here to the companion *Digest of International Arbitrations* (6 v. 1896)—but enhanced the reputation and influence of the United States, since Foreign Offices not only paid the closest attention to the views expressed by American officials, but also, as I have had occasion to learn, marvelled at the openhandedness of the United States in disclosing its archives to public scrutiny in a form so easily accessible and so cheap that every student and public official could have it at his side. When Judge Moore asked Secretary of State Sherman whether any part of the archives were to be regarded as confidential and therefore not be published, he was informed that everything in the Department was at his disposal for publication. Those were the good old days.

Now, for the benefit of the profession and the public, comes a continuation of Moore's work, fashioned by the hands of Mr. Hackworth and his assistants in the Department of State. Only the first two volumes of what is expected to be an eight volume work have thus far been published; and while it is not likely that the Department is now as generous in disclosing all its archives as it was in 1906, still we must be grateful for the supplemental material offered for our inspection. Mr. Hackworth states that the material since 1906 is more voluminous than that accumulated up to that date, and

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probably space considerations alone dictated some selection. The classifications laid out by Mr. Moore are quite faithfully followed, as well as the scholarly methods of full recitals of fact which Mr. Moore inaugurated. Although the material was largely gathered and classified by devoted assistants, Mr. Hackworth has personally supervised and revised all newly composed material and assured himself that the extracts presented an intelligible picture of the case, the respective contentions and the final result.

In subject-matter, the material in these first eight chapters covers international law in general, states and governments, recognition, acquisition of territory and sovereignty, national jurisdiction and territorial limits, including water domain and contiguous seas, the legal effects of national jurisdiction, exemptions from territorial jurisdiction, including asylum, and the high seas and interoceanic canals.

Access to the material is aided by side-hearings, and each document carries a reference to the original source. Extracts or digests from opinions of courts occupy considerable space. The work includes reports of arbitral decisions and extracts from the report of the United States Agent. Matter from the Foreign Relations, already accessible, and extracts from treatises are not excessively reprinted. Perhaps more of the original views of authorities printed in legal periodicals and not readily available might have been preferable to extracts from well-known text-books. The summaries of long dispatches and the new matter connecting quotations from original source material have apparently been prepared with exceptional care and the treaty material seems to have been well selected to convey an idea of modern practice. Considered judgments on the merits of special chapters are difficult to express until time affords a better opportunity actually to use the material in practice or study; but from what has been examined it is evident that a serious effort has been made to continue the scholarly, scientific standards set by Moore's *Digest*. The work is a great credit to the learned editor, a man of excellent judgment and balance and long experience in the Department of State, to the assistant editors and to the United States.

EDWIN BORCHARD †

ARGUMENT FROM ROMAN LAW IN POLITICAL THOUGHT, 1200-1600. By Myron Piper Gilmore. (Harvard Historical Monographs, XV) Cambridge: Harvard University Press, 1941. Pp. 148. \$2.00.

THERE is a growing realization among historians of political and legal thought that the influence of Roman law in the Middle Ages and even in the sixteenth century, the period of the rise of the national state and monarchic centralization, was more that of constitutional limitations on the power of

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the prince than of justifications of royal absolutism. In this book, the specific influence of Roman law on the theory of the distinction between the power of the prince and the magistrates' right to office, between public power and private property, is studied carefully and penetratingly by Dr. Gilmore. He traces the history of the interpretations of *merum imperium* (as discussed by Papinian and Ulpian) from about 1200 to 1600, showing how the Roman law was adapted first to medieval feudal society and later to the national state.

Among the glossators and post glossators the dominant interpretation, from Azo to Bartolus, fitted *merum imperium* into a society in which public authority was shared, in hierarchic degree, by all magistrates from emperor to the lowest officer having "ordinary jurisdiction". This *imperium* was chiefly jurisdiction, though Bartolus included the right to found law in the highest degree of *merum imperium*. This hierarchy of jurisdiction reflected the fact that public power was not separated from private property; the magistracy had some proprietary right to the powers.

In the sixteenth century French humanists were in conflict with the Bartolists. They generally were opposed to the idea that magistrates had a proprietary right in the *merum imperium*. The magistrates exercised it, while the right to it resided in the prince (Alciatus). The public power, vested in the prince, was dissociated from private proprietary right; the prince was absolute in the sphere of administration and limited in the sphere of the private common law (as in medieval theory). But the prince's *merum imperium* was that of high criminal jurisdiction rather than legislation, which, however, was reserved to the prince as a faculty. Dumoulin exalted the royal power still further, and emphasized the making of law; in theory, the magistrates had no proprietary right in their offices.

Bodin denied that magistrates could share with the prince in the *summum imperium*, which becomes sovereignty. But if Bodin substituted the concept of sovereignty for that of supreme jurisdiction, and if Loyseau distinguished public power from private property, this was not synonymous with a theory of absolutism. For even if the king alone possessed the *merum imperium*, the French magistracy did have some sort of right in offices; and thus the magistracy limited royal absolutism.

Thus does Gilmore show how the Roman law on this point, as on others, was one of the forces that limited the power of the prince up to the end of the sixteenth century. Dr. Gilmore would admit that this and other influences of Roman law on political theory need further study in relation to the papal *plenitudo potestatis*; to the Roman theory of consent in private law and its limitation of the power of the prince; and to the Romano-medieval idea that the prince, as highest judge, in effect "legislated" as judge by interpreting as well as by founding the law. It is perhaps not wise to distinguish too clearly between jurisdiction and administration, or between jurisdiction and legislation in the fourteenth century monarchy (Bartolus is not an expert on French kingship). Further, by his powers of dispensing and interpreting, the prince (if not the Emperor) sometimes had more prerogative than the

Bartolists would allow in their discussions of *imperium* alone. But for what it is intended, this is a cautious, thoughtful and praiseworthy study.

GAINES POST†

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**Erratum:** "The Regulation of Stock Exchange Members", reviewed at page 884 of the March issue of the YALE LAW JOURNAL, was published by the Columbia University Press and not, as the review stated, by the New York University Press.