

REVIEWS

BEHIND THE SILKEN CURTAIN. By Bartley C. Crum. New York: Simon and Shuster, 1947. Pp. 297.

PALESTINE MISSION. By Richard Crossman. New York and London: Harper and Bros., 1947. Pp. 205.

IN the long and dreary record of what the world has done to the Jews who live and die in it, these two little books will be a sketchy footnote. As an explanation of the predetermined fate of the ill-starred Anglo-American Committee of Inquiry, they unfold a tragic tale of hypocrisy and power politics with minor overtones of sincerity and disillusionment.

The Committee itself was a brief episode in post-war Palestine history, with little relation to what had preceded or has followed it. It was a straw at which a harried Labor Government grasped in a desperate effort to gain time. Time for what? Committed up to its neck with regard to Palestine by promises it found impossible to keep, the Labor Party had but one program—to stall just for time itself. So far as Mr. Bevin was concerned, his policy appeared to be one of improvisation, for which he had decided talents. Since 1939, the White Paper had been a festering sore in Britain's Middle East policy: there was the Arab disaffection during the war, British interest in the oil of Iraq, trouble in India and Egypt, and increasing violence in Palestine. Mr. Attlee could no more afford to preside over the liquidation of the British Empire than could his predecessor, nor had he any more intention of voluntarily doing so.

But the White Paper was a plain repudiation of the League of Nations Mandate for the execution of which Great Britain was responsible as the Mandatory power. Moreover, the United States might be regarded as having a legal as well as a political interest in the Mandatory's performance inasmuch as the Convention of 1924 in substance made this government one of the principals to which Britain was accountable for the discharge of her responsibilities. The rising resentment in America and the enormous increase of Zionist sympathy after the war had needed the President into making a public demand for the immediate admission of 100,000 Jewish refugees into Palestine. Mr. Attlee's proposal for a joint committee to investigate the facts, perfectly well known to both governments, had the certain advantage of gaining time and the possible one of involving the American Government in the Mandatory's responsibilities. Mr. Attlee and Mr. Bevin were also thoroughly sensitive to the stake which American aviation and oil interests had in the Middle East. Mr. Truman, having made his demand for the 100,000 in a loud voice, agreed to the British dilatory proposal in a soft one.

Both Crum and Crossman tell vividly the story of law, morality and justice caught in a network of imperialist aspirations of three great world powers, the story of a great humanitarian ideal smothered by the ruthless force of

dollar diplomacy. Here is the living tale of a dead issue—the issue of justice for Palestine and the thousands of European Jews whose sole passion in what is left of life is to exercise their legal right to go to Palestine. A timid President and perfidious State Department¹ on the one hand, a desperate Foreign Minister with a savagely anti-Jewish Colonial Office on the other, have probably ended forever the chances for a just solution of the problem.

Both books follow the same pattern. They outline in chronological order the Committee hearings in Washington and London, recount experiences of the Committee members in Europe, Cairo, Jerusalem, and finally Lausanne where the report was drafted. Crum's book is definitely pro-Zionist, Crossman's pro-Arabic. In spite of the difference in bias, both believe that the practical solution is partition, a recommendation which the Committee itself would not endorse. Both writers are realistic and see the human problem against its sordid background of politics, oil, and a disintegrating empire, with this difference—it is Crossman's empire that is going to pieces.

From Crum's book one obtains a sharp impression of a conscientious and sincere man striving to think his way through the tangled intrigue and cunning propaganda which has so enveloped Palestine as almost to obscure the real issues concerning that unhappy land. Here also is the acute pain and disappointment which accompanied rejection by two governments of the unanimous recommendations of a group of distinguished citizens of both countries who devoted four months of their lives attempting to solve one of the world's toughest problems. There is something of the same feeling about Crossman's book although, in spite of the Foreign Minister's commitment to do everything in his power to carry out a unanimous report, there were fewer illusions among the British members about the good faith of either government than on the part of the American members of the group.

Crum accepts the water-tight legal and moral case of the Jews and sees through the synthetic opposition of the Arab world. The problem of Palestine, he thinks, has been made unnecessarily complicated. He is convinced that, were it not for the influence of British administrators and the small group of Arab families who act as feudal overloads, Jew and Arab would live and work together in peace. Indeed, despite obstacles created by special interests, they are doing so now. He is confident of the ultimate success of the Jewish experiment in Palestine moderated perhaps by political compromises imposed by other nations. He believes in the formulation of a definite American policy notwithstanding the Committee's failure. Basically this policy must be one of two alternatives: either to support "the forces of reaction who prop up feudalistic regimes in the Arab States" or to back "the progressive

1. Although Crossman appears to accuse President Roosevelt of talking to the Arabs and Jews out of different sides of his mouth (pp. 44-5), Crum attributes the duplicity of American policy to the State Department and appears to have the evidence to support his conclusions (pp. 36-41).

forces in the Middle East."² He believes that "support for the Jewish National Home is the first and logical step to take on the path toward the advancement of a democratic way of life in that area of the world."³

Throughout Crossman's anti-Jewish pages on the other hand there is constant effort to build up the Arabs' phoney case for Palestine. The effort fails as does the case. Indeed, there is no case and for all his pains Crossman cannot produce one. Unlike Crum, he recognizes the contradictions of Zionism; nevertheless, he appears to accept the equally anomalous Arab nationalism and is not troubled by the spectacle of six Arab States acting as spokesman for and identifying their interests with the people who have a genuine and legitimate concern in the political destinies of Palestine.

"Western imperialism" is the Arab charge against the Jew. "The Zionist, the new Jew," says Azzam Pashe, speaking for the Arab League, "wants to dominate and he pretends that he has got a particularly civilizing mission . . . the Arabs simply stand and say 'no.' We are not going to allow ourselves to be controlled either by great nations or small nations or dispersed nations."⁴ "I have no doubt," comments Crossman, "that he had spoken for the whole Arab world. He had put to us an argument which, if it were accepted, would cut away, at a single stroke, the whole Jewish case."⁵

It is not easy to understand how a man with a grasp of the realities of the Middle East should be so impressed with the Arab position. Yet Crossman writes, as he apparently acted on the Committee, with an intelligent sense of the responsibilities which that body had a right to assume were theirs. As an Englishman, it is perhaps understandable that he cannot excuse Jewish leadership for refusing to follow the moderate policy of that other loyal Englishman, Weizmann, who struggled so long to obtain complete collaboration between the Jewish Agency and Great Britain. Crossman also accurately senses the weakness of the Zionist position in failing to make a definite decision either to negotiate in good faith or to resort to all-out revolution together with the Irgun and the Stern Group. Like Crum and the other members of the Committee, Crossman struggled both with his conscience and his colleagues for a unanimous report and thought the results achieved both a palliative to relieve immediate tension and a basis for eventual solution.

The two books together constitute an ironic preface to the appointment of the new international commission to rediscover all over again the matters reported by the Crum-Crossman group. In the meantime, as the Committee's report is filed along with many other similar reports, the small remaining segment of European Jewry can prepare to face another winter in the camps which Hitler invented while Palestine still waits for peace.

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2. P. 291.

3. *Ibid.*

4. P. 110.

5. *Ibid.*

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TAXATION FOR PROSPERITY. By Randolph E. Paul. Indianapolis: The Bobbs-Merrill Company, 1947. Pp. 448. \$4.00.

AGENDA FOR PROGRESSIVE TAXATION. By William Vickrey. New York: The Ronald Press Company, 1947. Pp. 496. \$4.75.

THE notion that taxation can have any other than an inverse relation to prosperity or that it should be made more, rather than less, progressive may not enjoy legislative favor today, but it nevertheless—indeed, for that very reason—desperately needs spokesmen. Randolph Paul's *Taxation for Prosperity* and William Vickrey's *Agenda for Progressive Taxation* go far toward answering that need. Mr. Paul, drawing on his experience as practitioner, public servant, writer, and teacher, gives us, along with a useful account of recent tax history, a vigorous and popular statement of how we can tax for prosperity, while Mr. Vickrey, writing more for the technician, details the reforms that are urgently needed to prevent dissipation of the progressive aspect of our tax structure, and advances in addition an alternative system of taxing income and inheritance which lawyers and economists will want to study carefully. Together the books could be a sound corrective to the growing fever for such anti-progressive steps as sharp cuts in individual surtax rates (without raising the pitifully low exemptions or materially reducing the initial rates), elimination of the tax on capital gains, abandonment of federal gift and estate taxation, and granting other relief to those who least need it. Such a corrective is especially necessary now that the chairman of the House Ways and Means Committee has appointed a tax advisory group which, however eminent and fair-minded its members may be, is not representative of the public. Its appointment is an unexplained break with established practice: Committees of Congress ordinarily offer interested persons and groups an opportunity to present their views as advocate-witnesses, but depend on their staffs to supply the "unbiased analysis" of tax problems which is said to be the assigned task of this advisory group. Since several of the group's members have been associated with the Committee on Postwar Tax Policy, the Twin Cities Tax Plan, and the NAM's Tax Committee, it is especially to be hoped that the views of Paul and Vickrey will receive a hearing.

Paul commences with history, taking as his starting point the polar arguments of Joseph H. Choate and James C. Carter in *Pollock v. United States*, but passing quickly to the "peaceful revolution" wrought in the American fiscal structure by the Sixteenth Amendment. When President Taft proposed the amendment in 1909, many welcomed it as an inexpensive way to appease the insurgent Republicans who had joined with the Democrats to demand a new federal income tax. They must have been first dismayed by the alacrity of Congress and the States in adopting the amendment and then horrified as the individual income tax became our "fiscal beast of burden." Paul sketches the developments of succeeding decades primarily with an eye to executive-legislative jockeying in the tax-making process and with emphasis, quite natu-

rally, on New Deal and wartime developments. Although his review lacks the detail of Ratner's *American Taxation*, it encompasses later years and is a convenient outline for the non-specialist.

But the heart of Paul's book is his sturdy insistence on the affirmative economic role of taxation: "It would be madness to impose taxes for revenue only and with blind disregard for their social and economic consequences. . . . It is the highest function of taxes to accomplish positive social or economic objectives beyond the revenue."¹ Of course few would be so hardy as to deny that taxation affects saving, consumption and other economic patterns, though no doubt there are still those who hope that these effects can be minimized by averting the eye or by calling them "indirect." Paul's contribution is a demand that we bring such results out of the realm of the subconscious or accidental and that we levy taxes not only to raise revenue but also quite deliberately to achieve the community's social and economic goals. "We must first determine our social and economic objectives, and then decide which taxes will lead us to our goals."² The objectives to which Paul would harness taxation are familiar: achievement of full employment and a high level of national income, and the prevention of undue concentration of wealth. To insure full employment, the rates of income and social security taxes must be adjusted so as to curb inflation in one phase of the business cycle, and so as to expand purchasing power and stimulate lagging investment in the other. The function of checking undue concentration of wealth is served by estate and gift taxation and by progressive graduation of the income tax.

Except that the use of taxation as a contra-cyclical force is of recent origin, Paul's thesis is not novel. Throughout our history excise taxes have been levied on commodities which the community has thought—rightly or wrongly—deleterious or dispensable. Many advocates of federal death taxation have desired not so much to raise revenue as to restrict the transmission of "fortunes swollen beyond all healthy limits," to use Theodore Roosevelt's phrase.³ Indeed, some taxes would have been a failure in the eyes of their authors if they had produced *any* revenue; state bank notes and yellow oleomargarine and machine guns prove that a tax can destroy, in fact as well as in rhetoric and even while the Supreme Court sits. Yet despite ample historical buttress for Paul's views, there lingers a feeling that it is morally reprehensible to introduce non-revenue considerations into the tax structure. A recent example is the outcry against the punitive tax treatment of black market prices and of profits made in violation of the anti-trust laws.

Mr. Paul accompanies his credo with a bill of particulars too detailed to summarize. It may be noted in passing that he is not impressed by the assertion that taxing capital gains depresses investment, that he favors more lenient treatment of capital losses, that he would permit the income of closely held

1. Pp. 215-7.

2. P. 217.

3. RATNER, *AMERICAN TAXATION* 260 (1942).

corporations to be reported as though the stockholders were partners, that he would allow larger corporations some credit for distributed earnings and, in recessions, for new capital outlays, that he would meet part of the costs of the social security program by government contribution rather than by payroll taxes, and that he would raise rates, lower exemptions and close loopholes in the federal estate and gift taxes. Specific issues are treated in a broad and nontechnical fashion which will make up in appeal to the general practitioner and interested layman what it loses in precision for the specialist.

Since Paul gives us so much, it is perhaps captious to ask for more. Yet there would have been profit in a fuller discussion of the thorny question of tax incidence and shifting. The awkward fact that a tax is not necessarily borne by the person who pays it threatens every effort to affect behavior (savings, investment, consumption, or whatever) through tax burdens or concessions. So far as the tax or the concession is shifted, the desired end will not materialize. Even if an economic lag results in short-run achievements, it may be that lasting effects will require more frequent and more ample doses of the prescribed medicine. Moreover, Mr. Paul constantly refers to "ability to pay" as a criterion of a fair tax program without indicating how this test—an emotionally satisfying goal in distributing the burden of a tax levied to raise revenue—can be of service when the aim of a tax is, for example, to curb inflation. If a tax is successfully to restrict purchases, must it not look less to the taxpayer's ability to pay than to his propensity to consume? If one is seeking to stimulate investment, should concessions be made to potential investors even though they may be more able to pay taxes than their fellow citizens? Another issue: Beardsley Ruml, never one to boggle at the unorthodox, has gone far beyond Paul to assert that the federal government can finance itself without *any* taxes, and that taxes should be levied *only* for non-revenue purposes. Here again Mr. Paul's views would have been welcomed, and one cannot but regret that he merely dissents without opinion. Despite these omissions, the book is an excellent presentation of forward looking opinions and effectively translates the basic questions of policy into language that all can grasp.

Vickrey has set for himself a task of more modest compass than Paul: the elucidation of "what must be done to weld our progressive tax structure into a consistent, workable system, reasonably free from undesirable repercussions and capable of producing substantial redistribution of income."⁴ Content to let others shape policy, he is concerned largely with techniques for making their decisions effective. This responsibility, never ministerial, has become staggering as higher rates have elicited and rewarded protean ingenuity on the part of taxpayers. Yet Vickrey's book is not innocent of major premises; as the title promises, it is a program for a progressive tax system, though one not hitched to a particular level of rates. We delude ourselves if we look only to

4. P. iii.

nominal rates, without regard to devices by which income can be split among several taxpayers, transmuted into capital gains taxable at lower rates, shifted from one year to another, or realized in non-taxable form. Contrariwise, it is equally fallacious to ignore the extent to which taxpayers with irregular income patterns are unable to recoup losses, depreciation, obsolescence, or other capital impairment when others, perhaps less venturesome, pay no greater taxes although their net worth is undiminished. When taxation is for revenue only, imperfections like these interfere with an equitable distribution of the load; when taxes are designed to achieve fundamental policy objectives, as Paul urges, imperfections have the additional consequence of frustrating the community's aims. It is to such imperfections, technical only in the sense that a carpenter's level or a seaman's compass is technical, that Vickrey addresses himself in painstaking and helpful fashion.

His discussions of imputed income from assets (owner-occupied homes and consumer durables), insurance, depreciation and allied deductions, capital gains and losses, and corporate savings are notably suggestive and, despite a pedantic tendency to treat the trivial as solemnly as the important, deserve a wide audience. But Vickrey goes beyond a program for reform within our present framework to propose a spendings tax to displace in part the familiar income tax, a "cumulative annual averaging" method for assessing either the income or the spendings tax, and a "bequeathing power succession tax" as a substitute for the estate and gift taxes. None of these proposals is easy to understand, and the third in particular is very intricate; moreover, the author's style is sometimes as opaque as the internal revenue regulations, so that one is never sure that he has not misunderstood.

Vickrey's faith in the spendings tax is surprising. Certainly if one subscribes to Paul's view that we should set our sights on a high level of national income, rather than merely on the accumulation of capital, the spendings tax can hardly be commended. As Vickrey himself concedes, a spendings tax would respond less flexibly to changes in the economic outlook than does the income tax and would, moreover, be less effective in curbing the accumulation of large fortunes. As an emergency measure during serious inflation, the spendings tax could be useful, as Secretary Morgenthau unsuccessfully argued before the Senate Finance Committee in 1942, but as a permanent part of our fiscal structure it would be a retrogressive step.

Vickrey's "cumulative annual averaging" method for assessing either the income or the spendings tax is a thorough-going attack on our present system of taxing on the basis of annual accounting periods. Annual accounting notoriously discriminates against persons with fluctuating income; its distortions in this respect are tacitly acknowledged, though only partially corrected, by existing provisions for the averaging of back pay awards and of lump sum compensation, the carry-over of capital losses, and the carry-back and carry-over of net operating losses. Because of the shortcomings of annual accounting, the code has an array of cumbersome artillery to prevent manipula-

tive shifting of income from high to low tax years: rigid depreciation and obsolescence regulations, penalty taxes on personal holding companies and corporations improperly accumulating surplus, disallowance of wash and intra-family sales, and the like. In spite of these anti-shifting weapons, annual accounting still places an undesirable premium on shrewd timing of capital and other transactions. Vickrey wants to avoid these defects by making tax liability independent of the timing of income.

He proposes, in brief, that each year the taxpayer's income be cumulated from the beginning of his averaging period, that a tax be computed for this cumulative total, that the sum of the taxes paid in previous years (with interest) be deducted from the liability so computed, and that the difference be paid as the current tax due. At the end of the averaging period, the taxpayer would account for accrued but unrealized capital gains and losses. The interested reader will find this proposal elaborated with great care and attention to detail. Although it is strewn with complexities, Vickrey may well be on firm ground in asserting that by sweeping away existing intricacies its net result would be simplification. The reader of Paul's book quite properly will ask how cumulative averaging will affect the achievement of desired social objectives through taxation. He will note, for example, that when a taxpayer's income increases abruptly in an inflationary period, averaging will smooth out the hump, so that his tax liability will not advance as fast as his current income. Vickrey believes, however, that the greater equity attainable under averaging will warrant the use of higher rates; unfortunately, his discussion of this crucial issue is meager.

Vickrey's "bequeathing power succession tax" would substitute for the existing estate and gift tax structure a most original plan to insure that "the tax burden [will] be exactly the same on the transfer of a given sum from one individual to another regardless of the number of steps or the channels through which the transfer is effected, and as nearly as may be regardless of the time of the transfer."⁵ It does this by putting inter vivos transfers on the same footing as testamentary transfers, and by graduating the tax not only according to the size of the taxpayer's estate but also according to the difference between his age and the age of his transferee. Thus a transfer from a husband to his wife or another contemporary would be taxed more lightly than a transfer to his son or grandson; moreover, transfers from father to son and later from son to grandson would incur the same total liability as an initial transfer directly to the grandson. The purpose is to create a tax which will truly reach the transmission of wealth by whatever means from one generation to the next. Under the present system, of course, there is not only an unwarranted disparity between inter vivos and testamentary transfers but also a premium on transfers which bestow the income but not the ownership of funds on as many successive transferees, of as widely separated generations,

as practicable. The technique by which Vickrey would achieve his desired end is too elaborate to be discussed or even summarized here, but his effort to create an instrument graduated according to age differences is highly to be commended. Aside from its forbidding intricacy, its main drawback is that, like the existing federal estate tax, it looks to the wealth of the donor rather than to that of the recipient. After all, it is legatees, rather than their dead testators, who are the real taxpayers and who enjoy the concentrated economic control which inheritance taxation seeks to mitigate. Accordingly, a tax increasing as the legatee's receipts (both gifts and bequests) increase would come closer to the social function of inheritance taxation than does any existing system. A stimulating proposal looking in this direction is the "accessions" tax suggested by Rudick in the *Tax Law Review* several years ago. Perhaps Vickrey will be attracted to adapt his age differential scheme to an accessions tax; if the result were not unduly complex, it ought to command widespread interest.

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CASES ON CREDIT TRANSACTIONS. By Wesley A. Sturges. St. Paul, Minn.: West Publishing Co., 1947. Pp. 1020. \$7.50.

A REVIEW of the third edition of Dean Sturges' casebook must necessarily be written for two different groups of potential readers. For one, comprised of persons who are acquainted with the earlier editions, it will suffice merely to report that the new edition is a revised and improved execution of the ideas and methods of its predecessors.¹ These readers will not, in all probability, find the revisions substantial enough to influence opinions already formed concerning the efficacy of this casebook for teaching purposes. A somewhat broader analysis may be warranted, however, for the consideration of persons who are not familiar with the book, and who find themselves, with this reviewer, newly engaged in teaching law courses covered by some or all of the materials in it. A beginner's notions of whether and how to adopt a casebook may have some utility for fellow beginners.

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1. The third edition differs from the second in these respects: 27 text cases added, 30 omitted; 112 text notes and footnotes added (exclusive of those posing new questions), 23 omitted, 57 revised (usually by the addition of citations to recent material); 88 questions added, seven omitted; four excerpts from the Restatement of Security added; three law review extracts added, seven omitted; three statute extracts added, one omitted; two forms and one textbook extract omitted; Uniform Trust Receipts Act added, National Bankruptcy Act and Uniform Real and Chattel Mortgage Acts omitted. The greatest reorganization and revision of material occurs in the sections dealing with insolvency and bankruptcy, mortgages on after-acquired property, and dealers' financing. The present edition, which utilizes larger type, is 79 pages longer than the second edition (exclusive of appendix and index).

Dean Sturges' purposes, methods and organization of material are extensively analyzed in the reviews which greeted the earlier editions.² His collection of materials is offered to focus attention upon business dealings and practices, and to encourage law teachers and students to "deal with commercial law in terms of commercial doings."³ The editor's primary purpose is apparently to educate the creditor's counselor through a comprehensive survey and comparative analysis of the plethora of security devices used in recurring commercial transactions involving the borrowing and lending of money and the purchase and sale of property on credit.⁴ Indeed, one reviewer was so impressed with this aspect of the materials as to suggest that while a student steeped in the lore of Sturges would be "a young man who knows where he is going, and how to get there," he would have to "imbibe [his] ideas of social valuation (if any,) from other courses than the one on credit transactions."⁵

It seems clear, however, that this casebook need not limit so narrowly one's approach to the study of security transactions. Certainly it incorporates material which demonstrates the impossibility of planning transactions so scientifically as to eliminate the factor of judicial predeliction.⁶ Moreover, a number of cases are concerned with the problem of disentangling "homemade" security transactions which would horrify the security counselor.⁷ However this may be, a teacher will probably most closely identify himself with the editor's purpose in attempting thoroughly to familiarize students with the wide variety of ways in which the creditor may seek to secure himself, and encouraging them to utilize the available devices interchangeably as individual situations warrant.

But the law teacher who seeks to employ Dean Sturges' book to produce

2. First edition: Arnold, 31 COL. L. REV. 734 (1931); Donoghue, 15 MARQ. L. REV. 121 (1931); Gess, 19 KY. L. J. 190 (1931); Hanna, 40 YALE L. J. 495 (1931); Hayden, 79 U. OF PA. L. REV. 251 (1930); Hopkins, 1 IDAHO L. J. 204 (1931); Isaacs, 44 HARV. L. REV. 880 (1931); Kidd, 29 MICH. L. REV. 1117 (1931); McLaughlin, 5 TULANE L. REV. 326 (1931); Mechem, 6 WASH. L. REV. 44 (1931); Meriwether, 16 ST. LOUIS L. REV. 183 (1931); Miller, 10 ORE. L. REV. 213 (1931); Patterson, 17 A.B.A.J. 402 (1931); Sayre, 16 IOWA L. REV. 335 (1931).

Second edition: Hanft, 15 TEX. L. REV. 400 (1937); Keefe, 6 FORD. L. REV. 347 (1937); Levi, 12 NOTRE DAME LAW. 468 (1937); Poteat, 23 VA. L. REV. 739 (1937); Ransom, 11 TEMP. L. Q. 452 (1937); Ritchie, 46 YALE L. J. 732 (1937).

3. P. vii.

4. Hanft, Book Review, 15 TEX. L. REV. 400 (1937); Kidd, Book Review, 29 MICH. L. REV. 1117 (1931); Meriwether, Book Review, 16 ST. LOUIS L. REV. 183 (1931); Patterson, Book Review, 17 A.B.A.J. 402 (1931); Ransom, Book Review, 11 TEMP. L. Q. 452 (1937).

5. Patterson, 17 A.B.A.J. 402, 403 (1931).

6. For example, see the cases dealing with sole and unconditional ownership clauses in fire insurance policies, pp. 294, 324, 350.

7. For example, see generally pp. 303-41. One reviewer has suggested, however, that the editor means to encourage the counselor to make even such unorthodox devices part of his stock in trade. Hanft, 15 TEX. L. REV. 400 (1937).

lawyers qualified to participate in the policy-making function of selecting particular security devices for specific purposes will encounter serious difficulty. The editor has provided no information about business practices and problems in relevant fields of commercial activity. Thus, for example, classroom discussion of the comparative utility of the chattel mortgage and the conditional sale for securing the seller of durable consumers' goods must proceed without reference to the impact of each on contemporary business activities. Perhaps when the student is later sitting across the desk from a man who lends money or sells property on credit, he may expect his client to keep these practical considerations in the forefront in policy discussions. This thought offers little solace, however, to the teacher wishing to present a functional analysis of the lawyer's problems arising out of security transactions. He must continue to work in the traditional law school vacuum, and to train mere legal theorists, unless and until he supplements this casebook with his own non-legal information.

Another difficulty in using Dean Sturges' book for its avowed purpose inheres not in the materials themselves, but in the formidable pedagogical problem posed by attempting to conduct a sustained comparative analysis of the security devices considered. While many of the book's numerous provocative questions are designed to aid in this process,⁸ they are not likely to prove wholly adequate. A possible solution may lie in adoption of the problem method as a major teaching vehicle for such a course.⁹ Several problems might be prepared raising the more important questions with which a creditor's lawyer should be concerned in the simpler security transactions—*e.g.* rights against third parties, procedures for realizing upon the security, etc. As each of the several security devices is considered, class discussion could work out answers and solutions, which in turn could be compared with those developed in other parts of the course. Such comparative analysis, brought to bear on a few familiar concrete problems, might at least indicate to the student the techniques which can be expected to serve him well in practice.

It may be doubted that a teacher could hope with his first classes to realize the vast teaching potentialities of this casebook and the method it espouses. Even failing, he can hope to do a better than average teaching job. The challenge which Dean Sturges presents is worthy of any law teacher's mettle.

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8. See, for example, questions in the footnotes on pp. 116, 345, 507, 705, 790.

9. See the Report of the Committee on Teaching and Examination Methods, *HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS* 85, 86-90 (1942).

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THE LIMITIST. By Fred I. Raymond. New York: W. W. Norton & Company, Inc., 1947. Pp. 166. \$2.00.

IN this little book the author argues the best way to cope with the dual problem of monopoly and extensive concentration of economic power—a problem he regards as acute—is to place a precise limit on the size of economic enterprises. Hence, the title *The Limitist*. (Limitists don't believe in "reasonable" speed limits. They believe in fixed maximum speed limits.)

The author then goes further, much further, and by means of two rough-draft statutes prescribes precise limits to control the maximum size of business and industrial enterprises on one hand and enterprises engaged in producing agricultural products on the other. For business and industrial enterprises the limit used is the number of employees. One thousand employees is the general limit for enterprises "which deliver to purchasers at more than one point of delivery." An enterprise which has only one point of delivery ("considered to include actual points which are separated from each other by more than ten miles") and not jointly owned with others would be free from a limit on size "so that mass production could be carried on without limit and without interference." Thus, the limit applies to other than local chains or groups of business enterprises under common ownership.

For agriculture, less precise, or at any rate, less enduring limits would be set by production quotas, to be determined by the federal Department of Agriculture and validated by act of Congress. As I understand them, these quotas would fix maximum limits on the amounts of production to be assigned to each individual farm and thus block at a set limit the growth of large-scale corporate farming. The quotas would, in turn, be so geared that when multiplied by the number of farm operations covered they would assure the "desired total production" of the products in question.

Please do not ask me just what the "desired total production" means and I have a suspicion that Mr. Raymond would prefer not to be asked either. But the general idea seems to be that it would be a volume of production of farm products covered by the quota which would assure fair prices, contented small farmers, and happy urban consumers. In the field of farming the concept seems somewhat analogous to the notion of full employment Professor A. G. B. Fisher of the Royal Institute of International Affairs in London presents in his book, *International Implications of Full Employment*,—i.e., a level of unemployment which will not "provoke an inconvenient restlessness among the electorate."

It would, I believe, be rather a simple matter to poke large holes in Mr. Raymond's limitist formulas. For agriculture particularly the plan seems to be one which in the process of getting rid of a not very staggering degree of "big business" among producers, would introduce a myriad of tortuously complicated controls to be managed by big government. As such, the plan seems to me to have no palpable merit; and before he gets through thinking

about it I wouldn't be surprised if Mr. Raymond comes to much the same conclusion.

The absolute one-thousand employee lid on all except local business enterprises (utilities are exempted) also readily lends itself to attack as arbitrary and neglectful of the dictates of economic reason. Apart, however, from involving what would be some terrible complicated corporate unscrambling operations it does present a simple, clear-cut and readily understandable remedy for what many sensible people believe to be grave dangers inherent in tremendous corporate size.

I think there is a way to work out a much better solution than Mr. Raymond proposes. That is to apply intensively the arts of economic investigation and analysis (probably developing some new ones along the way) to the problems of determining with some degree of precision, case by case and industry by industry, the relationships between corporate and industrial bulk and economic efficiency. Most economists, however, when it is suggested that they dig into that problem, take to the tall timber, muttering something about "competition takes care of that" as they depart, and not noting that competition may also have largely departed in the industries under consideration.

So long as we persist in our ignorance of the precise economic significance of corporate and industrial size, we have the choice of taking chances on the social and political dangers which enormous size introduces, or striking them down with some such meat axe device as that proposed by Mr. Raymond. And the chances of being able to cope at all effectively with the dangers decline as they continue to be ignored. Seen in that perspective his plan looks rather different than it might against a rich background of economic knowledge which does not now exist.

The jacket of *The Limitist* states that it "presents a practical solution to the problems raised by Brandeis, Belloc, and others unwilling to believe that giantism is the mark of industrial efficiency or economic justice." Hence, it is perhaps primarily in that dimension—as a solution—that the author would have it judged. I suspect, however, that some of the more significant parts of the book are those which analyze the growth of giant business enterprise and some of its major causes. In this connection, I was particularly interested in the discussion of taxation as a contributor to "giantism," and in the discriminating observations about the effect of the antitrust laws and their administration in maintaining equality among giants.

Contrary to the jacket, I do not believe that *The Limitist* has found the solution for the problems to which it is addressed. However, I respect it for taking a broad swing at them and in the course of doing so presenting a number of interesting ideas in consistently lucid prose—a relatively rare attribute of books concerned with this subject matter. In fact, between being an ostrich and a limitist, I would prefer to be a limitist. However, I would like to avoid being either one.

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THE NÜRNBERG CASE. By Robert H. Jackson. New York: Alfred A. Knopf, 1947. Pp. 269. \$3.00.

THIS second book on the Nürnberg trials by the Chief of Counsel for the United States, like his earlier one,¹ is primarily a collection of documents bearing on the proceeding. Some of the materials contained in the first—the text of the Four Power Agreement, the Charter of the International Tribunal, and Mr. Jackson's opening statement—are here republished. In addition, this volume contains his Report to the President of June 7, 1945, his argument to the court on the legal basis for treating Nazi organizations as criminal, his closing address, and excerpts from the cross-examination of defendants Hermann Göring, Hjalmar Schacht, Albert Speer and Erhard Milch.

The negotiations which culminated in the indictment of the top Nazi leaders and organizations as war criminals, and some of the highlights of the trial, are reviewed in an eighteen page preface. Reconciliation of the conflicting legal philosophies of the four signatory nations presented some interesting difficulties. Justice Jackson tells us, for example:

“. . . It was something of a shock to me to hear the Russian delegation object to our Anglo-American practice as not fair to a defendant. The point of the observation was this: We indict merely by charging the crime in general terms and then we produce the evidence at the trial. Their method requires that the defendant be given, as part of the indictment, all evidence to be used against him—both documents and the statements of witnesses. . . . So, while we may think that Continental procedure puts too much burden of proof on the defendants, the Anglo-American method seems unfair to them because it does not inform a defendant of the whole evidence against him. When we produce it at the trial it may cause surprise and become known too late to be answered adequately. Our method, it is said, makes a criminal trial something of a game. This criticism is certainly not irrational.”²

The procedure adopted in the Charter of the Court was prescribed in relatively general terms. It required counsel for defendants, and laid down the conditions of a fair hearing. Rules of evidence were flexible, the provision being that any testimony deemed to have probative value be heard. Of the judges' rulings in the course of trial the author observes: “It is notable that while there were differences of opinion among them at times, solutions were found always sufficiently acceptable from the viewpoint of all systems of law so that no member ever publicly dissented in a matter of procedure or evidence.”³

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1. THE CASE AGAINST THE NAZI WAR CRIMINALS (1946).
 2. THE NÜRNBERG CASE, vi-vii.
 3. *Id.*, vii.

The United States prosecuting staff carried the burden of establishing the charge in Count One of a Nazi conspiracy to seize power, establish a totalitarian regime, prepare and wage a war of aggression. Witnesses were used sparingly, the case resting chiefly on about 4,000 captured documents, selected from over 100,000. At least one defendant indicated a willingness to give evidence against his co-defendants in return for an agreement that in the event of conviction he would be shot rather than hanged, but the proposition was rejected. Justice Jackson's explanation affords an interesting contrast to the tolerated domestic practice of rewarding those who turn State's evidence and betray their accomplices:

“. . . My primary objection to using testimony of some defendants to convict others was that such testimony always would carry the odor of a bargain. It always would be suspect. . . .”⁴

All in all, these “first international Criminal Assizes in history” consumed 216 days of trial time. The prosecutors for the four powers called 33 witnesses in addition to the documentary, photographic and motion picture exhibits. The defendants called 61 witnesses and used interrogatories answered by 143 more. Nineteen of the defendants took the stand. All save Schacht, von Papen and Fritsche were convicted. Four Nazi organizations—the Leadership Corps of the Nazi Party, the *Schutzstaffeln* or SS, the *Sicherheitsdienst* or SD, and the Gestapo—were likewise adjudicated criminal in character. The Court declined, however, so to find with respect to the *Sturmabteilungen* or SA, the Reichscabinet, the General Staff and the High Command. The Soviet member of the Court dissented from the acquittal of the three individuals and the failure to find the General Staff and High Command criminal.

In his final report to the President on October 7, 1946, Justice Jackson recognized that “We are too close to the trial to appraise its long-range effects.”⁵ The hope was that the Four Power Agreement and ensuing judicial proceedings had “. . . made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.”⁶ Certainly the judgment of the Tribunal constituted a precedent, with sanctions.

There has been little criticism of the kinds of sanctions applied. Most of the convicted individuals were sentenced to hang, and the remainder received

4. *Id.*, ix.

5. *Id.*, xiv.

6. *Id.*, xiv-xv.

long *fixed* terms of imprisonment. Belief in the efficacy of either type of sentence to advance the ends of justice in the more familiar contexts of domestic administration of criminal law and frequency of resort to them has, of course, been declining in many countries including Great Britain and the United States during recent years. But neither of those forms of sanction had been completely eliminated from the municipal law of the four participating powers—or, for that matter, from German law—as of the time in question. In this situation it was probably inevitable that such sanctions should be applied.⁷

Debate since⁸ as well as before⁹ the event has centered instead on the character and significance of the precedent. To call the norms by which the defendants were held accountable law and to designate their conduct criminal in the technical sense has impressed some as a weakening departure from Western democratic principles of *nulla poena sine lege* and *ex post facto*.¹⁰ Basically, the question is whether the norms applied at Nürnberg were less crystallized or less widely understood ingredients of the mores of the international community, or otherwise significantly different from “the developing morality of their age” from which Anglo-American judges have been accustomed to derive and apply principles of municipal law in adjudicating issues unresolved by legislation. A most thorough exploration of this question with specific reference to Nürnberg has been published by Professor Glueck.¹¹ Supporting in final analysis the legality of the proceedings held at Nürnberg, I find it persuasive. Count One of the indictment, dealing with conspiracy to wage an aggressive war, obviously presents some of the closest questions. Its wisdom and the ultimate verdict of legal history will no doubt depend on the extent of achievement of other international ventures now and in the future. As these work for or against the development of international order under law they will reinforce or undermine the rationale on which the Nürnberg judgments rest.

GEORGE H. DESSION†

7. Cf. discussion of punishment and correction in C. XI of GLUECK, *WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT* (1944).

8. See Biddle, *Report to the President*, 15 DEF'T STATE BULL. 954 (1946); Fite, *The Nürnberg Judgment: A Summary* 16 *id.* 9 (1947); Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396 (1946); Wyzanski, *Nuremberg in Retrospect*, 178 ATL. MONTHLY 56 (Dec. 1946).

9. The various points of view are analyzed in GLUECK, *op. cit. supra* note 7. See also the imaginative treatment of the problem in RADIN, *THE DAY OF RECKONING* (1943). The original Soviet point of view was elaborated in TRAININ, *HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW* (1944).

10. See, e.g., the criticism by Senator Taft reported in N. Y. Times, Oct. 6, 1946, § 1, p. 1, col. 4 and Wyzanski, *Dangerous Precedent*, 177 ATL. MONTHLY 60 (April, 1946). For an extended analysis of the meaning and policy of the *nulla poena* and *ex post facto* principles in our law see HALL, *PRINCIPLES OF CRIMINAL LAW* C. 2 (1947).

11. GLUECK, *op. cit. supra* note 7.

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ECONOMICS OF PUBLIC UTILITIES. By Emery Troxel. New York: Rinehart and Co., 1947. Pp. xiv, 892. \$5.75.

THE present volume, although written as a text for college courses in public utility economics, should be of interest to lawyers and administrators as well as economists. Because of the highly developed controls to which our utility industries have been subjected, a study of public utilities affords an excellent opportunity to study the interaction of economics, politics, administration and law in a society of private property and private enterprise.

Because of its coverage and emphasis this volume is distinctive in its field. It discusses most of the problems traditionally included in standard texts with the exception of the public relations and propaganda activities of the utilities. To this and the allied problem of the relationship between utility and legislature little attention is given. The book emphasizes the traditional utilities—water, urban transportation, gas, electric and telephone—but it also includes a chapter on radio broadcasting which presents “socially important problems of service control.”¹ Its uniqueness lies principally in three directions: (1) its emphasis on the relation of earnings control to investment and its deemphasis of valuation, (2) its attention to control of the price structure of utilities, and (3) its concern with problems of multiple-purpose projects. The discussion of price structures includes several chapters on differential pricing and discrimination, a chapter on proposals for marginal-cost pricing, another chapter on proposals for cyclical flexibility of utility prices, and finally a comparison of the theory and practice of pricing by privately owned and publicly owned utilities. The discussion of multiple-purpose projects, covering four chapters or about 12% of the volume, is one of the best sections of the book.

The author has shown admirable judgment and balance in his treatment of the various topics. He has taken considerable care to develop various points of view on controversial issues and to consider their merits in terms of economic, political, administrative and legal problems. Nowhere is this better illustrated than in his treatment of public ownership, for which he indicates something of a preference.²

The author believes that regulation of our utilities has been hampered from the time of *Smythe v. Ames*³ by undue judicial concern with fair value. But he has hope for more successful regulation in the wake of the *Hope* decision.⁴ “At least it [the Supreme Court] centers attention on the primary question of reasonable earnings rather than reasonable property values, and is in a good position to reorient commission behavior in future decisions.” He warns, however, that “our society still is so attached to private property values that

1. P. vii.

2. Pp. vii-ix.

3. 169 U. S. 466 (1898).

4. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

the Court may not be able to keep away from them as further cases come to it."⁵

In the regulation of utilities earnings the author believes more attention should be given to the relation between earnings and investment decisions. He urges that in setting rates the commissions give greater attention to future changes in consumer demand and operating costs rather than concentrating as they do at present on consideration of current and historical costs. Moreover, he thinks it desirable to develop a method for continuous control of earnings which will "turn excess past returns into current price reductions and make up deficiencies in past returns with current price increases. . . . Under these conditions a decision of a commissioner, involving either a price increase or a price reduction, is not final; it is subject to reconsideration as the earnings experiences of the company unfold in the future."⁶ Nowhere does the author consider at length the effect of this or other proposals upon incentives for efficiency on the part of corporate managers. Yet, inefficiency in the control of operating costs may contribute more to inflated prices than substantial increases in the earnings rate.

The author gives considerable attention to utility price structures. This is a healthy emphasis. In our regulation we have been concerned too much with insuring absence of excessive earnings and too little with the effects of prices on inducing efficiency and allocating our resources. The author believes that although the companies are not interested in the social effects of their price structures, the commissions should be.⁷ However, the initiative in developing price structures has been left to management. "Commissions usually avoid puzzling relationships of reasonable earnings and prices, particularly the relationships of earnings and demand behaviour and alternative choices of price structures. . . . Controlled by businessmen, the price differentials were based on private rather than social considerations. Commissions had many chances to revise these price structures. . . . The regulators neglected this opportunity."⁸

In his discussion of proposals to establish prices by equating marginal cost with price the author notes that while such proposals represent a social standard of pricing, they have the serious defect of failing to stimulate private investment in a private enterprise economy.⁹ Moreover, adoption of such a scheme is impeded by the problem of measuring marginal costs, by the judicial concept of reasonable price control, and by the interest of utility commissioners in simple and understandable methods of control. For public plants he believes that marginal-cost pricing has more to recommend it. However, because of political dangers and resistance of "matter-of-fact" administrators,

5. P. 284.

6. P. 397.

7. P. 643.

8. Pp. 532-4.

9. Pp. 458-9.

"marginal-cost pricing is only another idea of economists that has no political significance and no evident prospect of political acceptance."¹⁰

While the author recognizes that legislatures and courts are in part to blame for the ineffectiveness of our systems of control, he places much of the blame on the commissioners themselves, especially those of the states. "Practicing the practical art of politics, the state commissioners are conservative administrators; they rely on hard facts and old methods of control. . . . they seem usually to manage the control in a clerical and opportunistic manner. . . ."¹¹ With the gradual extension of federal controls, however, he foresees increasingly effective regulation.

One unique aspect of this volume is the use of tools of modern economic analysis. I share the author's belief that more effective regulation depends upon greater understanding of economic issues and that the tools of modern economic analysis can help increase this understanding. However, I believe that in his use of these economic tools to illuminate the problems concerned the author is least successful. The tools must be sharpened more keenly and given statistical content before either students, administrators or lawyers are likely to be convinced or enlightened.

The discussion of the economics of price differentials is a striking example of the problem. Much confusion arises from the author's failure to distinguish between alternative services and truly joint services produced from common resources, and a parallel failure to distinguish between costs common to alternative services, which can be allocated, and joint-costs of truly joint services, which cannot be allocated on any defensible economic basis. The author, in fact, rejects the notion of truly joint services and joint-costs as not being applicable to utilities.¹² Moreover, he proceeds to use the term joint-costs to refer to cases of true joint-costs (off-peak services) and to common costs of alternative services. A theoretical analysis of costs for utility purposes, even on static assumptions, must provide at least for a classification of costs into common, joint and specific and for a subclassification of overhead and variable. I should also like to urge the need for statistical study of the costs of utilities under modern conditions. Much discussion of regulatory problems proceeds on the assumption that most firms are operating under decreasing unit costs. The evidence for this seems scanty.¹³

Likewise, the author's distinction between discriminatory and non-discriminatory price differentials is far from adequate. He apparently defines discriminatory differentials as those which are determined by differences in buyer demands, and non-discriminatory differentials as those due to differ-

10. P. 761.

11. P. 791.

12. P. 537.

13. Much discussion of the problems of railroads has also proceeded on a similar assumption. This assumption has recently been seriously challenged. Cf. HEALY, *THE ECONOMICS OF TRANSPORTATION 197-3* (1940).

ences in service costs.¹⁴ It is a familiar proposition that an unregulated price of a manufacturing industry will normally be determined by both demand and cost, or more specifically by marginal revenue and marginal cost. Discriminatory prices are no exception.¹⁵ In technical terms discrimination means some difference in the degree of monopoly power exercised in different sales.¹⁶ It is not true to say that costs do not enter into a seller's calculation in setting discriminatory prices. Likewise in the case of truly joint products there may be, even in the absence of any monopoly elements, price differentials resulting from differences in demand. Such differentials would not ordinarily be considered discriminatory, although the author's definition suggests that they are.

Other questions might be raised concerning the treatment of the theory of marginal-cost pricing. While I do not disagree with the author's conclusions concerning the inappropriateness of the proposal as a guide for regulating privately owned utilities, I do not believe he has represented the theory adequately. He points out correctly that the problem is complicated by the question of whether to consider the plant as given or as variable, and consequently whether to operate with long-run or short-run marginal cost.¹⁷ He then proceeds to assume that the plant is given and the regulatory authority operates on short-run marginal cost. I venture the opinion that this is not what the proponents of marginal-cost pricing have in mind. Marginal-cost pricing is a derivative of static analysis in which the problem of the difference between the long-run and short-run marginal cost does not arise. This has without doubt given rise to considerable confusion. However, the purpose of the proponents of marginal-cost pricing is the ideal allocation of resources, plant and equipment as well as materials and labor.

These examples will serve to illustrate the difficulties arising from the use of the tools of modern economic analysis for solution of regulatory problems in the present volume. In part the difficulty arises from trying to transfer an analysis and geometry applicable to a single service firm to a multiple service firm. In part it arises from inadequate definition and classification of costs on a theoretical level. Finally, it arises from an attempt to apply a pricing theory, adequate to deal with problems under static conditions, to dynamic conditions. The first two of these sources of difficulty can be solved by applying more adequate tools which are at hand. The solution to the third source of difficulty is not so clear.

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14. P. 570.

15. See ROBINSON, *ECONOMICS OF IMPERFECT COMPETITION* C. 15 (1933); BOULDING, *ECONOMIC ANALYSIS* 540-6 (1941).

16. See MILLER, *UNFAIR COMPETITION* 122-5 (1941).

17. Pp. 447-8.

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