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BOOK REVIEWS

MILITARY JUSTICE UNDER THE UNIFORM CODE. By James Snedeker. Boston: Little, Brown and Company, 1953. $15.00.*

Although characterized in the author's preface as an "outline sketch of the substantive and procedural military law," *Military Justice Under the Uniform Code* neglects neither the background nor the border areas of that outline, and is, in scope, undoubtedly the most comprehensive text on military justice published in recent years. Divided into the three parts familiar to students of military justice, it treats as separately as practicable of the constitutional and statutory background of United States military justice, the procedural provisions of the Uniform Code of Military Justice, and the specific provisions of the several punitive Articles.

Part I, "The Background of United States Military Justice" explores generally the constitutional provisions from which federal military justice legislation must be derived, and reviews briefly the history of earlier military justice statutes enacted by the Congress within that framework. Constitutional problems—and particularly those traditionally disputed — will, of course, never be authoritatively resolved by text writers, but General Snedeker's conclusions in these matters are worthy of consideration. A point of general interest emphasized here is that the Congress, although it may at times have passed beyond proper bounds in particular matters, has never wholly utilized the full scope of its constitutional authority in this field: many matters now and in the past wisely excluded by statute from the cognizance of military tribunals can constitutionally be handled within the military and, in other times and conditions, might be so treated. Pursuing the constitutional theme, this part of the work concludes with a discussion of the question whether courts-martial are, functionally, merely disciplinary agencies of commanders or truly judicial bodies, and the author concludes, properly I believe, that courts-martial are intended to be courts of justice in the fullest sense. The author takes cognizance of a popular confusion of the nature and functions of courts-martial with their organizational position in the constitutional separation of powers. Arguments which properly support the doctrine that courts-martial are not "constitutional courts" created by Article III of the Constitution *have* on occasion been improperly used to support the *nonsequitur* that they were therefore less than judicial in function. General Snedeker's discussion should dispel any lingering doubt the reader might have of the truly judicial nature of the American court-martial's acts and determinations.

* For a biographical sketch of General Snedeker, see p. 288 *supra*.

The remaining Parts of the work, comprising its main body, are devoted to the operation of the present Uniform Code of Military Justice[1] and the *Manual for Courts-Martial, United States, 1951.* The procedural subdivision is so organized as to correspond closely to the comparable provisions of the *Manual.* The substantive offenses are grouped in a novel but appropriate scheme according to their general nature, and are severally discussed in detail. This portion of the work is drawn for the most part from the *Manual,* liberally supplemented by matters of general criminal law not presented at length there, illustrative citations and the author's own comments and conclusions.

As is perhaps inevitable in a treatise of such magnitude, the main portion of the book presents certain difficulties that cannot be overlooked. The author has indicated that these Parts were written, in point of time, after the Uniform Code and the new *Manual* were published but before their interpretation by the Boards of Review and the United States Court of Military Appeals had really begun. No reference is made, therefore, to the very substantial body of case law already developed by the Court of Military Appeals and the four armed services.[2] The law is presented as it then might have appeared to a lawyer with considerable military justice experience under the Articles for the Government of the Navy, and there is an occasional failure to correlate the various provisions of the Code and of the *Manual.*[3] It is now rather late for such an approach, and as a result portions of the work are already out of date. By way of example, the very last section of the book, which deals with the offense of "negligent homicide," appears to coincide with certain decisions reached under the Articles for the Government of the Navy. However, the Court of Military Appeals, in effect adhering to the views of the Army and Air Force under both the Articles of War and the Uniform Code, has already rejected the application of this Navy law to the Uniform Code, and has over-

1. 64 STAT. 108-145 (1950), 50 U.S.C.A. §§ 551-736 (1951).

2. During the first year of the Uniform Code's operation, 12,797 cases were decided by the Boards of Review of the Army, Navy, Coast Guard and Air Force, and 814 of these were forwarded to the Court of Military Appeals for further review. ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND JUDGE ADVOCATES GENERAL (1952). At the present time, decisions of the Boards of Review of the four services and of the United States Court of Military Appeals are published in four volumes, and editorial work is being completed on decisions to constitute volumes 5 and 6, the advance copies of the decisions to be printed in such volumes having already been disseminated.

3. The author observes (§ 305d) that hard labor without confinement is not an authorized punishment under the Code, and that hard labor may not be required of a prisoner before conviction. Although hard labor without confinement is not, under Article 15, a specifically authorized disciplinary punishment imposable by a commanding officer without trial, it is expressly recognized in the Code as a punishment that may be adjudged by courts-martial. UCMJ Arts. 19, 20, 50 U.S.C.A. §§ 579, 580 (1951); MCM 1951, ¶¶ 15b, 16b, 126k, 127c. An unsentenced prisoner whose normal military status makes him amenable to such tasks, as a private, may be required to perform hard labor as a part of his duty, but not as a punitive measure. UCMJ Art. 13, 50 U.S.C.A. § 567 (1951); MCM 1951, ¶ 18b (3). And compare § 1005g of the text.

turned virtually every major point made in the author's discussion.[4] This same section illustrates another difficulty with the work — the author's understandable but rather general tendency to rely too heavily upon Navy precedent as representative of all the services, even though in some cases the practice in other services has been quite converse. Thus he states that an enlisted person sentenced to punitive discharge and confinement usually serves his sentence to confinement before the discharge is executed.[5] This appears to represent Navy and Coast Guard practice; it has never been the practice in the Air Force; and it has not been the practice in the Army for many years, if it ever was.

It is a mere recitation of fact to observe that the Uniform Code, except for some Articles drawn directly from the Articles for the Government of the Navy and certain important procedural innovations, was derived for the most part from the Articles of War as last, and rather materially, amended by the Selective Service Act of 1948.[6] Similarly, the *Manual for Courts-Martial, United States, 1951,* in large part either repeats or intentionally modifies the provisions of the Army and Air Force *Manuals for Courts-Martial, 1949.* In some instances the author appears to have given insufficient weight to these circumstances in construing the present Code.[7] The copious footnotes to the text are illustrative rather than comprehensive: not a single case decided in the Army since the 1948 amendments became effective February 1, 1949, nor *any* case decided in the Air Force since it began the exercise of separate jurisdiction in 1948, is cited or mentioned. As a result, in some instances insufficient cognizance is taken of the more recent development of case law,[8] and of intentional modifications of former

4. United States v. Schultz, (No. 394) 4 CMR 104 (USCMA 1952); United States v. Kirchner, (No. 654) 4 CMR 69 (USCMA 1952); United States v. Roman, (No. 191) 2 CMR 150 (USCMA 1952); United States v. Clark, (No. 190) 2 CMR 107 (USCMA 1952).

5. Sections 702f(4), 706a(2).

6. 62 STAT. 604-27 (1948), 50 U.S.C.A. 451-73 (1951).

7. Thus, in §§ 506b and 604c(2) it is stated that an officer who signs the formal charges and specifications upon which the accused is to be tried is not necessarily such an accuser as is disqualified by Articles 22 and 23 from appointing a court-martial for the trial of the accused. However, "The person who signs and swears to charges is always an accuser." MCM 1951, ¶ 5a (4); "Charges and specifications shall be signed . . . under oath." UCMJ Art. 30, 50 U.S.C.A. § 601 (1951); and "In no case may an accused be tried on unsworn charges over his objection." MCM 1951, ¶ 29e. The identical rule prevailed under the Articles of War and the 1921, 1928 and 1949 Manuals. Similarly, the discussion of the offense of violation of parole (§ 3702i) does not conform to Army and Air Force precedent: the case cited (CM 330669, Noell, 79 BR 117, 118) does not support the conclusion that "If a parolee, while under moral restraint only, leaves the limits of his arrest, he is guilty of breach of arrest under Article 95." The two offenses do have certain common aspects, and under former law were said to be "analogous" for certain purposes of punishment. ACM 2166, Fehlhafer, 2 CMR(AF) 527 (BR 1950).

8. Section 2920f concludes, "an airman at an air base which is not under attack or imminent attack by the enemy who refuses to go on an air combat mission which would bring him in contact with the enemy is not 'before the enemy,'" citing CM ETO 1226, Muir, 4 BR(ETO) 121, 127, 130, 3 Bull. JAG 342;

law embodied in the new Code and *Manual*.[9]

Little purpose would be served by enumerating here other specific weaknesses and errors of which the foregoing are illustrative. The careful student who must pursue a particular problem to its ultimate solution will, of course, discover these vagaries in the course of his research. The more casual user, however, may be misled. Far too intricate and detailed to appeal to many but the military lawyer, yet insufficiently complete and accurate for a truly professional text, the present volume leaves the general impression of being a preliminary draft of a potentially outstanding work. The fundamental organization and scope of the work, and the basic research reflected and recorded therein present a truly valuable start toward that end. It is hoped that such errors and omissions of detail as impair use of the present work as a reliable reference authority will shortly be corrected, as they readily can be. The author has announced a plan to supplement the present text with periodic pocket parts, embodying recent decisions and other interpretive material, which when published should be of material assistance in this regard. If, in addition, the work should be brought up to date in a revised edition by incorporation of the vast body of case law omitted from the present text, and comprehensively annotated, such a revised edition would indeed be invaluable to the military lawyer.

REGINALD C. HARMON†

CM 269349, Coldiron, 6 BR(ETO) 239, 247, 3 Bull. JAG 342; and CM 271809, Picoulas, 7 BR(ETO) 197, 207, 3 Bull. JAG 343. But a contrary view was expressed in CM 268570, Kopetchny, 4 BR(NATO-MTO) 277, 4 Bull. JAG 11, and the doctrine of the Muir case was thereafter expressly repudiated (SPJGG 1945/1669, 29 Jan 1945, 4 Bull. JAG 11).

9. Footnote 313, p. 289, with respect to presentencing procedure, states that previous convictions of a "general prisoner" may not be considered if the offense were committed before the accused became a general prisoner, citing cases decided under MANUAL FOR COURTS-MARTIAL, 1928. However, the present MANUAL provides, "When the last enlistment . . . was terminated under other than honorable conditions . . . all convictions by courts-martial of offenses committed in the prior term of service, if within the three year period, are admissable. . . ." MCM 1951, ¶ 75b(2) (1951). Again, the rule of ¶ 77a of the MANUAL that a recommendation for clemency does not impeach findings of guilty, correctly recited in § 1317a of the text, was adopted for the purpose of revising the doctrine of the cases cited in footnote 338, p. 292 [pertinent cases under the Articles of War are collected and discussed in ACM 2435, Brasfield, 3 CMR(AF) 478, 489 (JC 1950)] and to bring the military practice in this respect more nearly into accord with the analogous federal rule.

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CONSCRIPTION OF CONSCIENCE. By Mulford Q. Sibley and Philip E. Jacob. Ithaca: Cornell University Press, 1952. Pp. x, 580. $6.50.

Here is a 580 page book worthy of any reader's time and thought. There are 481 pages of text; bibliography, a table of cases and appendix take up the remainder of the volume. It is a volume of the Cornell Studies in Civil Liberty, Robert E. Cushman, Advisory Editor. The book was written to tell the story and analyze the problem of the conscientious objector in World War II. It tells the story up to 1947, and tells it well.

Dr. Cushman, in the Editor's Preface, calls attention to the fact that in 1944 the Rockefeller Foundation made a grant to Cornell University to be used under Dr. Cushman's direction for making studies which would record our management of civil liberties during World War II. This volume deals with the conscientious objector. Of the authors Dr. Cushman says: "I persuaded Mulford Q. Sibley and Philip E. Jacob to undertake jointly this laborious study. I did this in full knowledge of the fact that both men are sympathetic to the viewpoint of the conscientious objector." Dr. Cushman, as one who is not a conscientious objector himself, believes that this predisposition is an asset rather than a disqualification and that "their high reputations for sound scholarship provided an adequate guarantee that the problem would be treated with objective honesty and the facts presented with scrupulous integrity."

The law of the conscientious objector comes in for attention in the very first line of the first paragraph of the book—in the Editor's Preface—where attention is called to the fact that on June 8, 1789, James Madison introduced in the House of Representatives his proposal for a federal Bill of Rights. In one of the twenty clauses in Madison's draft there were included in the statement of the "right of the people to keep and bear arms," that "No person religiously scrupulous of bearing arms shall be compelled to render military service in person." This provision was dropped out before the Bill of Rights took its final form.

There is no constitutional provision on the subject of the conscientious objector; it became a problem of policy rather than one of constitutional law. It became a problem for the Congress whose delegated power to "raise and support armies" carried with it authority to deal with the question of persons whose religious scruples prevented them from performing military service. When we could no longer fight our wars by voluntary armies, when in World War I the Congress provided for "universal selective conscription into the armed forces, the dif-

ficulties and complexities of the conscientious objector problem were brought home to us for the first time," Dr. Cushman reminds the reader.

The authors divide conscientious objectors in World War II — a rather arbitrary division, they say — into eight major groups: (1) The Mennonites of various denominations; (2) The Church of the Brethren; (3) The Friends (Quakers); (4) Protestants outside the so-called Peace Churches (the three Historic Peace Churches: Mennonites, Brethren, Friends); (5) Roman Catholics; (6) Jehovah's Witnesses; (7) Minor religious groups; and (8) Philosophical and political objectors. The authors point out that classifications of this kind are unsatisfactory in many respects, but despite overlappings (in terms of religious and political philosophy), the subject is clarified when the authors examine the significant teaching of each group, point out the relationship of the group and its members to the wider society, and inquire into grounds for conscientious objection and pacifism.

In Chapter II: "The Community of Conscientious Objectors," there is a detailed discussion of these groups. Segments of protestant churches, outside the three Historic Peace Churches, in the 1920's and 1930's, and in World War II (Methodists, Presbyterians, Congregationalists) had small groups of conscientious objectors, as did the Roman Catholic Church. Some Jews were also pacifists on religious grounds.

The Selective Training and Service bill became law with the President's signature, September 16, 1940. The bill provided that it should not be construed to require any person to be "subject to combatant training and service in the land or naval forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Local boards set up for classification purposes were to pass upon the claim of objectors. The boards were to place the individuals involved either in noncombatant Army training and service or assign them to "work of national importance under civilian direction."

One gains from this book exact knowledge of the philosophy and teachings of church groups, and learns (of Friends — Quakers — for example) of how segments within church groups differ widely in degrees of pacifism.

Of the 34,000,000 registrants under the World War II Selective Service and Training Act of 1940, which was in effect until March 31, 1947, conscientious objectors numbered about 0.30 of 1 per cent. The law was administered by 6,422 local Draft Boards in 3,070 counties. Members of over 200 religious sects were involved. The Mennonites accounted for around 40 per cent, the Brethren for about 11 per cent, and the Friends for about 7 per cent of the total. There were some "objectors" with no religious affiliations of any kind, for example, The War

Resisters' League (the more radical of the pacifists).

The objectors finally wound up either in (1) the Armed Forces; (2) Civilian Public Service camps (alternative public service); (3) prison; or (4) probationary status and parole. In the Armed Forces prior to January 21, 1943, the conscientious objector might be assigned to diverse tasks. After 1943 he served only in the Medical Corps, although even there he might be assigned a wide variety of tasks.

In the Army the performance of conscientious objectors varied all the way from a shoddy grade to the one man in Medical Corps activities who won the Congressional Medal of Honor (Desmond Doss, a Seventh-Day Adventist, of the 77th Division).

Conscientious objectors in the alternative public service program, under the 1940 Selective Training and Service Act, served without pay. Not only was there no pay but also there was no allowance for dependents and no compensation for injury or death.

The authors commend the Director of Selective Service, Clarence Dykstra, and sharply criticize his successor, General Hershey, for many administrative practices, particularly with reference to the Rules and Regulations in the management of Civilian Public Service camps.

There were 5,516 prosecutions of persons claiming to be conscientious objectors down to a month before the conclusion of hostilities with Japan, as shown by Department of Justice reports. Altogether more than 6,000 conscientious objectors, including the Jehovah's Witnesses, were prosecuted down to the expiration of the Selective Training and Service Act, March 31, 1947. This constituted more than one person out of every three of the approximately 16,000 prosecuted for all types of violations of the Act. The Amnesty Board appointed by President Truman on December 23, 1946, divided the 15,805 convicted under the Selective Service Act into two categories: (1) "wilful violators" (10,000 in number), and (2) those who had violated the law because of religious training or "other convictions." The line between conscientious objector and "draft evader" was admittedly often a fine one. Prosecutions were on charges of failure to register; failure to return questionnaire; failure to report for preliminary physical examination; failure to report for induction; failure to report to C.O. camp; failure to comply with C.O. assignment — walkouts, refusals to work, and so forth; counseling and aiding evasion.

About 75 percent of all conscientious objectors prosecuted during World War II were Jehovah's Witnesses. In the overwhelming majority of these cases the technical offense charged was failure to report to the Army or to Civilian Public Service camps, as ordered. Normally, the trials were in federal district courts. Under the Act five years in prison and a $10,000 fine could be imposed; average length of sentences

ran from one year and one month in Vermont, to 55.7 months in South Dakota. Fewer than four percent were given probation; approximately 96 percent were imprisoned or fined or both. "Time" was served in: (1) county jails as federal prisoners; (2) federal penitentiaries; (3) reformatories; (4) corrective institutions. Twenty-two federal institutions in nineteen states housed the objectors. The percentage breakdown of prisoners was: 93.1 religious objectors; 5.4 "philosophical or political" objectors; and 1.5 unclassified.

In Chapter XIX of this twenty-chapter book, the authors in three concluding paragraphs state that certain elements of the law and custom of conscientious objection assume primary significance. With respect to the conscripted objector they were: (1) the ambiguity of the statute with respect to judicial review of administrative action and the slowness and lack of clarity characteristic of the courts in the development of their interpretation; (2) "religious training and belief" were never defined by the Supreme Court; (3) while the Supreme Court never passed directly on the issue of alternative service, by refusing in a number of cases to grant certiorari, it virtually did so; (4) the near certainty that the Supreme Court would uphold the constitutionality of peacetime conscription; (5) the legal position of the objector in C.P.S. (Civilian Public Service) as halfway between that of a soldier and that of an ordinary civilian: subject to the civil courts only, he was yet legally under the control of Army officers for twenty-four hours a day, and no court seriously challenged this statement of the law.

Outstanding in the law and custom of "objection" in civil society, based upon court opinions and dicta, it is pointed out, were (1) conflicting interpretations of the oath of office: in education and the practice of law, the courts thought an implicit promise to bear arms might be discovered, while in civil service, and, eventually, in naturalization no such promise could be found; (2) in the *Summers* opinion[1] the decision would seem to mean that the Fourteenth Amendment afforded no protection whatsoever if a state wished to make practice of a trade or profession contingent on the practitioner's not being an objector; (3) general failure to pass special laws restrictive of the rights of objectors in civil society; (4) the precarious position of school teachers; (5) relatively great freedom enjoyed by pacifist and objector press, despite statutes which might have been invoked against it.

This interesting book closes with an evaluation of American experience with conscientious objectors in World War II by raising and proposing answers to five key questions: (1) Did the American nation tolerate freedom of conscience during the war? (2) How much conscience was there? (3) Did the churches betray religious liberty by

1. *In re* Summers, 325 U.S. 561, 65 Sup. Ct. 1307, 89 L. Ed. 1795 (1945).

collaborating with Selective Service in the administration of alternative service? (4) Was compulsion effective in securing the compliance of conscience with the demands of the state? (5) Can conscience be more adequately recognized, assuming continued conscription?

A. B. BUTTS*

THEFT, LAW AND SOCIETY. By Jerome Hall. Indianapolis: Bobbs-Merrill Co., Inc. Second Edition, 1952. Pp. xxiv, 398. $10.00.

"The social scientists all want to teach law," it was said some years ago, "while members of the law faculty want to devote their chief time and attention to social science." This was an exaggeration, of course, but it emphasized a tendency. The law teacher who suddenly realizes that he has been overlooking entirely the possible contributions which social science might make to his particular field is likely to go "overboard" in his swing from one extreme to the other. One of the great merits of this book, in both editions, is that it explores the social and economic conditions in which the acquisitive crimes have been committed, and presents the findings without fantastic conclusions. Professor Hall does not insist that all the answers are to be found outside the law, or that this part of the law is entirely wrong and should be changed completely. At the same time he does not hesitate to point out steps or devices which have been taken in the effort to prevent theft, other than direct legal attack, or to indicate certain weaknesses in the present structure of the law. He does not hesitate to suggest that the legal categories in this area be broken down and reintegrated in terms of present social and economic needs and conditions rather than those of the eighteenth century. But a review of the second edition of a book so well-known as this should direct attention largely to what is new.

This is a new edition in the true sense. It is not a reprinting with merely a few superficial changes. The whole work has been reexamined and there has been substantial revision throughout. The author has substituted a realistic introduction of his own for the somewhat idealistic introduction by Professor Llewellyn. He has taken *Carrier's Case* out of the appendix and made it chapter one — where it properly belongs. The most significant change, however, is in the last chapter. In place of a proposed reform of treatment of petty larceny he has substituted a searching study of embezzlement.

In his study of embezzlement Professor Hall found nothing comparable to the divergent varieties of conduct uncovered in the other

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part of the book. He found no empirical differences suggesting differentiated legal handling comparable to theft-for-sale versus theft-for-personal-consumption, for example. He found nothing comparable to criminal receiving by a dealer versus such receiving by a nondealer, or to larceny of an automobile versus "joy-riding." He did, however, find much of interest along other lines.

He found that the embezzler is rarely called upon to pay the penalty for his crime. This results from a combination of circumstances. Most significant, perhaps, is that employers are reluctant to report such cases to the authorities. But he found also that prosecutors do not initiate proceedings in many of the embezzlement cases reported to them; they dismiss a high percentage of the prosecutions they do initiate; acquittals are frequent; and if the case does reach the point of conviction there will probably be a suspended sentence, or probation, if restitution has been made or arranged. He probed rather deeply into the first of these causes. He found that many employers are deterred by the expense, inconvenience and uncertainty of trial. The dislike of publicity is also a potent influence, particularly in the case of institutions whose good will is dependent upon public confidence in the integrity of its employees, such as banks. A more selfish interest is the fear of some employers that prosecution of the employee would uncover criminal activities or sharp practices by the employer. "The embezzler uses his knowledge of these facts as a kind of extortion — the threat of exposure if the management initiates prosecution for the embezzlement." The author adds that perhaps the most important factor is restitution. This is the first thought of the victim of this crime, and the tendency is to forego prosecution where restitution is made.

This study reveals not only that prosecution for embezzlement is notoriously lax, in general, but that the frequency of the crime and the amounts involved are appalling. It shows, in contrast to this general picture, that Uncle Sam is vigorous and relentless in the prosecution of such offenses in the Post Office — and that the rate of embezzlement in this department is very low. The author draws no hasty conclusion from these findings. He points out other factors which no doubt account, in part at least, for this difference. But such findings certainly give no comfort to those who have tended to discount the value of efficient enforcement of law.

Professor Hall concludes that the most important single reform, indicated by this part of his study, would be to require surety companies to make official reports of all cases of criminal defalcations included in claims presented to them by those insured. The businessman is unlikely to forego the advantage of his insurance and hence will prove his claim. And if the surety company was required to report this case to the proper authority, any embezzlement by an insured em-

ployee would be likely to come to the attention of the prosecuting attorney.

As was true of the first edition, this book is interesting and instructive.

ROLLIN M. PERKINS*

FREEDOM OF THE PRESS IN ENGLAND 1476-1776. By Fredrick S. Siebert. Urbana: University of Illinois Press, 1952. Pp. xiv, 411. $7.50.

This is a very handsome volume that is loaded with details on the methods used for 300 years to control the press in England. The effort began in 1476 when William Caxton set up the first English printing press at Westminster. This particular story ends about 1776. By that date, freedom of the press had been established as a matter of law in Great Britain.

The Tudor kings and queens started off with a full bag of tricks. The first step was to license all printers in England. Shortly thereafter we find the practice of granting a monopoly on the printing of certain types of books (*e.g.*, Bibles or law books). In 1529 Henry VIII issued a list of prohibited books. This was just thirty years before the first papal index of prohibited books was issued on the Continent. Elizabeth took the smart step of having the industry police itself. In 1559 she confirmed the charter of the Stationers Company and the master printers (23 of them in 1583) took charge of the industry. Siebert says: "The principal regulatory provision of the charter of the Stationers Company prohibited all printing within the realm except by members of the Company or by those having special license from the Queen." (p. 68)

The Company had the power to fine and imprison and even to seize the offending press and printing implements and to deface the type of the printer. The Company also executed the orders concerning the trade which were issued by the Star Chamber. This was the court which handled matters arising out of the exercise of the prerogative of the Crown.

As the Stuarts and Parliament began to square off, Parliament asserted rights to control the press in order to have some sanction to apply against publications supporting the Stuart cause. The tide went against the Crown and upon the abolition of the Star Chamber in 1641, Parliament itself undertook the licensing of printers. From now on, freedom of the press would depend upon what was conceded by, or wrung from, Parliament.

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The atmosphere of the Civil War period produced much solemn debate, but nothing more majestic than John Milton's *Areopagitica* which was published on November 24, 1644. This pamphlet now enjoys the reputation of being the supreme plea, in the English language, for full freedom of the press. Scholars seem agreed, however, that Milton's immediate reason for publishing the pamphlet was because of some difficulty that Milton had had with the authorities over a pamphlet he had written on divorce which pamphlet, in turn, had been prompted by some difficulties that Milton had been having with his wife. Further, in 1651, we find that this great defender of liberty had become the "official licenser and censor of newsbooks." (p. 196)

The devices used to control the press varied between the carrot and the stick. In the middle of the 18th century Robert Walpole was spending £5000 a year in subsidies for newspapers friendly to his administration. On the other hand, in 1712 a newspaper tax simply killed 50 per cent of the London newspapers. In the end, of course, nothing suppressed the publication of news or opinion. The times were not advanced enough for adequate enforcement. Our current experience demonstrates that the way to control the press is to kill all opposition printers, destroy their presses and then handle your own side's version yourself. And what with radio and the airplane, that isn't proving an airtight technique either. Above all your printers must not have any legal rights that may be publicly debated. An efficient control of the press must avoid public trials of printers, or more probably, must avoid any trials at all for such persons. Liberty is all one package. Siebert makes these same points more elegantly. He advances two propositions to describe the nature and extent of governmental control over the press. First, the nature of the control depends on the relationship between the Government and its citizens. Second, the amount of control is inversely proportional to the stability of the Government. (p. 10) His narrative seems to support the truth of these propositions.

For those interested in the perennial problem of the freedom of the press, this is an important book. The struggle for that freedom is told in enormous detail, the forgotten heroes of that struggle are named, and once again we are reminded that philosophical concepts must have a legal and administrative filling in order to have life. Until the law of treason, sedition, libel, defamation and kindred subjects was established, freedom of the press, as a concept, had little meaning. And until we are certain that there may be a disinterested review somewhere of every administrative act, we cannot be sure that we are free to do what the law says we can do. Siebert's book describes all sorts of efforts to license and tax the press as means of control. We should recognize that it takes a mature judicial and administrative system to permit the licensing and taxing of the press without any interference

with the freedom of expression of that press. And it has taken a long time to develop such a system.

I have one complaint about the book. Mr. Siebert says that his work on the subject matter of the book began, at least, back in the Thirties. And so for twenty years he has been climbing through the literature in this field. And now, when the book finally appears, we are told that: "Instead of a formal bibliography, acknowledgment is made in footnotes which contain bibliographic details." (p. ix) And the footnotes are for the most part references to original sources. I think that footnotes are more than just proof that the author has done his homework. If an author has really done his work he has significant opinions on the literature in the field that any successor in the same field should want to know about. Mr. Siebert has unquestionably done his work, but he ought to have helped out all those little thesis writers, and so forth, who are to follow. Our author has safeguarded himself by never getting very far away from Holdsworth's *History of English Law*. So his main constitutional views are predictable, but there is virtually no reference at all to the vast periodical literature which must be examined to fill in details. Take the furor over John Wilkes. There are citations to two editions of the *Letters of Junius*, including John Wade's edition of 1868, but there is no biographical reference for Wilkes himself. There should have been a bibliography, preferably annotated.

The University of Illinois Press has produced a very fine looking volume. It is however marred by several editorial faults. For example, the Index does not distinguish between the Pitts, father and son; at least three methods of citing English statutes are used (pp. 322, 368, 391); and the footnotes ought to be rechecked (*e.g.*, see p. 117 n. 29).

STANLEY D. ROSE*

WAGE-HOUR LAW: COVERAGE. By Herman A. Wecht. Philadelphia: Joseph M. Mitchell, 1951. Pp. viii, 499. $15.00.

It is a reasonable guess that the great majority of practicing attorneys cannot claim even a fair working knowledge of the complexities of wage and hour law. Only in recent years have many schools come to offer any course of instruction in labor law. And most of them have restricted the course to matters of union-management relations and the establishment of standards of employment through collective bargaining. Little or no attention is devoted to the other major area of labor law — the establishment of standards of employment by government regulation.

This is a somewhat anomalous situation. In many sections of the

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country, at least, the general practitioner is more likely to encounter problems involving wage-hour legislation than those involving labor organization and concerted action. The federal Fair Labor Standards Act[1] is estimated to cover more than 22,000,000 employees, as compared with a nation-wide union membership which probably totals less than 16,000,000. And, of 33,479 establishments investigated by the Wage and Hour Division in the fiscal year ended June 30, 1951, 54% were found to be in violation of the basic provisions of the Act.[2] These figures are at least suggestive of the volume of potential claims under the statute.

Moreover, the problems of wage-hour law are anything but simple and routine. Since it rendered its first decision under the FLSA in 1940, the United States Supreme Court has made scores of interpretations of the Act in more than 50 separate cases. The number of such decisions in the lower federal courts and in the state courts has reached monumental proportions. It has been said that the Act "has been the subject of more litigation in the last decade than any other federal statute."[3]

Under these circumstances, almost any contribution to the literature of wage and hour law has significance for the legal profession; and Mr. Wecht's book deserves more than passing attention. It was apparently conceived as one of several volumes designed to cover all the major aspects of the FLSA, and is itself directed to the basic question, "Who is covered by the Act?"

Mr. Wecht states in his preface that he "has had the task of making practically all deductions of legal principles directly from a great and ever-increasing mass of confusing and conflicting decisions, as well as that of organizing and presenting them in some logical sequence of his own invention." In this connection it may be noted that there have been a number of scholarly and helpful analyses of the general coverage provisions of the statute in the legal and economic periodicals.[4] Perhaps Mr. Wecht examined these, and found them of little assistance in his own approach to the subject. However, in view of the admittedly controversial nature of many of his deductions, he might well have given his reader the benefit of references to some of these articles.

The author seems to be entirely accurate in suggesting that his book

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1. 52 STAT. 1060 (1938), 29 U.S.C.A. §§ 201-19 (1947), as amended.
2. 1952 WH (BNA) 1113, 1114.
3. Sanders, *Basic Coverage of the Amended Federal Wage and Hour Law*, 3 VAND. L. REV. 175, 177 (1950).
4. See, for example: Davisson, *Coverage of the Fair Labor Standards Act*, 43 MICH. L. REV. 867 (1945); Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 HARV. L. REV. 321 (1946); Sanders, *Basic Coverage of the Amended Federal Wage and Hour Law*, 3 VAND. L. REV. 175 (1950); Smethurst and Haslam, *The Fair Labor Standards Amendments of 1949*, 18 GEO. WASH. L. REV. 127 (1950); Tyson, *The Fair Labor Standards Amendments of 1949—Wage and Hour Coverage*, 28 N.C.L. REV. 161 (1950); Weiss, *Economic Coverage of the Fair Labor Standards Act*, 58 Q.J. ECON. 460 (1944).

is something of a pioneer in attempting a comprehensive collation of the hundreds of judicial and administrative interpretations as to the basic coverage of the FLSA. Consequently one must feel some diffidence in criticizing his performance of the difficult task to which he set himself. But the very absence of any comparable work perhaps justifies the raising of some questions about the book.

As the device for organizing his materials, Mr. Wecht selected Section 3 of the Act, the "Definitions" section. He uses the subdivisions of this section as his topic headings, dealing successively with the statutory concepts of "Person," "Commerce," "State," "Employ," "Agriculture," "Industry," "Goods" and "Produced." It is questionable whether this was a happy choice of structure. There are two general categories of employees who are within the coverage of the statute: (1) those who are engaged in interstate or foreign commerce, and (2) those who are engaged in the production of goods for such commerce. There is reason to believe that a more orderly development of the subject-matter could have been achieved by building around these basic classifications and seeking to deal more directly with the problems of particular industries, occupations and fact-situations.

Adherence to the sequence of definitions in the statute apparently leads the author to take up such matters as the wage-hour exemption for persons employed in agriculture, the overtime exemption for certain employees of motor carriers and the industry committee procedure for setting wage rates. These are topics not germane to the subject of the book; and the discussion of a few of the Act's express exemptions is misleading and superficial when lifted out of the context of the numerous other exemptive provisions contained in Sections 7 and 13.

The framework adopted for the book also seems to lead to an unfortunate amount of repetition. For example, the proposition that applicability of the Act is not dependent upon the proportion of the employer's business or of the employee's duties which is interstate in character is set forth at pages 60-65, and then largely reiterated at pages 186-88. Again, the principle that an employee who engages in covered activities during part of a workweek is protected by the Act for the entire workweek is presented at page 53 in the discussion of "Commerce," at page 138 in the discussion of "Agriculture" and at page 183 in the discussion of "Produced."[5] The materials relating to such general considerations, which are pertinent regardless of whether the

5. For other examples of duplication, see the discussion of coverage of employment outside the continental United States at page 34 and again at page 88, activities of the individual employee rather than of the employer as the test of coverage at page 45 and again at page 179, significance of the employer's knowledge that goods will eventually move out of the state and of further processing intrastate before shipment at page 162 and again at page 208, and legislative history of the 1949 amendments at pages 192, 221 and again at page 329.

basis of coverage is engagement in commerce or engagement in production for commerce, might better have been collected and analyzed at some one place in the book.

One other objection which derives from the form of organization is that it seems to lead to a confusion of terms. Perhaps this comment reflects undue conceptualism, but distortion of the meaning of the statutory language is not calculated to produce sound analysis. For instance, the concept of "person" seems to be confused with that of "employer" (pp. 43, 44), the discussion of what are "goods" seems to get involved with the distinguishable question of whether particular goods were produced "for commerce" (pp. 148-160), and the meaning of "produced" seems to be obscured by intermingling with the problem of what constitutes work or employment for purposes of the Act (pp. 174 *et seq.*).

A more serious question is whether the author has adequately appraised and correlated his cases. There seem to be a good many instances in which Mr. Wecht relies upon court opinions which are rather clearly out of line with the weight of authority. His acceptance of decisions at face value leads him to make what appear to be contradictory statements. Cases are sometimes cited for a proposition without any indication that they pretty clearly point in different directions.[6]

A number of the statements about the distributive trades (pp. 50-60) suggest that there is more doubt about the coverage of various wholesale and warehouse employees than the decisions of the Supreme Court seem in fact to leave.[7] There are several statements in the discussion of what constitutes employment for purposes of the Act (pp. 91-127) to the effect that the statutory language describes "the conventional relation of employer and employee" (pp. 94, 104) and that there must be some agreement to pay compensation for the work (pp. 94, 101, 105). Elsewhere the author seems to recognize that these statements are inaccurate, standing alone,[8] but they are nevertheless confusing.

6. For instance, at pages 116-19, the author apparently cites with approval both Western Union Telegraph Co. v. McComb, 165 F.2d 65 (6th Cir. 1947), and Blankenship v. Western Union Telegraph Co., 161 F.2d 168 (4th Cir. 1947), although the Sixth Circuit court expressly rejected the Fourth Circuit decision, noting that in the latter case the Wage-Hour Administrator had not had an opportunity to present evidence and urge his position as an expert.

7. See Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 Sup. Ct. 332, 87 L. Ed. 460 (1943); A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 67 Sup. Ct. 807, 89 L. Ed. 1095 (1945). But see Higgins v. Carr Bros., 317 U.S. 572, 63 Sup. Ct. 337, 87 L. Ed. 468 (1943).

8. It is clear that the employer-employee relationship under the FLSA is not limited to situations where employment would be found to exist for other purposes, such as the doctrine of *respondeat superior*, and that the absence of an agreement to pay for particular work is not *per se* determinative of whether it constitutes employment. Cf. Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 Sup. Ct. 1473, 91 L. Ed. 1772 (1947); Walling v. Portland Terminal Co., 330 U.S. 148, 67 Sup. Ct. 639, 91 L. Ed. 809 (1947); Jewell Ridge Coal Corp. v. Local No. 6167, UMWA, 325 U.S. 161, 65 Sup. Ct. 1063, 89 L. Ed. 1534 (1945).

The discussion of what is "agriculture" gets off on the wrong foot by omitting the word "or" from the phrase "practices . . . performed by a farmer or on a farm" in quoting the statutory definition (p. 127). The ensuing text leaves the implication that only activities by a farmer constitute agriculture, whereas it is clear that certain work by independent contractors constitutes agriculture when done "on a farm."[9]

At pages 162, 208 and 210, Mr. Wecht makes statements to the effect that "the intent or knowledge of the processor-producer, operating intrastate, as to the eventual shipment of his product in interstate commerce is immaterial." This seems to be the exact opposite of the well-established rule that goods are produced for commerce, within the coverage of the Act, if the employer at the time of production intends or has reason to believe that they will be shipped out of the state.[10]

Other topics, the discussion of which seems to involve conflicting statements and some confusion of analysis, are the possibility of segregating covered and noncovered work within a single workweek or as between employers (pp. 53, 138, 183-90, 310), coverage of production for military purposes (pp. 80, 85, 169), coverage of the production or handling of containers (pp. 153, 210-15), the status of reports and other written materials as "goods" (pp. 156, 160), the attempted distinction between "ideas *per se*" and "goods" (pp. 157, 295), coverage of processing by the ultimate consumer (pp. 164-73) and coverage of exploration, research and construction workers (pp. 236-60).

Mr. Wecht devotes nearly a third of his book to the full text of the statute (25 pages), a reprint of the Wage-Hour Administrator's Interpretative Bulletin on General Coverage (35 pages) and an extensive Index (84 pages). There is some reason to question whether setting forth the Act and the Interpretative Bulletin is defensible, since both can be obtained from the Department of Labor without cost. Moreover, Mr. Wecht has not only noted the Administrator's interpretations, as reflected in the bulletin, at appropriate points throughout the book, but he has also summarized much of the bulletin in considerable detail at pages 342-51 of his text.

A full index is an important asset to any reference work, and Mr. Wecht is surely justified in devoting a substantial amount of space to his. Only sustained use will serve to demonstrate how readily it affords access to his materials. However, casual experimentation suggests that there may be room for improvement in the choice of key words and classifications. For instance, under the heading of "Oil" there is no reference to any part of the industry except pipelines. Again, one interested in the coverage of chain stores would find no help in the index

9. See 29 CODE FED. REGS. Part 780-B (1947).
10. See United States v. Darby Lumber Co., 312 U.S. 100, 118, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).

unless it occurred to him to look for "Interstate and Local Chain Store Systems."

In so unsettled an area as the law of wages and hours, there are bound to be differences of view as to both substantive conclusions and manner of presentation. Much of what has been said above involves matters of opinion on which Mr. Wecht may find more support than the reviewer. But whether or not Mr. Wecht has made sound decisions and accurate deductions on all points, he has assembled a tremendous amount of case material which should have great value for practitioners in this field of law.

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THE LAW OF LABOR RELATIONS. By Benjamin Werne. New York: The MacMillan Company, 1951. Pp. xiv, 471. $5.75.

This book is the work of an experienced writer and scholar in the field of industrial relations. Mr. Werne's purpose, as announced in the preface of the book, is "to deal systematically with what is permitted, what is prohibited, and what is desirable under the statutes, regulations, rulings, and awards that both direct and limit the processes of collective bargaining." The reader is immediately struck not only by the breadth of this undertaking but also by the detailed research necessary to produce an authoritative book on this field. To accomplish this momentous task and to state "the law of labor relations" within the bounds of a single volume, the material is organized under four major headings.

Part One deals with problems of employee representation by labor organizations, which is one of the major functions of the National Labor Relations Board. This problem as to whether a labor organization will represent a certain group of employees touches vital issues of business organization, industrial relations and employee freedom. The specific principles used by the Board in determining the bounds of the appropriate bargaining unit are spelled out, including the criteria for deciding issues involving fringe, craft, industrial, multi-employer and multi-plant issues. An explanation is given of the administrative procedures for making these determinations and the election technique for recording the democratic desires of the employees.

A second major function of the Board is the investigation and issuance of remedial orders in unfair labor practice cases. Part Two of the book turns to the jurisdiction and authority of the National Labor Relations Board to fashion administrative remedies for unfair labor practices.

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The author discusses both the informal and formal procedures of the National Labor Relations Board as they relate to complaint cases and devotes attention to the important aspects of judicial review of the administrative decisions and orders. The reader is given an insight into the nature of the remedial order issued by the Board in various types of unfair labor practices by a description of the negative and affirmative aspects of cease and desist, back-pay and reinstatement orders.

Part Three presents a detailed but unusually comprehensive statement of employer and union conduct circumscribed as unfair labor practices, considering the fact that these principles have been developed through a labyrinth of administrative and judicial decisions over the past decade and one-half. Each section on the various unfair labor practices is concluded by using the technique of a check-list to indicate in broad strokes the nature and type of conduct prohibited. Mr. Werne suggests the guide posts for the employer in exercising disciplinary action against employees within the framework of a statutory policy which protects employees in their rights of free self-organization. The activity of self-organization, when cast in the form of a strike, is discussed both in terms of protected concerted activity and as an instrument of illegal interference by the union under the Taft-Hartley Amendments. Not by any means least important is the attempt to chart the troublesome and shadowy area of conduct falling within the pale of "free speech." Necessarily the material on union unfair labor practices is less substantial, but adequately states the development of the law up to the time the book went to press.

Part Four, entitled "Collective Contracts," deals with the aspects of negotiating and drafting collective bargaining agreements. Specific illustrations of typical collective bargaining clauses are collected to indicate the scope of the subject matter covered by collective bargaining agreements. Materials are included on the practical aspect of operating under collective bargaining agreements, and there are short chapters on Grievances, Arbitration and Litigation.

The book, written in a simple and straightforward fashion, requires a medium degree of concentration, but may be read without difficulty by an interested reader. The author admits that the book does not attempt to discuss the "philosophy, psychology, or economies of labor," but its foremost aim is to be of practical use. Thus, it makes no attempt to state what the law ought to be but rather is a competent and accurate statement of what the law is. The author's style, mid-point between a detailed technical treatise and a layman's presentation, is an achievement of the author's aim to present not only the forest but the individual trees in their proper perspective. The book is carefully subdivided within the chapters comprising each of the four major

parts, and its usefulness is enhanced by a good index. The book may well prove useful as a guide to the more experienced observer in the field of labor relations, as is physically emphasized by the inclusion of some 94 pages of citations and footnotes at the conclusion of the book.

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