Washington and Lee Law Review

Volume 23 | Issue 2 Article 20

Fall 9-1-1966

Of Men, And Not Of Law. Lyman A. Garber.

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BOOK REVIEWS

OF MEN, AND NOT OF LAW. Lyman A. Garber. New York: The Devin-Adair Company, 1966. 196 pp., $3.95.

Alleged "judicial usurpation" of the legislative function in fields of law ranging from civil rights to sovereign immunity is the subject of Lyman A. Garber's book *Of Men, and Not of Law.* Although American courts usually speak only in response to a "case or controversy," they not only adjudicate with some interstitial legislation, but frequently legislate on a grand scale.[1] Proponents of grand-scale judicial legislation urge courts to promote reform by correcting injustices and guaranteeing constitutional rights to all citizens.[2] But opponents accuse the courts of acting as "super legislators," [3] and insist that most social, economic, and political evils cannot be cured by judicial decision.[4] Mr. Garber is a member of this latter group.

The author places part of the blame for the increasing crime rate in the United States on the courts because of their alleged preoccupation with the protection of the criminal. According to the author, the successful prosecution of lawbreakers is becoming more and more difficult because judges have developed "infinite refinements on the technique of 'trying the record' instead of trying the criminal." (p. 117). He also says that "today Federal interference is the most notable factor in criminology and is the major force in extending further immunities to criminals." (p. 117). To support these statements, Mr. Garber points to the 31 reversals of state court judgments in 50 first-degree murder cases reviewed by the United States Supreme Court between 1935 and 1957. But the author fails to include the percentage of murder cases that were actually appealed, and 31 reversals in 22 years does not seem out of proportion to the great number of such cases and the severity of the penalty. On the other hand, Federal influence cannot be shown by statistics alone for the threat of a reversal undoubtedly has an important curbing effect upon state prosecutors.

Although the author praises rules that serve "solely" (p. 141) to minimize the chance of convicting an innocent man, he condemms rules that sometimes enable "unquestionably guilty" criminals to escape

[1]See Pound, *The Formative Era Of Common Law* 124 (1938).

[2]E.g., Vanderbilt, *The Doctrine Of The Separation Of Powers And Its Present Day Significance* 135-39 (2d ed. 1963).

[3]Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting).

[4]See Reynolds v. Sims, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).

punishment. For example, he criticizes the Federal evidence rule which generally excludes evidence obtained by unlawful means, such as unreasonable search and seizure. Mr. Garber suggests that the average citizen would prefer to have his home invaded by law-violating police officers rather than by law-violators called criminals, who, but for the exclusionary evidence rule, might be safely lodged in prison. Also, the author asserts that, with the exception of an occasional regulation that is frequently flouted, "a fair degree of law and order is achievable only when police power is so overwhelming that none but psychopathic persons dare break the law." (p. 6). The zealous and powerful police force advocated by Mr. Garber is not necessarily an ideal goal.

Of Men, and Not of Law also criticizes the judiciary for enabling the Federal government to increase its control over individual citizens. Two of the examples used by the author are the Supreme Court decisions in *Wickard v. Filburn* (1942)[5] and *Shelley v. Kraemer* (1948).[6] The former, by upholding the constitutionality of the wheat marketing quota provision of the Agricultural Adjustment Act of 1938, sustained a penalty against a farmer for raising wheat in excess of a quota set by the United States Department of Agriculture. This wheat was intended solely for the farmer's own family and livestock, and Mr. Garber claims this was an "invidious restriction on the freedom of the American farmer." (p. 36). The author neglects to mention, however, that prior to the effective date of the quota, the Secretary of Agriculture was required to conduct a national referendum of wheat growers. If 1/3 of those voting opposed the quota, the Secretary was required to suspend its operation. On May 31, 1941, 81% of those voting in the referendum favored the quota. Thus, though Farmer Wickard was bound by the majority vote of his fellow wheat farmers, he had an opportunity to vote against the quota.

Similarly, the author claims that *Shelley*, which prohibited state court enforcement of racially restrictive covenants in real estate contracts, "abridged one of the American citizen's most valued and valuable rights—the freedom to contract and the related doctrine of sanctity of contract." (p. 47). Mr. Garber apparently places property rights at the "tip-most top of the top-most tip of the eucalyptus tree," for he blatantly asserts that "the degree of liberty among human beings is measurable by the right to own and manage property, to buy and sell it, to contract." (p. 34).

There is no doubt that a good argument can be made for more

[5]317 U.S. 111 (1942).
[6]334 U.S. 1 (1948).

self-restraint in the area of judicial law-making. However, *Of Men, and Not of Law* fails rather miserably in its attempt, and is hardly the "revealing expose of judicial usurpation" claimed in the book's foreword. The book is of little value to laymen, lawyers, or students of government. It is neither particularly well-written nor well-documented, and the author's bias and lack of objectivity outweigh the occasional valid and interesting comment. The book is especially disappointing because of the importance of its subject, for today judges are exercising vast and undefined powers. The social philosophies of our judges are quite legitimately a matter of great concern to all citizens, because judges, once installed, are relatively independent of popular control. Such independence, coupled with legislation on a grand scale, can violate classical democratic theory. The people should rely on their legislative representatives (who can raise the issues with the people in their election campaigns) to make laws preserving the liberties of all.

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MASTERPIECES OF LEGAL FICTION. Ed. by Maximilian Koessler. Rochester, New York: The Lawyers Co-operative Publishing Company, 1964. 862 pp., $9.95.

For this collection of 38 stories, Maximilian Koessler gathers notable fiction in which law plays a prominent part. His scheme is simple. He includes full stories only and generally arranges them according to their time setting. Spanning Europe, America, and the Orient, the stories in this collection suggest problems leading into and out of the courtroom. Included are Herman Melville's "Billy Budd, Foretopman," Steen Steensen Blicher's "The Rector of Veilbye," and Anatole France's "Crainquebille." Less familiar treasures include Sir A. P. Herbert's "Is Marriage Lawful?" and "Computer in Court," Robert Bristow's "Beyond Any Doubt," and Vincent Starrett's "The Eleventh Juror."

The stories in this volume appeal to a wide variety of literary tastes. The suspense of "Billy Budd, Foretopman," for example, centers on 2 characters who, representing moral extremes, clash in a court-martial. As whimsical as "Billy Budd" is dramatic, Sir Herbert's "*Marrowfat v. Marrowfat*: Is Marriage Lawful?" questions whether marriage is a contract or a gamble. For those who enjoy speculating as to tomorrow's law, there is a futuristic twist in "Computer in Court," which discusses the possibility of a libel suit when a power failure causes a computer to publish an erroneous credit report.