# BOOK REVIEWS

THE GROWTH OF AMERICAN LAW: THE LAW MAKERS. By James W. Hurst.* Boston: Little, Brown and Co., 1950. Pp. xiii, 502. $5.50.

Any historical work of significance is a compound of objective reporting and subjective interpretation. Even the historian who sets for himself the goal of surveying the past *sine ira et studio* with the utmost detachment and scientific exactitude is likely to fall short of his austere and commendable objective. The very process of selecting, from the inexhaustible storehouse of the past, the facts worthy of historical treatment and analysis involves a determination of what is important and what is immaterial. This determination is, to some extent at least, dependent upon the author's own sense of values and the intellectual and moral orientation of his time. Events that appear highly significant to him may have meant little to the contemporaries of the event, and the generalizations drawn by him will frequently be colored by his basic philosophical assumptions and social beliefs. Also, the chain of causation responsible for a historical happening is often so complex that the web produced by innumerable causal threads becomes too intricate to be unravelled. On the other hand, unless the historian yields to the temptation to mistake the complexity of the historical process for mere accidentalism, he must trace causes and discern connections between events. His special knowledge, background, and experience will almost invariably lead him to attribute particular weight to those factors which are most accessible to his perception.

These considerations indicate that the attempt of the conscientious historian to reconstruct the past "as it really was" is beset with almost insuperable difficulties; but they are not meant to suggest that the pursuit of maximum objectivity in historical reporting is a false or futile goal. Some great historians have succeeded in minimizing the element of "subjective interference" of the observer and, lifting themselves above their individual preferences and the prejudices of their time, have attempted to describe and analyze a historical epoch in the light of its own basic beliefs and peculiar scale of values. Other historical works—often highly influential ones—have been, on the other hand, primarily vehicles of political or religious propaganda designed to prove dictatorially the truth of certain pre-conceived axioms and theses.

Professor Hurst's work, like most significant historical treatises, combines factual reporting with personal interpretation, and the relative proportion of these elements in his treatment is sound and balanced. A large part of the book is devoted to the collection of historical information on subjects as diverse as the working characteristics of legislatures, the influence of

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lobbies, attitudes of courts toward legislation, use of the power of judicial review, objectives of legal education, standards of admission to the bar, size of law firms, class background of lawyers, and trends in administrative regulation. His chapter on the American bar, which is replete with historical and sociological information on the place of the legal profession in the political and social structure of the United States, is particularly instructive.

On the interpretative side, Professor Hurst has undertaken to analyze, among other subjects, the social functions of legislatures, the contributions of judges to law-making, the working philosophy of lawyers, and the comparative influence of the various law-making agencies. His viewpoint, Professor Hurst points out in his prefatory note, is "primarily that of a professional interest in law as an instrument of social values," and he has tried to "select for discussion lines of growth which have meaning for the middle of the twentieth century." From his avowed emphasis on law "as an instrument of social values" follows, with logical consistency, his criticism or disapproval of certain facets of American legal growth. He believes that, by and large, legislatures failed in their social functions.[1] He points out that the ethical standards of legislators have generally been low.[2] The undertone in his discussion of the uses of judicial power is that judges have overstepped their proper bounds in limiting the efforts of nineteenth century legislatures to regulate the conduct of business.[3] He expresses the view that our constitutions were not mindful enough of the general welfare and did not show enough confidence in the uses of authority.[4] The bar, he intimates, has catered too much to the interests of business and, being too preoccupied with law as an instrument for private gain, has not done enough for the common man.[5]

All these criticisms have a solid foundation in fact and appear justified from his twentieth-century viewpoint which sees in law a device for the rational ordering and harmonious adjustment of social relations. If, on the other hand, we attempt to measure eighteenth and nineteenth century legal developments by the then prevailing standards of value, we would find that law in that epoch was regarded primarily as a bulwark of individual rights and freedoms against governmental encroachments, and only secondarily as an instrument of public power designed to promote the general welfare. Its chief objective was to secure a maximum of individual self-assertion in the competitive struggle for wealth, tempered by the indispensable minimum of regulation necessary to preserve public order. On the basis of this outlook, a number of factors and trends viewed by Professor Hurst with a critical eye may be viewed as necessary concomitants of the prevailing social climate. If

1. P. 23.
2. P. 63.
3. P. 31.
4. P. 24.
5. Pp. 328, 375.

private and corporate expansion of power (within certain limits) is valued as the chief spur to economic progress, the susceptibility of legislators to outside pressures is not necessarily undesirable. The inclination of judges to view regulatory legislation in the social and economic field with distrust is logical and meaningful in a social order which operates within the framework of constitutions inspired by individualistic ideals rather than by conceptions of "general welfare." The close association with business interests will not evoke pangs of bad conscience among lawyers when business is regarded as the chief source for the creation of wealth, employment, and prosperity. American history of the eighteenth and nineteenth centuries presents such a unique attempt to put a logically thought-out and self-consistent pattern of life into operation that correlating legal developments with political, ideological, and economic trends is, within the limits discussed below, a particularly fruitful avenue of approach. Professor Hurst has done a pioneering job in this mode of historical presentation, although those who, like this reviewer, have a personal predilection for maximum detachment in historical writing, might argue that at some places in the book the author has projected his own social ideals somewhat too strongly into an analysis of historical materials which, as Tocqueville has shown, lend themselves particularly well to an interpretation by standards of value intrinsic to the epoch.

One phase of the development that might have merited special consideration in a study of this type is the peculiar relationship that binds the legal profession to the object entrusted to its care, the law. A legal system designed to set the "rules of the game" in a free society of competing individuals, and to make these rules as certain as possible in order to ensure a reasonable measure of calculability in economic transactions, tends to evolve, in the hands of a professional class, into a highly technical mechanism following autonomous lines of growth. In the attempt to shape the law into a logical and self-consistent system, certain forms and conceptual aids are created which, although born of expediency and practical necessity, in a later stage are absolutized by the legal profession and elevated into allegedly "natural" and essential elements of the law as such. Thus, many lawyers and judges, after the introduction of code pleading, proclaimed the ancient forms of action to be necessary forms of legal thinking which no code could abolish; and the system of actional formalism, although progressively relaxed, continued to linger on in the Anglo-American legal system until our own day. The doctrine of consideration has been watered down to what amounts in most cases to a mere form requirement, yet in spite of its essentially ritualistic character the doctrine remains deeply embedded in Anglo-American legal thinking. Similar attempts to petrify forms and conceptual devices into ends in themselves can be observed in the history of legal science in Rome. They are tied in with the general conservative leanings of the

legal profession rightly attributed by Professor Hurst to the search for regularity and predictability of affairs;[6] but one particular by-product of this mode of thinking which deserves special emphasis is a certain emancipation of the law from the social forces that helped to create it. The law gains some independence from its socio-economic substructure and acquires a life and history of its own. The positivistic approach to jurisprudence, which considers the law as an independent and self-sufficient object of study to be kept "pure" from the "contaminating" influence of the social sciences, has its historical roots in such a condition of the law, i.e. a condition in which a partial divorce of the law from its supporting sociological forces has in fact taken place. It should be noted, however, that this phenomenon is limited to highly developed legal systems whose administration is entrusted to a specially trained professional class; and it is for this reason that its description and explanation would seem to have a place in a history of the "law-makers."

The obvious dangers of such an insulation of the law are over-technicalization and the growth of an interpretative formalism which converts the law into a secret science comprehensible only to the initiated. A further practical result is that the cost of administering the elaborate and complex apparatus of the law becomes so great that litigation tends to become a privilege of the upper classes. Countervailing propaganda for a popularization and simplification of the administration of justice is inevitable and, if successful, is likely to usher in an era of bureaucratization of the law which deprives the professional class of private practioners of a large share of its former influence in society. In Rome, this development led to a gradual extinction of the class of eminent private jurisconsults and the increasing absorption of lawyers into the political and administrative hierarchy of the Empire. Outstanding lawyers who in the period of the Republic would have chosen the career of a private counsellor streamed into the public service to become members of the Emperor's legal council or to serve as high judges or provincial administrators. The result was an increasing integration of the law into the political apparatus of the Empire; law ceased to enjoy an autonomous growth and became a flexible instrument used by the sovereign power to accomplish its political and economic objectives. The story is highly instructive, and it unfolded under political and international conditions not dissimilar to those facing us today. We should ponder its causes and effects, for a crisis in the relationship of the legal profession to society in general is in progress at the historical juncture at which we stand. Professor Hurst's valuable work is a witness to its existence.

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6. P. 359.

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