BOOK REVIEWS

THE ART OF ADVOCACY, A Plea for the Renaissance of the Trial Lawyer. By Lloyd Paul Stryker. New York: Simon & Schuster, 1954. Pp. 306, $5.00.

The reader approaches a book on advocacy with enthusiasm, especially when written by a celebrated advocate. To the practicing lawyer, trial work is the most dramatic branch of legal practice; and to many laymen it is thought of as all there is to legal practice.

Stryker takes us along the entire road of the advocate's work. He begins with the arrival of a new case in his office and goes on through the preparation of the case and then its actual trial from the selection of the jury to the closing address. He discusses separately advocacy in the appellate courts and cites with justified admiration the address of John W. Davis and his decalogue of rules for appellate advocacy.

Stryker emphasizes the wisdom of permitting the client in his interview with his lawyer to reveal the facts in his own unorganized and irrelevant fashion. Here the art of the advocate is the art of listening. Anyone reading this book will be impressed with the indefatigable search for facts which is one of the outstanding characteristics of the author. The search is endless and the zeal is unabating. "Would that there were some way," says he, "over and beyond italics, with which I might stress, might shout aloud, that word: *facts.*" This is echoed in the short and provocative introduction by Judge Medina, who describes the capacity for ferreting out the facts as "the most important talent which a modern trial lawyer can possess." A by-product of the zeal for facts is orderliness in the arrangement of documents, the ability to produce them without fumbling before an impatient court. Indeed, Stryker concludes this portion of his book by remarking that "a skillful handling of the facts is advocacy."

From the beginning, the character of the advocate is thrown into issue before the jury. Indeed, in many ways it envelops that of the client himself. "Draw the robes of your own character about the shaking shoulders of your client," says Stryker. He cautions against the advocate's imitation of the great instead of being himself.

Cross-examination is perhaps the most frequently discussed of all the branches of advocacy. It is given detailed consideration by the author. The great question here is always stated to be whether the advocate should cross-examine at all and the test is said to be whether the witnesses actually hurt the client's case. But there is more than the factual question involved; there is the emotional question whether the witness made a good impression on the jury while conveying to them the notion that he is

antagonistic to the client. If this be so, harm has been done which it is the duty of the cross-examiner to seek to undo, even though the record may be barren of any fact adverse to the client, for that is important only on an application for a directed verdict or on appeal. The adage that great harm is done by indulging in unwarranted cross-examination is, of course, true. But it is equally important to emphasize the opposite, *i.e.*, that great harm is done by a fear of cross-examining and thereby permitting the jury to believe that a hostile witness must have been impregnable.

The closing speech Stryker compares to the work of an author in the similarity of the problem of selection, but more difficult because the lawyer must work in public without opportunity for revision or amendment, whereas the author works leisurely, with time for reflection. The advocate, on the other hand, has the advantage over the author that he can watch his public—the jury—and can alter the nature of his text to suit their mood. It seems to the reviewer that the true element of success in summation is so to marshal the facts and the results to which they preponderantly point, while making all fair concessions to one's opponent, that the ultimate conclusion emerges as inescapable after full and fair allowance to both sides. This gives the advocate the authority of a judge and therefore raises him far above the level of a mere advocate of one side.

One feels in reading this book that Stryker fails to emphasize sufficiently the intuitive qualities, which tower above all the other necessary elements in the equipment of the advocate. Any able office lawyer can present adequately the facts in a case and the applicable law. Indeed any good office negotiator can rise to eloquence in presenting his view. But there is something beyond all this which is the distinguishing hallmark of the trial lawyer. The study of facts, important as it is, is only the understructure. The rare quality is the capacity to improvise, and above all to act spontaneously and intuitively in the heat of the battle.

As the title itself suggests, and as Stryker points out, advocacy is an *art*. It is difficult to teach. This difficulty perhaps explains the reluctance of the law schools to enter into the area even though they have eagerly entered into new branches of the law, some of which would seem to old-fashioned lawyers too transitory to be worthy of academic interest.

Indeed, the great difficulty in the teaching and description of advocacy is that so much of it is subtle and elusive, partaking as it does of the qualities of art. There is always frustration and incompleteness in the effort to reveal the secrets of the artist. Indeed, it may well be questioned whether advocates are themselves conscious of the attributes which are the main sources of their fame. Just as the writer and the artist generally fail to meet our expectations when they undertake to describe the sources of their power, so also is there a feeling of inadequacy when an artist in advocacy seeks to describe consciously the elements which make up his art. For in a sense the artist who succeeds is a man of action. What has been hidden and unconscious has taken on an external form; and wise though

he may be instinctively, he is not necessarily gifted with the capacity to understand the hidden mainsprings of his action or to explain how they break forth from intuitive comprehension into specific action.

The great battles of advocacy are difficult and perhaps impossible to recapture in narration. The living drama is at best weakened when it becomes a twice-told tale; and it would require the skill of the dramatist to re-establish at least a good deal of it. But even the perfectly told dramatic tale can do no more than re-create the scene as it once existed. Not even the participants in the original scene, however, now re-created in the courtroom, can penetrate the secrets which conceal the causations of the advocate's conduct. Indeed, most of the descriptions which the advocate himself would give are *ex post facto* probings toward an hypothesis which will match what he has already instinctively done. "In the face of art," says Freud, "psychoanalysis lays down its arms."

It ought to be possible, nevertheless, to enumerate at least some of the equipment which is to be found in the knapsack of the masters of advocacy.

The quick and ready mind is essential. A ceaseless, restless striving in an endless sea of facts and circumstances is one of the outstanding qualities of the advocate. But an elaborate enumeration of the obviously necessary qualities of the advocate tells us nothing significant. Indeed, it tends to obscure the uniqueness of the advocate's intuitive qualities. Ask a trial lawyer why he undertook to cross-examine an important witness one way rather than another and watch as he himself begins to dig into the unconscious causes of his conduct which were not consciously known to him at the time he acted. Another element is a kind of understanding of universal motivations, an impersonal but profound compassion, which understands but does not judge the good and bad, but seeing them all alike, is able in reconstructing the thread of events to reveal the nature and the character of the actors. It is in this intuitive way that the advocate thinks for the litigants in the *ex post facto* enactment of their conroversy. It is what neither he nor others have been able to do for him in the description of his work.

Reference is often made to the physical appearance of the advocate. He is described as having a commanding presence or majestic and sonorous voice or penetrating eye. While in many cases these descriptions are accurate, it is possible to recall masters of advocacy apparently lacking in grace or charm. But whatever may be the individual elements which contribute to the result, perhaps the consistent element is nothing more than the ability of the advocate to center all attention upon himself. It is this which makes him appear to have a commanding presence or a hypnotic power. It is this which makes him appear to dominate all others in the courtroom and thus to appear stronger and more powerful than they. It is in effect the willingness to assume complete responsibility, to take over the risks of his clients, to confront their adversaries, to draw down upon himself rather than upon his clients the sharpest dangers. It is this characteristic which ultimately creates the impression of the masterful.

In seeking to understand the advocate we must not forget the scene in which he is cast. A courtroom means a judge, whether an individual judge or a judge and jury, and the parental figure represented by the judge calls on us to find a definition for the role of the advocate. This is no easy matter. He represents a confrontation of authority always in the mask of humility. If there is one point upon which all trial lawyers would agree, it is never to offend the judge or the jury. Thus this masterful man must work within a framework of subordination. He may unleash against the witness all the weapons in his armory, but—aside from the restraint of his own integrity—the only check upon his sarcasm, scorn and even brutality to the witness is the ever-present test whether he is pleasing or offending the judge or the jury. For all his efforts are directed to the single issue of their decision. In their decision will be swallowed up all the doubts, the turmoil and the uncertainties of the struggle.

Accordingly, within the framework of the constraint put upon him by the judge and the jury, the advocate must dominate the scene. The client turns helplessly to him for care and protection. Men successful in their own affairs, when they come into his hands are childlike in their faith and in their helplessness. His role is nothing less than parental. Yet in this very process of dominating his clients and seeking to dominate the witnesses and masterfully engaging in combat with opposing counsel, he is the subordinate and indeed the child of the judge. Even the nomenclature of the courtroom is loaded with echoes of subservience and the effort at placation. "May it please your Honor" is a phrase so well-worn on the tongue of the advocate that it must be surprising to contemplate what it would mean to hear it said in any other walk of life.

Stryker's plea for greater recognition of advocacy in the law schools is well founded. Indeed, the increasing interest of the law schools in psychological and social factors makes advocacy a subject which should have unusual appeal to a teacher interested in pursuing the play of these elements. Stryker's argument that advocacy should be recognized as a separate and important branch of legal practice is moving and effective. His plea for a Bar divided between barristers and solictors will be welcome to all advocates, and who knows, perhaps to office lawyers too—for different reasons. His criticism of the public's scorn for lawyers who represent defendants in unpopular causes is well worth all the emphasis he gives it, and so is the reiteration in Judge Medina's introduction.

The Art of Advocacy represents the effort of a celebrated advocate to describe the art which he practices. In the course of it, the author calls to his aid some of the masters of the past and some of his great contemporaries. Although it plows no new fields and penetrates no mysteries, the book is illuminating and makes a strong impression of dignity, integrity and strength of character.

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SUPREME COURT AND SUPREME LAW. By Edmond Cahn (Editor),[1] Willard Hurst,[2] Paul A. Freund,[3] John P. Frank,[4] Charles P. Curtis,[5] and Ralph F. Bischoff.[6] Bloomington: Indiana University Press, 1954. Pp. ix, 250. $4.00.

"What practical, working differences does judicial review make in the contemporary American scene? Has the Supreme Court exercised its power to determine constitutionality too extensively or too narrowly, with wisdom or imprudently? By passing on the validity of laws and executive actions, in what directions does the Court turn the dynamic force of the Constitution?" [7] Such questions furnished the theme for a series of meetings held at New York University School of Law to commemorate the one hundred and fiftieth anniversary of *Marbury v. Madison*. *Supreme Court and Supreme Law* contains a series of essays, and a stenotypist's record of their oral discussion, by a group of distinguished scholars. For three reasons this volume constitutes the most significant addition to the literature of judicial review in recent years. First, the essays point up enough major unresolved issues to provide valuable avenues of inquiry for a seminar or advanced course in Constitutional Law. Second, it marks a commendable return to reasoned criticism of the Supreme Court, as distinguished from the intemperate castigation which some commentators have found it necessary to employ. Third, criticism of existing institutions is usually followed by constructive suggestions as to corrective modifications which would be permissible from both power and policy points of view.

After a valuable historical introduction by Professor Cahn, the book contains six brief papers and the record of their oral discussion, followed by four essays of somewhat greater length. Despite the relative brevity of the volume, the richness of these essays is such that only a survey of the major issues is attempted here.

Confining his inquiry to three recent cases,[8] Dean Bischoff concludes in the first brief essay that at least in the civil rights area, the Court has "required too much of a litigable interest, with the result that decisions on genuine controversies are often unnecessarily delayed and individuals are left in doubt about the status of their civil rights." [9] Professor Freund suggested, in the oral discussion which followed, that a change be made so as "to make standing to raise a federal constitutional question, itself a federal question, so that it will be decided uniformly throughout the country." [10] One wonders, however, whether this would solve the problem

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6. Assistant Dean, New York University School of Law.
7. Preface, page vii.
8. Adler v. Board of Education, 342 U.S. 485 (1952); Doremus v. Board of Education, 342 U.S. 429 (1952); and Zorach v. Clauson, 343 U.S. 306 (1952).
9. Page 29.
10. Page 35.

or whether it would generate new cases determining who has standing to raise the standing issue.

Professor Frank contends in the second essay that the doctrine of political questions is currently undergoing a most undesirable expansion. Admitting that political questions is a "legal category more amenable to description by infinite itemization than by generalization," [11] he suggests that there are four practical grounds for the doctrine: (1) the need of quick and single policy, (2) judicial incompetence, (3) clear prerogative of another branch of the government, and (4) avoidance of unmanageable situations. Particular objection is made to the expansion of the doctrine with respect to political apportionment,[12] presidential power in foreign relations,[13] the duration of a war,[14] and the deportation provisions of the Alien Registration Act of 1940.[15]

In the third essay, Professor Freund distinguishes adjudicative and legislative facts, points up the unresolved issue as to Supreme Court reassessment of adjudicative facts, and offers a critique of "the great invention" in the realm of legislative facts, the Brandeis brief. He suggests that the Court's weighing of legislative facts in the commerce cases [16] provides an analogy for First Amendment decisions: "To the extent that a free market in ideas is a basic process upon which representative government rests, as a free market in goods is a basic process on which our federal system rests, there may be ground for judicial intervention in the two areas alike." [17] Whatever the wisdom of abolishing the "double standard" of review,[18] and the concept of the "preferred position" of First Amendment freedoms, there is evidence that such a transition is already under way. Such significant cases as *Dennis v. United States* [19] and *American Communications Association v. Douds* [20] intimate an infusion of commerce criteria into freedom of expression decisions.

In the fourth essay, Professor Hurst points out that the "general political, economic, and social history of the United States is legally competent and relevant evidence for the interpretation of the Constitution." [21] He concludes that "[i]f the idea of a document of superior legal authority is to have meaning, terms which have a precise, history-filled content to

11. Page 36.
12. Colegrove v. Green, 328 U.S. 549 (1946).
13. Chicago & Southern Airlines v. Waterman S.S. Co., 333 U.S. 103 (1948).
14. Ludecke v. Watkins, 335 U.S. 160 (1948).
15. Harisiades v. Shaughnessy, 342 U.S. 580 (1952).
16. For example, Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).
17. Page 50.
18. Compare Justice Stone's famous footnote in United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).
19. 341 U.S. 494 (1951). "We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interests which the State was attempting to protect was itself too insubstantial to warrant restriction of speech." *Id.* at 508.
20. 339 U.S. 382 (1950). "In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate-commerce. . . ." *Id.* at 400.
21. Page 56.

those who draft and adopt the document must be held to that precise meaning. On the other hand, when the document speaks in generic terms, to outline substantive power and to announce standards for the use of power, 'we must never forget, that it is a constitution we are expounding.'" [22] The framers of the Fourteenth Amendment intended, according to Professor Hurst, to delegate a "rule-making power" to Congress, but the Court "took the ball away from the Congress. . . ." [23] Yet, as Professor Frank added, "Error can become history, too, and it can become vested with the same weight that perhaps an original intention had." [24] Thus whatever the merits of the controversy as to the relationship of the Bill of Rights and the Fourteenth Amendment, it would be most undesirable to disregard the intervening seventy-five years of experience in determining the constitutional limitations upon the states.

Mr. Curtis, discussing "The Role of the Constitutional Text," makes the debatable suggestion that "any theory of the Court's interpretation of the Constitution must be the same theory on which the other government agencies act, consciously or unconsciously, when they interpret the Constitution for their purposes." [25]

The thesis that "the Supreme Court has departed too far from the respect for precedent which has been a working maxim of the common law" [26] is presented by Dean Bischoff. Admitting that *stare decisis* "is not an absolute with the identical role to play in public and private law, nor for that matter even in the various branches of constitutional or private law," [27] he contends that the Court has "overstressed its own role as the overseer of our democracy and the judge of social need and that therefore *stare decisis* and the processes of adjudication have too often played a secondary role or have been a mere means to an end." [28] In explanation of the judicial gyrations of 1937, he suggests: "Because laissez faire was constitutionalized it had to be deconstitutionalized." [29] Professor Freund quipped that part of the Court's difficulties may be traced to its unfortunate tendency "to write for the anthologies too much and for the litigants too little." [30]

In addition to the foregoing series of brief papers, four of the participants presented somewhat longer essays on various phases of judicial review. In the first, Professor Freund suggests that although Dicey was right when he said that federal government is legalistic government, in the United States that legalism has two sources of strength: one is the "calculated generality of the principal constitutional provisions" so as to facilitate "pragmatic as against nominalistic judgments;" [31] the other is the "avoid-

22. Page 57.
23. Page 60.
24. Page 62.
25. Page 68.
26. Page 76.
27. Page 79.
28. Page 80.
29. Page 80.
30. Page 84.
31. Page 87. Compare Professor Hurst's contention text at note 22 *supra*, that where the Constitution uses "terms which have a precise, history-filled content," the

ance of judicial decisions on abstract or merely textual questions." [32] Reviewing the Court's treatment of governmental power at the national level, he doubts that we have "actually reached the point where Congress could do whatever might be done in a unitary system." [33] Observing that in the conflict between state power and interstate commerce the Court "has been more successful in its pragmatic adjustments than in its explications," [34] Professor Freund suggests that a special tribunal comparable to the Interstate Commerce Commission might provide a solution with respect to state taxation of interstate enterprise, and to a lesser extent, state regulation of interstate commerce. He also suggests that greater congressional assertion of its power under the Full Faith and Credit Clause, as well as further use of the federal tax-and-credit device, would aid in the solution of problems of federalism.

In the second of the major essays, Professor Frank considers judicial review of congressional legislation and concludes that "there is not a single case of real consequence in which, in 160 years, judicial review has buttressed liberty," [35] and that history demonstrates that "courts love liberty most when it is under pressure least." [36] He suggests four possible consequences of judicial review with respect to Congress: "1. Congress might abstain from passing repressive legislation because of a fear that it would be invalidated—or, at a minimum, might eliminate some of the more repressive features of legislation for that reason. 2. On the other hand, the fact that judicial review is in the offing might cause Congress to abandon any serious constitutional consideration, passing the responsibility to the Court. 3. Judicial review might at least have the effect of slowing and sobering congressional action while constitutional issues are considered. 4. Judicial review might furnish the rhetoric of legislative discussion, providing useful symbols for debate as well as furnishing concrete information to legislators." [37] Considering recent legislation in the light of these possible consequences, Professor Frank finds that there was little concern in Congress over the constitutionality of the non-communist affidavit requirement of the Taft-Hartley Act, or over the principal section of the Smith Act, but that the McCarran Act was appreciably affected by constitutional discussion. "It is distinctly possible that judicial review has encouraged a tendency to congressional irresponsibility (a) by proliferating the law through so many decisions that Congress cannot be expected to cope with it; and (b) by giving an appearance of a judicial veto in the field of liberty when in fact there is almost none." [38] He suggests five proposals which

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document "must be held to that precise meaning." Query: are the two views consistent?

32. Page 87.

33. Page 94. Is this a suggestion that the doctrine of dual federalism still retains some vitality?

34. Page 96.

35. Page 111.

36. Page 114.

37. Page 119.

38. Page 129.

he believes would bring the institution of judicial review closer to the plan of the founding fathers. First, "a severe contraction of the area of non-justiciability. The doctrine of political questions ought to be fundamentally reconsidered and slashed to the minimum." [39] Second, "there should be a complete revision of the doctrine of standing to raise constitutional questions where basic liberties are concerned. Particularly when the First Amendment is involved, there should be no necessity to show the kind of immediate interest hitherto required." [40] Third, "the doctrine of presumption of constitutionality should be completely eradicated in cases involving basic liberties. In that area, a presumption of unconstitutionality should prevail." [41] Fourth, "the definition of criminal punishment should be thoroughly revised to keep the Bill of Rights abreast of the times." [42] On this point he particularly objects to the "baldest fantasy of all" that "denaturalization and deportation are not 'criminal offenses.'" Fifth, he suggests "more tentatively" that we need "a whole new legal doctrine on the constitutional permissibility of interference with speech and press." [43] The clear and present danger test should, he thinks, be replaced by something "more nearly absolute and hence less malleable." [44] In a supplemental statement to his essay, he correctly refers to *Wolf v. Colorado* [45] as "the outstanding triumph of form over substance in constitutional law." [46]

"Measured by the intent of their framers," Professor Hurst argues in the third major essay, "many statutes have in practical effect been ruled unconstitutional when the Court 'interpreted' the words of the act in such manner as 'to avoid a serious constitutional question.'" [47] The policy of the political question doctrine is said by Hurst to testify "to the strong practicality which has generally marked the institution" [48] of judicial review. Many students of Constitutional Law will disagree with his view that decisions involving political questions "have been of secondary significance for the division of powers in regard to domestic policy; they have been of prime importance in emphasizing the President's leadership in foreign relations." [49] Contending that the importance of judicial review as to the national government has been overrated, he points to the fact that the National Industrial Recovery Act did not "drop out of the national

39. Page 132.
40. Pages 132-3.
41. Page 133. Compare Professor Freund's argument, text following note 15 *supra*, for the abolition of the double standard in judicial review.
42. Page 134.
43. Page 135.
44. Page 136.
45. 338 U.S. 25 (1949). The Court there held that although the Fourteenth Amendment forbids unreasonable searches and seizures by the states, there is no federal constitutional compulsion for states to exclude evidence so procured from consideration in their criminal proceedings.
46. Page 139.
47. Page 142.
48. Page 144.
49. Page 144. *But cf.* Coleman v. Miller, 307 U.S. 433 (1939); South v. Peters, 339 U.S. 276 (1950); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); Georgia v. Stanton, 6 Wall. 50 (U.S. 1868); Mississippi v. Johnson, 4 Wall. 475 (U.S. 1867).

political picture because of the Court's decision," [50] and that President Truman's recall of General MacArthur "was a more potent precedent for the assertion of civil control of the military than any likely to come from the Court in our time." [51] With respect to the volatile area of legislative investigations, he finds that "there appear to be no judicially enforceable limits on the subject matter of legislative investigation; that, barring some Bill of Rights limitations (of which only the guarantees against self-incrimination and unreasonable search and seizure have been substantially tested), there are no judicially enforceable limits on the taking of evidence in legislative investigation; and, finally, that there are no judicially enforceable limitations on the order of procedure or the dignity with which legislative investigations are conducted." [52] He also contends that there is "only one main area where judicial policy-making received impetus and grew as a consequence of the expanded functions of the federal government. This is in the field of anti-trust law, the substance of which has been made more by the Supreme Court than by Congress." [53]

In the last essay, Mr. Curtis argues that "the Court is still looking at the Bill of Rights as in a mirror which reflects our current political morals." [54] Charging that in the *Zorach* [55] and *McCollum* [56] cases, the Court was dealing with "immanent law," he questions the precedent value of such decisions. "What Marshall did was not simply to give the Court the function of declaring void and ignoring the acts and statutes of our imposed order which violated our Constitution. This was the least consequence of *Marbury v. Madison.* He opened the way for the Court to take upon itself the function of interpreting and declaring our immemorial immanent law. The Court is quite aware that it is performing this function, but it is too discreet to boast about it. . . . A small example is the public-opinion survey on which the Commission and the Court in part relied when they found the music-as-you-ride radio was not unconstitutional. . . . [57] A more convincing example is the Court's acceptance of the Brandeis factual brief. Even the old Court, fanatic ideologists though they were, listened; and what bearing did the facts which Brandeis' brief brought to the Court's attention have on due process of law except its immanent content?" [58]

Here, then, is a volume rich in ideas clearly expressed and skillfully defended. New York University School of Law and the contributors to this symposium are to be congratulated for providing such a valuable addition to the literature of judicial review.

Richard A. Edwards †

50. Page 147.
51. Page 154.
52. Pages 155-6.
53. Page 161.
54. Page 183.
55. Zorach v. Clauson, 343 U.S. 306 (1952).
56. McCollum v. Board of Education, 333 U.S. 203 (1948).
57. Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).
58. Pages 192-3.

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