

BOOK REVIEWS

LAW: THE SCIENCE OF INEFFICIENCY. By William Seagle.
The Macmillan Co., New York, 1952. Pp. 177. \$3.50.

In our mechanical era "efficiency" is a word that evokes the same sort of allegiance that "virtue" commanded in the moral ages. So highly prized is it that even personal relations come to be valued in terms of efficiency. A young mother is likely to be more flattered at being thought efficient than loving. It is not surprising, therefore, that someone has undertaken to attack government by law as "inefficient." That is Mr. Seagle's thesis—not that the ancient list of the law's shortcomings, its delays, its pedantry, its inflexible certainties and harrowing uncertainties, should be overcome; but that law must be abandoned because inefficiency is inherent in it, in the very substance of it. All reforms are mirages. Law must go. The personal justice of wise men is the only hope of the future.

It is disappointing that the author approaches—and concludes—his exposé of the law's inefficiency without any clear notion of what efficiency means. In engineering, efficiency is the ratio between energy input and work done. We can measure the theoretical energy potential in a ton of coal. We can also measure the distance traveled by a steam engine when it burns a ton of coal. The farther it travels, the better we like it, and the more efficient we say the engine is. It's a simple matter because we make only a simple demand of a steam engine. If we expected a steam engine to mind the baby or to create conditions for world peace, it would be necessary to complicate or discard "efficiency" as a standard. No such complications are apparent in Mr. Seagle's unarticulated standard of efficiency, although he attempts to apply it to the social engine called law, which must supply and reconcile the manifold conflicting desires of millions of people for justice that is swift but also sure, for adaptation as well as continuity, for order which does not sacrifice freedom. As far as one can judge, the author's idea of efficiency in law and government is the unremitting pursuit of any given objective without regard to the consequences. Armies and totalitarian states approach this ideal; democracies have foresworn it.

The chapter entitled "The Bogus War on Crime" is as good an illustration as any of Mr. Seagle's analysis. Among the "inefficiencies" for which he would condemn all law to limbo are: civil service status for policemen; judicial supervision of police practices ("interference"); criminal codes which define in advance what conduct may be punished; prompt arraignment ("secret prolonged questioning . . . is often the only way of getting a suspect to talk"); giving the accused notice of the precise nature of the charge ("really comic from the standpoint of efficiency . . . gives him an opportunity to rig up alibis and other explanations"); the right

to counsel ("neutralizing . . . the skill of the prosecutor"); trial by jury ("judges . . . are more likely to believe the prosecution"); examination of prospective jurors for bias ("particularly absurd American custom . . . trying the jury before trying the prisoner"). In his zeal to discredit law, Mr. Seagle is not always careful to get it straight, as where he mistakenly posits that police may not arrest without warrant a person whom they have good reason to suspect of serious crime.

Readers who do not suffer from high blood pressure may safely be invited to explore the chapters on administrative law, constitutional law and, finally, world government. Each chapter offers the same pot-pourri of sardonic insights and intemperate judgments, right down to the last page of apocalyptic warning to the "lawmongers" who dream of a world order modelled on the American federalism. The author reminds these "glib publicists" of the "failure" of the American Constitution, a document which, by his lights, can be highly regarded only if one "glosses over" the Civil War.

"After all, if after the adoption of a world constitution, the cold war were to become hot and humanity were to be almost destroyed in a war fought with atomic weapons, the pitiful remnant of the survivors could hardly derive comfort from the fact that the war had technically been a civil rather than an international war. It has been said that those who live by the sword shall perish by the sword. It is equally true that those who live by the law shall perish by the law!"

Finis.

This is a silly and perhaps dangerous book. If our law were more "efficient" in the Seagle sense, it would probably suppress such effusions. Let us give thanks for such inefficiencies, and get on with the business of constructive law reform.

Louis B. Schwartz †

CONSCRIPTION OF CONSCIENCE: The American State and the Conscientious Objector, 1940 to 1947. By Mulford Q. Sibley and Philip E. Jacob. Cornell University Press, New York, 1952. Pp. 580. \$6.50.

Working under a Rockefeller Foundation grant to Cornell University and under the general supervision of Professor Robert E. Cushman, the two authors, both sympathetic with conscientious objectors, have produced the first scholarly, objective study of a conflict between government and conscience which has not been reconciled in any country. Not even today under a revised draft law which goes about as far toward exemptions as

† Professor of Law, University of Pennsylvania.

public tolerance of dissent will permit, nor even in Britain with more generous provisions, can hundreds of young men of undoubted conscience be accommodated outside prison.

Resistance to conscription for war on principle leads Quakers and others of equal sincerity to refuse even to register, and imprisonment results from the refusal. Government agencies charged with the almost impossible task of appraising genuine conscience deny recognition to men who do not conform to their concept of religion, and thus condemn them to prison. Though the conflict continues between the demands of conscription and the resistance of assorted objectors, from the other-worldly Jehovah's Witnesses to the strictly this-worldly socialists, it has diminished. It is less acute now than in World War II and it was less acute then than in World War I, when every objector faced the single choice of the army or prison. In World War II he had the choice of civilian public service. Today he has that and the chance for total exemption, although the latter is infrequently granted.

But the number of objectors has grown from an estimated 30,000 in World War I to an estimated 100,000 in World War II. Most of them accepted non-combatant service in the army in both wars and thus presented no conflict. In the total of men drafted they showed up as so tiny a minority—a mere .3 of 1% of the total—as not to be deserving of all the hostility and apprehension they aroused as “slackers.” The overwhelming majority were members of the historic peace churches and minor religious sects. Most of them came from the farms of the middle-west, Pennsylvania and California, reared in a religious tradition which made them quite different from the popular picture of disloyalty.

In view of the small number outside the army it may be wondered why the conflict took on the character of a running battle with the government, marked by petitions, hearings, scores of test cases in the courts, prosecutions and imprisonment. The reason lies in the determination of a few not to be coerced beyond the limits of conscience. Six thousand went to prison, compared with some six hundred in World War I. Almost two-fifths of all draft act prosecutions involved men who claimed conscience as justification for their resistance, and since there was always the comparatively easy road to non-combatant service in the army, their consciences may be accepted. Five thousand of those imprisoned were Jehovah's Witnesses who had vainly demanded total exemption as ministers. Their concept of “witnessing” on the streets and house-to-house could not be reconciled by government agencies with the ministry. Jehovah's Witnesses, along with the non-religious objectors and the “absolutists” who refused all conscripted service, were the irreducible elements whose only accommodation was prison.

But there were 12,000 others, standing between them and the non-combatants, who accepted civilian service under a unique system of work camps sponsored by the peace churches. The bulk of the book is devoted to the unhappy story of the relations of the churches to Selective Service,

which administered the system in traditional army style, and under restrictions greater than those in the army. The objectors got no pay whatever, and even when released from the camps, as many were, to work in hospitals and asylums, their pay was impounded and eventually merged with funds in the Treasury. Their dependents got nothing. They had no accident compensation. Their work was largely the made labor of cleaning up brush and weeds and digging ditches in remote places where they would not attract the neighbors' hostile notice. The churches paid the bills and the military gave the orders.

For the sake of protecting their men the churches suffered throughout the war the frustrations and humiliations of this bastard system. The authors, who disagree as to whether the churches should have withdrawn, render this common verdict: "Despite a crescendo of dissension, a stern and restrictive government policy, an increasingly resentful body of conscientious objectors, and at points a hostile and intolerant public, the uneasy partnership of c.o., government and church in pursuit of tolerance continued until the end of the war."

But such a partnership will not be repeated. It is out of the present draft system, under which men are assigned individually, as in England, to civilian services. The churches have learned what they might have guessed, that religion and government do not comfortably mix.

While the story of what actually happened to objectors occupies most of the study, a careful chapter deals with the law and the court cases. Since the constitutionality of the wartime draft act had been sustained in World War I, the 1940 Act could not be challenged as a war statute. But it was challenged as a peacetime statute with the result that a United States Court of Appeals sustained it as preparation for imminent war. The war power prevailed in all the decisions, and only incidental modifications resulted from the dozen test cases brought. Judicial review of erroneous classifications by challenge before accepting induction was granted to the objectors, but they won it a year after the war when it did no practical good. Until then the courts had insisted that the only way to challenge claimed error was to accept induction and proceed by habeas corpus.

The definition of what constitutes "religious training and belief" as the basis for recognition remained in doubt, with one Circuit Court requiring belief in deity and another only the "inner light." All attempts to upset the civilian public service system—with its military command, its made work, its payless labor—failed. The courts accepted the contradiction that men who were subject to the civil courts alone could nevertheless be held twenty-four hours a day under military authority.

Of the whole complex the authors comment that "law and custom was thus in large part a tapestry of conflicting patterns woven together without general plan or design."

The authors are disturbed by the implications of constitutional principle of one Supreme Court decision which sustained the Illinois bar examiners in refusing admission to a young lawyer who declared his conscientious

scruples against bearing arms. The Court held that he could not take the oath to support the constitution of Illinois in the face of the possibility that Illinois might require military service of all men. The implications are contrasted with the Supreme Court's decision permitting aliens to be naturalized despite professed objection to arms-bearing. Both were, however, 5 to 4 decisions, and the state of the law may not be regarded therefore as irrevocable.

Of course the basic evil is not to be found in law. I doubt that we would have acted more fairly as a nation under the pressures of either world war if James Madison had secured the adoption of his proposed amendment to the Constitution providing that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." Congress is master, and war powers are supreme. Conscription is inescapable in modern war. Until war is abolished the conflict between the State and the little minority of conscientious resisters will go on at the cost of prison, the submergence of religious freedom, and popular intolerance.

But if the spirit of enduring liberty resides in part in the refusal of men of conscience to be coerced, their contributions to our democracy are not without a significance far beyond their tiny numbers.

Roger N. Baldwin †

OUTLINES OF THE LAW OF AGENCY. By Floyd R. Mechem. Fourth Edition by Philip Mechem. Callaghan & Co., Chicago, 1952. Pp. 443. \$7.00.

In the field of Agency, Mechem has been an outstanding name for more than fifty years, for both lawyers and law teachers. Floyd Mechem's analytical mind and encyclopedic knowledge of the cases gave to the profession in 1913 a treatise which displaced all others. He had previously written "Outlines of Agency" and after the publication of his treatise he redistilled his cogitations, putting the product into a third edition of Outlines largely for law school use. Although the present work is brought out as the fourth edition, it is almost entirely new both in language and in thought.

In the thirty years which have elapsed since the earlier Outlines much has been done to clarify the subject. The Restatement, of which Mechem was Reporter until his death, was a complete reexamination of authorities and principles, reaffirming in most respects Mr. Mechem's prior findings, but finding and stating significant differences. Hence although the subject is not fluid, there has been sufficient movement, some resulting from

† Chairman, National Committee, American Civil Liberties Union.

the publication of the Restatement, to make it desirable to have a 1952 statement of fundamentals. Such a statement in a book of less than 500 pages represents the highest art of law writing. It requires ability to discriminate between the important and the relatively unimportant, to compress ideas into small compass, and to select outstanding cases for decision. It is fortunate that Mr. Mechem had a son with the capacity and the desire to do this.

He sketches in a masterly way the broad outlines of the subject, with sufficient minutiae to make it interesting. The work is clear enough for first year students to understand and its discussion of principles makes it useful for lawyers. The author is parsimonious with words but not with opinions. He does not hesitate to disagree with lines of authority which he believes to be headed in the wrong direction, nor does he try to harmonize decisions which are opposed to each other. He has a distinct hereditary virtue; the nearly 1500 cases he cites are not only the outstanding ones but, more importantly, they decided what he says they decided.

With almost all he says, I agree. In only a few cases would I demur, and even in those he is very likely right. Many of the matters upon which we might disagree are relatively unimportant. Thus, I agree that whether or not apparent authority is wholly based on estoppel is a matter of no substantial importance in the decision of cases, although I suggest that it is of importance in making accurate analysis. I agree with him also as to coverage. The book is limited to the traditional elements of the subject and does not include cases involving the effect of modern social legislation, aside from the Workmen's Compensation Act. While these matters are important, I believe they are not within the Agency orbit.

It is a book which I would be glad to have lawyers study. It is the sole book which I shall recommend to my Agency class for outside reading.

Warren A. Seavey †

† Bussey Professor of Law, Harvard University.

BOOKS NOTED

ARCHITECTURAL AND ENGINEERING LAW. By Bernard Tomson. Reinhold Publishing Co., New York, 1951. Pp. 424. \$7.00.

Perhaps the most unique feature of this book is the confinement of its contents to the subjects indicated by its title. It is not a book about the myriad legal problems evolving from the building enterprise generally, nor does it discuss the ethical problems arising from the practice of architecture and engineering. It is, rather, restricted to a consideration of the legal problems confronting the practicing architect and engineer in his relations with clients, builders and suppliers. The nature of these relationships make the book a handy reference tool for the latter groups as well as the former. The author is himself a practicing lawyer in this field, and he has not been inconsiderate of his colleagues in the book's preparation. He cites some 1300 cases throughout the book, the citations under each point being listed according to states, and with each citation is a brief resume of the facts and the holding of the case. In addition to this helpful departure from the usual "string" citations in books of this kind, Mr. Tomson has prefaced each section and subsection with a terse summary of its contents as an aid to locating quickly the particular area with which the reader may, at any time, be concerned. For architects, engineers and their clients, Mr. Tomson carefully points out that the book is not a substitute for a lawyer, but that it will acquaint them in a general way with the problems which may arise that demand legal intervention. For the lawyer, Mr. Tomson has provided a reservoir of basic material as a starting point for legal research.

SUCCESSFUL JURY TRIALS. Edited by John Alan Appleman. The Bobbs-Merrill Co., Inc., Indianapolis, 1952. Pp. 586. \$15.00.

It is frequently said that "law" and the "practice of law" are separate branches of learning; the former being derived from cases, textbooks, etc., the latter from experience. Unfortunately, it is too often true that "Experience keeps a dear school where fools will learn if no other." It is perhaps for this reason that Mr. Appleman and eleven other able trial lawyers have felt the need of recording the learning they have derived from years of experience before juries. Their symposium is not about the "law"; they cite no cases and discuss no rules. Their book is designed for the young attorney who, while he may know the law, is yet unseasoned in the technique of presenting facts and arguments in a manner which is most likely to result in a jury verdict for his client. The book treats a very broad field in a general way, but the general treatment does not obscure the scores of pitfalls which the inexperienced trial lawyer must avoid. This

is not, of course, a shortcut to a successful trial practice. Indeed, the most uninitiated reader may be convinced that some of the suggestions are clearly wrong. But whatever one's opinion may be as to a particular strategy, the symposium amounts to a helpful checklist in preparing for the problems which may arise in jury trials.

TRIAL JUDGE. By Justice Bernard Botein. Simon and Schuster, New York, 1952. Pp. 337. \$5.00.

The publishers note that when Justice Botein, of the New York Supreme Court, was asked what prompted him to write "Trial Judge", he replied, "I wrote it primarily for laymen, only secondarily for lawyers. For many years I have been peppered with questions by both laymen and lawyers which show an avid interest in, and abysmal ignorance of, a judge's job. Since I think it unhealthy to make a cabalistic secret of it, I decided a book was in order." It cannot be doubted that Justice Botein's volume will serve the purpose for which it was designed. His experience as a trial judge is unfolded against an autobiographical sketch of his background and experiences prior to his appointment to the bench. He has endeavored to provide for his readers at least a brief glimpse into all the many nooks and crannies of the judicial office. The functioning of the jury trial, the pre-trial conference, the out-of-court settlement, and the frustration of the "post-trial confessional" are related in a manner which sheds light on the judge's important role and sentiment in each. The less publicized judicial duties in cases of judicial sale, child custody, insanity commitments and the like are set forth with a quite frank discussion of the "non-doctrinal tugs" to which the Judge does not claim complete immunity. The author has circumvented the very real danger of weighting down his audience in a maze of exposition, by building his broad picture from a series of "snapshot" recounts of actual cases in his own career.

Contrary to the indication of the title, the book is more than a rehash of the duties and experiences in the life of a trial judge; it is a single judge's commentary on the law in action. Even the seasoned attorney may extract from this volume the benefit, for example, of an informed reflection upon the effectiveness of the jury system as it operates, the role of the court in stretching and contracting the rules of law to accommodate the particular fact situation and the propriety of a judge's indulgence in political patronage and other fields of influence into which his position affords him an opening. Justice Botein's very human approach to a job which in some circles is considered to be well outside that orbit is perhaps best captured in his opening paragraph where he acknowledges the wisdom of Lord Chancellor Lyndhurst's definition of a good judge: "First, he must be honest. Second, he must possess a reasonable amount of industry. Third, he must have courage. And then, if he has some knowledge of law, it will help."