

## BOOK REVIEWS

THE ELEMENTS OF CRIME. By Boris Brasol. Oxford University Press, American Branch, New York, 1927. Pp. xvii, 433.

Professor Brasol is a compiler and commentator rather than an original investigator and as far as basic material is concerned, adds little to our knowledge of crime and of its sources. Many of his generalizations are from insufficient and inconclusive data. The book, however, rings true. It approaches the study of crime from the right angle and it intelligently and comprehensively reviews a difficult problem. At the outset, however, we believe there is an important omission which would hardly be expected of a compatriot of the author of "The Resurrection."

The attempt of the author is "to find the underlying causes of crime and not to register its external manifestations." Purposely, but, we believe, mistakenly, he avoids the discussion of the important questions of punishment and of criminal administration. Though he says that these subjects belong to the science of penology and not to that of criminology and should therefore be ignored in his study of causes, he overlooks the fact that the methods which are used in the detection and punishment of crime have much to do with its promotion and continuance.

Crime is a rebellion against society. Its underlying cause is a lack of the ethics of Christianity in both the individual and in the law itself. We make criminals of innocent persons in our reform schools where only too often we throw into intimate association the innocent and merely dependent child with the actual criminal. We make criminals of heretofore relatively harmless persons by the mismanagement of our penal institutions. We make confirmed criminals and morose enemies of society of numberless first offenders who initially have transgressed on account of a momentary impulse rather than because of a confirmed hostility to law and to government. We make criminals of innocent persons whom we unjustly arrest while holding them for trial or on suspicion, and we make rebels against society of thousands of persons by the ignorance and brutality of our police and the methods of our detective bureaus.

Professor Brasol agrees with our modern criminologists in concluding that, strictly speaking, there are no criminal types as far as physical conformation is concerned, and that severity of punishment can do little in solving the problem. His main thesis seems to be that crime is a result of an egocentric or anti-social tendency which has a psychological rather than a physical foundation, and though this tendency may in part be laid to heredity and to inherited tendencies, mere heredity does not in itself create a criminal disposition, but there is always an interdependence between heredity and environment. He points out that in the well-known study of the Jukes criminality did not always follow from father to son but often skipped generations, and although there may be certain structures predisposed by heredity toward crime, they seldom develop without the aid of environment.

So far the analysis of Professor Brasol is clear and the conclusion is equally as clear that the basic cause of crime is either a lack of Christianity in

ourselves or a lack of Christianity in the law or in its administration. In his illustrations, however, the author is extremely unfortunate and, though he hints at the influence of Christianity and of religion in the prevention of crime, he has failed to realize its nature. "Crime," he says, "is a deed prohibited and punishable under the laws of a particular state constituting a willful attempt on the part of the individual against the existing social order." If this be so, it is quite clear that the amount of rebellion depends to a large extent on the nature of the social order and of the attitude of the public toward it. Like too many of his fellow writers, Professor Brasol makes a false estimate of social immorality. No doubt he is one of those who still insists upon a distinction between crimes which are *mala in se* and crimes which are *mala prohibita*. Protestingly he states that "there is nothing inherently wrong in selling a bottle of beer. However, for reasons which we do not attempt to explain here, this deed in the United States is prohibited and punishable."

This distinction is ethically and socially unsound and is difficult to reconcile with the author's later conclusions that the present-day lack of the religious sanction and the sense of duty and social responsibility which the Christian faith of the past furnished, has much to do with, even if it is not the paramount cause of our modern criminality. He claims, and no doubt correctly, that Christianity teaches duty and responsibility to others and that the mandate "render unto Cæsar the things that are Cæsar's" teaches a respect for law, yet he forgets the Biblical mandate against causing others to offend. Knowing, as he does, the untold misery that the use of liquor has entailed, its influence on crime and the inability of so many millions to control their craving for alcohol, he still maintains that there is no moral delinquency in furnishing the poison to the thousands who may be ruined by its use, or in violating a law which has been enacted for the purpose of the protection of the lives and morals of our citizens. He adopts the exploded distinction between a crime which is *malum in se* and one which is *malum prohibitum*—the old theory that there are certain vulgar crimes such as murder, robbery and criminal assault; that the commission of these crimes alone is a moral wrong; and that to sell liquor to a drunkard or to occasion others to offend is not a sin but merely the violation of a regulation.

Not the least interesting, however, are his chapters upon religion, the family, and education. Starting as he does with the theory that crime is the result of an anti-social impulse or training, he emphasizes the value of those agencies which tend to modify that impulse and to socialize the individual. Of these influences, religion, to him, appears to be the greatest. He starts from the time of the greatness of the ancient Roman Republic where in every house was an altar and around that altar the family assembled; where religion was not only a family practice but was intimately connected with the welfare of the state. Christianity, he says, for a long time took the place of the old Roman religion and Christianity teaches duties of the individual toward the Deity, duties of the individual toward society, and duties of the individual toward himself. In its precepts are the real antidotes to the anti-social tendency of the criminal and to the anti-social tendencies which environment so often creates. Christianity teaches a responsibility to God, the love of one's neighbors, modesty, mercy, forgiveness, disregard of material wealth, chastity, obedience to law, and absence of malice. Today he says the religious impulse is lacking. We are

living in an age of rationalism and materialism and rationalism is unproductive of social impulses. Our ministers are sensationalists and notoriety hunters rather than teachers of a fundamental faith and of a fundamental sense of duty. We need something definite. We need authority.

In speaking of education, he pertinently remarks: "The utter neglect of religious, ethical and æsthetical elements in modern education, both in the family and the school, is largely responsible for the almost intolerable vulgarity of the public taste. But the lack of mental refinement is invariably accompanied by and reflected in bad manners, which by no means are confined to the lower strata of society. This condition, to the casual observer, may seem unimportant, and yet it is a momentous anti-social symptom, signifying disregard of that propriety of social intercourse which, according to Professor Soloviev, is its cultural minimum. Even college education, which is supposed to create the highest standards of general learning, frequently does not bear any beneficial influence upon the social conduct of the alumni. The theoretical foundation of their training is only a formal acquisition of knowledge. But just in the same way as dexterity of the hands may be possessed by a pickpocket or a sharper, so equally, dexterity of the mind is capable of being utilized for vicious purposes and anti-social ends.

"The 'alma-mater' in our day is no longer a reservoir of moral ideals and social virtues. In many European countries but perhaps even more so in America, the average college undertakes to prepare a young man for his profession in as short a time as possible. Accordingly, the academic systems resolve themselves into quick work; hasty teaching; parrot-like learning by heart the fragments of digested science, with no traditional background or idea, other than 'picking up' some practical information promptly convertible into dollars and cents.

"On the other hand, there is much incredulity and scoffing at religion, not because of their alleged wisdom, but rather despite their incurable banality. Coupled with this we perceive an appalling ignorance of genuine art and a complete indifference to the noble principle of Beauty which—to quote Keats—'is truth.'

"No wonder, then, that many college graduates enter the ranks of society, although with some amount of mental equipment, but with no sound principles or firm moral convictions to guide them through the labyrinth of the social traffic.

"Nor does college tend to modify the 'Get Rich Quick' motto which is fast becoming the fundamental dogma of present-day social philosophy, dominating the minds of the old and young alike.

"However, precisely because of the predominance of the materialistic and mechanical ideology in our system of education, and notwithstanding the fact that in the United States, at least, the growth of material prosperity during the last decades has been astounding,—the volume of dissatisfaction and general restlessness, the sum total of moral wretchedness and mental misery, together with the epidemic of atrocious crimes and the alarming spread of professional criminality,—are assuming the proportions of a social calamity."

"Here, then" and again to use the language of the author, "criminology touches upon the real—not the imaginary—causes of criminality in its present-day militant aspect. It is not the mode of production, nor poverty, *in se*, nor

prosperity, nor the shape of the nose, nor the brachycephalic symptom, nor any other incidental factor, that generates the phenomenon of crime, but those fundamental destructive changes which take place in the composition of society itself, assuming the form of dangerous gangrenous processes and threatening the very existence of social order.

"When we begin to conceive that all moral foundations have been gradually destroyed, men, women and children alike, clamoring for nothing but material gain and self-gratification; when we think that people today, like the Roman mobs in the days of the decay of their Empire, are striving for nothing but '*panem et circenses*'; when our families are found in a state of complete dissociation, fathers and mothers having lost all ethical conceptions, and children morally neglected and abandoned by their parents; when we see supposedly civilized nations madly engaged in nothing but money-making enabling them to make mad expenditures for hideously vulgar and intrinsically immoral purposes; when all this is realized,—then, indeed, we begin to be drawing nearer to the scientific interpretation of the problem of crime."

If Professor Brasol's book had contained nothing else but the chapters on religion and on education, these alone would have justified its publication.

There is need, however, of men who, perhaps, are greater and more far-seeing than Professor Brasol, to solve the problem of our lack of faith and to lay the foundations for the new awakening. Professor Brasol belonged to the old regime; to the old Czarist day of orthodoxy and of establishment—perhaps to the day of ignorance and of lack of education. Men and women, especially college men and women, lose their faith not because they desire to but because they are investigators and thinkers and are taught to rationalize everything.

A conflict in religion, in faith and in philosophies exists among our ministers as well as among our laymen. Men know not what to believe since there are so many prophets teaching different doctrines. Will some great prophet arise who can restore Christianity to its simple essence and teach a philosophy of the Deity and a sense of responsibility which all may grasp? Then will come the solution of crime.

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CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS. By William Edward McCurdy. Callaghan & Co., Chicago, 1927. Pp. xxi, 1246.

Professor McCurdy's twelve-hundred-page casebook is stimulative not only of thought, but of emotion. What teacher of domestic relations can escape envying a man who has convinced his school that it would be better to omit the course entirely than to devote to it less than four semester hours!<sup>1</sup> That four hours can be profitably so spent, no one, save teachers of other courses, would deny. That four hours can be pleasantly so occupied everyone will admit, for there is no subject in which law students—from whom, fortunately, normal lay instincts never entirely depart—exhibit a more spontaneous interest. The fact

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<sup>1</sup> McCURDY, CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS (1927) iii.

remains, however, that Professor McCurdy's enthusiasm for his subject has won for it a rather generous time allotment.

Professor McCurdy, then, having four hours at his disposal, has naturally produced a casebook requiring at least four hours to cover, and, viewed as a whole, it is a very good one. As is pointed out in Professor Rice's review of the book,<sup>2</sup> the arrangement of the material is logical and orderly. While one finds in this casebook—as in most others to be sure—an occasional case, for the presence of which in the text it is difficult to account,<sup>3</sup> the cases in the main are well selected, with due regard both to principles discussed and to teachability.

New cases of interest and importance have been included, as for example, *Brown v. Scott*,<sup>4</sup> which holds, without the aid of the statutory mandate conferred on the New York courts,<sup>5</sup> that fraud concerning fortune and character, when practiced upon an immature school-girl, is ground for the annulment of a marriage; *Oppenheim v. Kridel*,<sup>6</sup> of value not only for its proper decision in favor of the plaintiff after a masterly discussion of the right of a wife to sue for criminal conversation, but also as a case deserving a place in a general history of the common law; *Tompkins v. Tompkins*,<sup>7</sup> introducing into the American common law the English Triennial Cohabitation Rule; *Maine v. Maine & Sons Co.*,<sup>8</sup> improperly, it would seem,<sup>9</sup> denying the right of a wife of an employee to recover against an employer for personal injuries sustained by her as a result of the negligence of the husband-employee, while acting within the scope of his employment; and *Gould v. Gould*,<sup>10</sup> which has been so frequently commented upon that its holding is known to all.

Considering the fact that Professor McCurdy was preparing a four-hour casebook in the field of persons and domestic relations, from which cases dealing with aliens, drunkards, insanity, capacity of husband and wife to testify against each other, crimes of married women and infants, dower, courtesy and conveyances between husband and wife in fraud of creditors were to be omitted,<sup>11</sup> it would seem that by a little closer editing of the cases chosen for the text, he could have, as suggested by Professor Rice in his review of the book,<sup>12</sup> found

<sup>2</sup> Book Review (1928) 41 HARV. L. REV. 414.

<sup>3</sup> *E. g.*, Shepler v. Chamberlain, 226 Mich. 112, 197 N. W. 372 (1924). The decision in this case is of interest and importance, but the opinion, which occupies five and a half pages of text, consists largely of a running digest of other cases, rather than a discussion of principles. A statement of the holding of the case in a footnote would seem sufficient.

<sup>4</sup> 140 Md. 258, 117 Atl. 114 (1922).

<sup>5</sup> *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63 (1903).

<sup>6</sup> 236 N. Y. 156, 140 N. E. 227 (1923).

<sup>7</sup> 92 N. J. Eq. 113, 111 Atl. 599 (1920).

<sup>8</sup> 198 Iowa 1278, 201 N. W. 20 (1924).

<sup>9</sup> Comment (1927) 13 CORN. L. Q. 106, discussing recent case taking similar position.

<sup>10</sup> 235 N. Y. 14, 138 N. E. 490 (1923).

<sup>11</sup> McCURDY, *op. cit. supra* note 1, iv, v.

<sup>12</sup> *Supra* note 2.

room, without increasing the number of pages, to include citations to non-legal discussion of the tremendous ethical and sociological problems presented by the family relations. He might also have added an appendix of important typical statutes, about which, as he so aptly says,<sup>33</sup> there has grown up "a large body of what may be termed the common law of the statutes." He might have developed his topical analysis in his table of contents in greater detail. Nor would he by so doing, as he apparently feared,<sup>34</sup> have prevented discriminating students from making their own classifications and divisions of material, but he would merely have furnished a reasonable aid to all the students, and have made his casebook that much more a useful working tool. Likewise the utility of the book would have been increased and the convenience of his readers better served, had he chosen to include in his table of cases all of the cases cited in the footnotes, instead of omitting from the table hundreds which, while cited, are not "stated or quoted from."<sup>35</sup> And finally, he could well have cited more law review material. He says:<sup>36</sup> "Law review material has been cited comparatively infrequently,"<sup>37</sup> due chiefly to the almost total absence of law review material of merit on the substantive law of Persons and Domestic Relations." This assertion is so sweeping as fairly to invite contradiction.<sup>38</sup> Nevertheless, how much law review material should be cited in any given case book is by no means easy to determine. If Professor McCurdy, therefore, had assigned almost any reason, other than the one he did assign, for the course he took in this regard, he would have found numerous allies.

It is, of course, undoubtedly true that part or all of the omissions mentioned above will be by many deemed virtues rather than faults. But, even assuming for the sake of argument, that these omissions are faults, Professor McCurdy's book, which is a veritable treasure-house of invaluable case material, deserves the careful and respectful attention of every teacher of persons and domestic relations. Even if twelve hundred pages seems rather much to put in the hands of students taking the usual two-hour course, no instructor in this field can afford to deny himself the suggestive help which this casebook will give him.

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<sup>33</sup> McCURDY, *op. cit. supra* note 1, iv.

<sup>34</sup> *Id.*, v.

<sup>35</sup> *Id.*, xi.

<sup>36</sup> *Id.*, vii.

<sup>37</sup> While the reviewer has not read the book page by page, his examination has been more than cursory, and as yet he has not found any law review citations.

<sup>38</sup> If the following articles are not "of merit," it is clear that writers in law reviews face an almost impossible task. Reference might be made to scores of other good articles and notes. Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417; Goodrich, *Matrimonial Domicile* (1917) 27 YALE L. J. 49; Comment (1923) 8 CORN. L. Q. 254.

LAWYERS AND LITIGANTS IN ANCIENT ATHENS. By Robert J. Bonner. University of Chicago Press, Chicago. Pp. 276.

If it be true that "in jurisprudence, as in theology, all roads lead to Rome," anyone with a passing knowledge of ancient juristic thought and its reception through the ages to modern times, who reads this scholarly little book by a former member of the Ontario Bar, now Professor of Greek in the University of Chicago, will be forced to the realization that in advocacy all roads lead past Rome to ancient Athens, where the Athenians "were a nation of lawyers."

There are eleven chapters in the book; three of them are devoted to "Attic Orators," "Forensic Oratory," and "Advocates and Speech-Writers." Three chapters are devoted to "Practice and Procedure in the Athenian Courts," "Prosecutors and Sycophants," and to the "Character of the Athenian Courts." Another chapter deals with "Athenian Litigiousness," one with "The Career of a Litigious Athenian," one with "Tactics and Technicalities in Litigation in the Athenian Courts," and the last chapter with some notable "Athenian Trials," including the famous trial of Socrates, and Aristophanes' burlesque on an Athenian trial in the "Wasps."

The book deals almost wholly with the adjective phase of ancient law, with incidental attention, only, to the substantive law of ancient Athens. The chapters on "Practice and Procedure," "Prosecutors and Sycophants," "Tactics and Technicalities in Litigation in the Athenian Courts," and "The Career of a Litigious Athenian," are particularly interesting, though it may be said that to a student of ancient jurisprudence the whole of the book is extremely so. It throws a penetrating searchlight on the courts, lawyers, and litigants of that ancient system of jurisprudence to which the philosophy of law is traced.

Perhaps the average modern lawyer who has given any thought to the subject, pictures Demosthenes as a very upright character warding off from his beloved city the machinations of the Macedonians. But Professor Bonner's study shows him to have been busily engaged in the Athenian courts pleading cases for clients, writing speeches for them, and not beyond stooping to practices which would be universally condemned by modern lawyers. The author quotes from an oration of Isæus relative to the assaults made upon the estate of one Nicostratus, who had died abroad after a continuous absence of eleven years, that: "What a crowd of relatives and sons by testamentary adoption appeared as claimants of the estate of Nicostratus! Demosthenes claimed to be his uncle; but when he was exposed by my clients, he desisted."

These seems to have been little humor in Athenian courts, but it is related that Demosthenes was defending a prisoner on a capital charge when he observed that the dicasts were restless and inattentive. Therefore he related the story of a man who rented an ass for a journey, and who dismounted and sat in its shade when the sun became uncomfortable, causing a dispute with the owner of the ass, which dispute was taken to court. The dicasts inquired as to the outcome of the dispute and Demosthenes said: "What, are you so interested in a dispute about a donkey's shadow, and yet in a matter of life and death you will not even take the trouble to listen."

"The Career of a Litigious Athenian" is that of Apollodorus, the son of Pasion, a former slave, who had been naturalized. There were no public prosecutors in Athens and the legal machinery for the punishment of transgressions

of the law was set in motion by private parties. Apollodorus not only instituted suits for recovery of real and imaginary claims, but prosecuted numerous Athenians for violations of the law, his career finally ending in loss of all his property. The practice of having a private person assume the duty of initiating prosecutions against offenders resulted in blackmail. The author says that "in Athens the threat of litigation was quite different from the threat used by modern blackmailers, which frequently contemplates the disgrace and ruin of the victim." In order to protect themselves from blackmail of sycophants, business men of Athens often found it to their advantage to keep men in their employ as agents to prosecute the sycophants. Bribery appears to have been prevalent and tolerated by the ancient Athenians.

It was the practice of the ancient Athenians to conduct the trial of their own cases, whether the proceedings were before the archons or the thesmothetæ, consisting of the six junior archons, or before the dicasts, and whether the case were criminal or civil. However, as oratory developed, it became the practice of litigants to secure the aid of orators in writing the speeches which they were to deliver, and finally the practice became such as to permit the plaintiff or defendant to be assisted by some relative or friend. This brought about the employment of orators as lawyers, and contributed to the rise of a professional class of men, who devoted their time to the courts and politics. The author refers to the training of Strepsiades, an Athenian farmer, for the law, as related by Aristophanes in the "Clouds."

The book is interesting throughout and will repay reading by anyone who has curiosity concerning the adjective side of ancient Athenian law, or in tracing out some points of resemblance between advocacy as practiced by the ancient Athenians and advocacy as we practice it today in our courts.

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