

# Missouri Law Review

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Volume 6  
Issue 3 *June 1941*

Article 6

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1941

## Book Reviews

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### Recommended Citation

*Book Reviews*, 6 MO. L. REV. (1941)

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## Book Reviews

**THE BOTTLENECKS OF BUSINESS.** By Thurman Arnold. New York: Reynal & Hitchcock, 1940. Pp. xi, 335.

This book is neither a legal nor an economic treatise. Rather it is addressed to the eighty-seven per cent of American families whose incomes are \$2,500 a year or less and whose standards of consumption are adversely affected by restraints of trade. The significance of Sherman Act enforcement is interpreted in concrete terms of automobiles, gasoline, spectacles, Nylon hose, food and other prices. However, the work is of peculiar interest to lawyers and economists because of the author's position of Assistant Attorney General in charge of Anti-trust Law Enforcement. His interpretation of the Sherman Act is, in part, an announcement of prosecution policy. Since the number of actions begun has increased from an average of ten each year from 1936 to 1938 to seventy-five in the fiscal year of 1939-40<sup>1</sup> this is of more than academic interest.

Discussion of the Sherman Act necessarily raises a number of specific questions. (1) What is the role of an 1890 statute in the disillusioned, not to say cynical, world of 1941? (2) What kind of market behavior is prohibited? (3) Does the Act subject business to an unreasonably indefinite hazard of prosecution? (4) Admitting the Act has not been effective in the past, can it be made effective for the future? Mr. Arnold's answers lay the foundation for a militant defense of our system of free enterprise.

(1) The book joins the current controversy over "Where do we go from here?" Little of comfort will be found by the economic planner or the "forward looking liberal" who anticipates the day when government will be business and business be government. Those who have a hankering for a "system of free enterprise" may likewise be disturbed by Mr. Arnold's thesis that Sherman Act enforcement is a necessary corollary to the preservation of that system, that it stands as the only bulwark against the economic Balkanization of America. We cannot have a system of free enterprise and "private seizure of economic power." This is so obvious that some of our more vocal defenders of "The American Way" might well ponder it and its implications. An economic system based on securing to everyone more and more of less and less cannot function very effectively. In less cryptic terms, we cannot assure each organized interest protection from competition, thus enabling it to restrict output and raise prices, without diminishing the total of goods and services available.

The Sherman Act is our only weapon to prevent this development because it is an integral part of our tradition. Its use involves the least dislocation of

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1. (1941) 9 U. S. L. WEEK 2351.

existing institutions and gives the least shock to existing ideals. The application of its broad formula is made by the judicial system which is "the symbol of due process itself." Any new form of attack, such as through administrative bureaus, must be exhausted by the energy necessary to start it. While the argument is consistent with the position developed in the author's "The Symbols of Government," it appears to give too little emphasis to administrative enforcement.

(2) The restraints of trade given greatest attention are those of business and of organized labor. The test of legality of business activity, stated non-technically, is presented:

"You may grow as big as you can provided that you can justify the extent of your organized power by showing that it contributes to the efficiency of mass production and distribution. We will protect you against organized groups of small business which attempt to prevent you from giving cheaper goods to the public. We will, on the other hand, attack you if you seek to maintain your system of distribution by using your organized power to prevent experimental developments by others either in production or in distribution or in price policies." (p. 125)

Concerning organized labor, it is stated that if the objective of the organization is legitimate, there is no unreasonable restraint of trade. Sherman Act violations would then include: attempts to prevent the use of cheaper materials, improved equipment or more efficient methods; requirements forcing the hiring of unnecessary labor; enforcement of systems of graft and extortion; enforcement of illegally fixed prices; and restraints designed to destroy an established and legitimate system of collective bargaining. (pp. 250-252)<sup>2</sup>

(3) The Sherman Act is viewed as a statement of general principles, flexible enough to fit any "private seizure of economic power" which might arise. It is an "economic common law" principle. Clearly this generality does subject business to an indefinite hazard of prosecution. "That hazard is no different from the one which accompanies the test of reasonable and due care in every branch of the law . . . It is the same kind of test that governs our fundamental conception of due process in constitutional law." (p. 138) To the laymen it would appear that those who insist upon skating on thin ice might expect an occasional soaking. The problem is one of consistency in application.

However, enforcement procedure tends to minimize this risk. Any firm entering into a border-line situation may submit all the facts to the Department of Justice. While the Department cannot approve such plans, it may find in them no reason for prosecution. "The good faith of the defendants in laying their cards on the table is protection against the hazards of criminal prosecution . . . If the experiment proves to be a failure, the only penalty will be that they will be told to stop . . . The worst that they would get would be an injunction." (p. 149) The hazard of criminal prosecution is reserved by the policy of the Attorney General's Office to reckless business con-

2. This last point referring to jurisdictional disputes was not upheld. *United States v. Hutcheson*, E. D. Mo., (1941) 9 U. S. L. WEEK 4151.

duct. Here is the administrative enforcement which earlier was made to appear impractical. Perhaps it is different when done by Mr. Arnold.

(4) In the past the Sherman Act has failed to perform its function chiefly because "enforcement has been used only for private purposes." (p. 164) In a private suit the consumer interest cannot be represented. Even in the public cases, practical economic objectives have not been defined or argued. Sporadic raids have been made but no consistent campaigns could develop. "The result has been that the judicial interpretation of the Act in the last 40 years has not only lacked precision, it has also lacked any direction whatever . . . No public prosecution policy existed to provide landmarks to keep the Sherman Act to its original direction." (p. 172.) In part this was due to inadequate staff. The average number of lawyers in the Anti-trust Division from 1914 to 1923 was eighteen. In 1933 there were fifteen. By 1940 the Division had a total personnel of about two hundred.

A consistent prosecution policy beginning in 1938 has clarified the more serious uncertainties of the law, turning it into an effective instrument to maintain a free market. Thus the way is clear for a definite enforcement program. The policy adopted is to prosecute simultaneously "all the restraints which hamper the production and distribution of a product from raw material to consumer." (p. 191.) Results have already been achieved by indictments and district court decisions in the food industry and the building industry.

The Sherman Act may yet preserve our system of free enterprise. It remains to be seen whether the impact of the defense emergency will return it to the desuetude of our state anti-trust laws. However, there is no technical need for its abandonment; whether there is a political need is another matter.

The reader who hopes for a system of economic planning in the United States will be dismayed by Mr. Arnold's exposition. On the other hand, the reader who hopes our system of free enterprise will be maintained, will be dismayed to learn that there never has been a consistent Sherman Act policy. The next wind from Europe may blow away the entire enforcement structure now so carefully built up. Possibly this may have been in Mr. Arnold's mind when he wrote the book.

There is a useful summary of leading anti-trust cases in an appendix and also an index.

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RUSSELL S. BAUDER

HOLMES-POLLOCK LETTERS. *The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*. Edited by Mark DeWolfe Howe.<sup>†</sup> Cambridge: Harvard University Press, 1941. Vol. I, Pp. xxii, 275; Vol. II, Pp. 358.

In 1921 Oliver Wendell Holmes, Jr., Justice of the Supreme Court of the United States, wrote to his friend, Sir Frederick Pollock, legal scholar and historian, that he was reading St. Augustine's *Confessions*. Said he, "He makes Cicero seem as of yesterday and Plato of a week ago; he is so modern by his humanity and they are so fresh to him." Although Holmes died in 1935 just two days short of his 94th birthday, so modern was *he* in his humanity all the days of his life that many a young American lawyer who cut his legal teeth on the great judge's opinions still thinks of him almost as a contemporary. These letters may have for such a reader the same curious effect that the reflections of St. Augustine had upon Holmes, and he will find himself uneasily passing "contemporary" judgment upon men dead before he was born.<sup>1</sup>

For American readers the chief interest in this correspondence lies in the light it sheds upon the personality, habits, character and convictions of Holmes. By comparison with the authors' published works the letters are not remarkable for style or profundity. In the first place, they were written (whether by Holmes or Pollock) for the eye of a singularly learned and perceptive man, and mere statement of the writer's current activity in effect "incorporated by reference" the reader's store of knowledge. In the second place, the discussions of legal topics presuppose active concern for and familiarity with decisions and controversies now seldom thought of. The letters are the journal entries of the writers' intellectual and physical adventures, not the published description. As such, they are an amazing series. Begun in 1874 with an acknowledgment of and comment upon certain legal essays sent to Pollock by Holmes, when both were little known young lawyers, they conclude in 1932, after Holmes had left the bench. Through wars and peace, sickness, travel, professional life and vacation, the record of their reading and thought continues. The letters have been annotated by the editor, one of Holmes' secretaries, with the care and detail which suggest a labor of love, and a reader with the necessary mental vigor and breadth of learning (there will be few) could follow much of the road traveled by two of the most cultivated minds of the past century. The learning of Pollock, the professional scholar, astounds one. Few were the fields entered upon by his correspondent of which he could not extemporaneously develop the history and mark the borders. Having in these letters given evidence of his familiarity with Greek, Latin, Italian, French, German, and Sanskrit, at 70 he took up Russian. Holmes ascended the bench not long after publishing *The Common Law* and thereafter the greatest part of his energies were neces-

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1. Not the least interesting aspect of the correspondence is the intimate discussion of most of the great legal, and many of the great political, figures of the past century.

sarily directed to the practical work of the law, and it is in his opinions that his rare qualities of mind are best displayed. The contribution that he made all American lawyers know, but the affectionate respect for his knowledge and judgment displayed by his correspondent must have gratified him extremely.

On that work, as well as on the semi-legendary character, the letters cast considerable light. Holmes for many years bitterly resented the editorial comments on his appointment to the United States Supreme Court, the indiscriminating and non-understanding praise hardly less than the judgment "brilliant but unsound."<sup>2</sup> The unfairness of the tabulation as a "radical"—the failure to distinguish between the conviction of legislative power and personal economic preference—is shown in many of these letters, where again and again he expresses his opinion of the unsoundness of the laws whose constitutionality he upheld. It should not surprise—but it may—that one of such individualistic personality should have been a "rugged individualist" in politics.

No American lawyer should have had difficulty guessing the author of one side of the correspondence even without title or signature. The terse but brilliant style, the single conclusive judgment, the broad culture and live humanity, the indefatigable and tough-fibered mind, the kindly arrogance of the Boston brahmin, are here on every page. The latest addition to "Holmesana" is the greatest.

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ORRIN B. EVANS

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THE LAW OF THE ORGANIZATION AND OPERATION OF COOPERATIVES. By Israel Packel. New York: Mathew Bender & Co., 1940. Pp. 264.

Anyone interested in the Cooperative movement from the broad viewpoint of its history, development, formation and operation of a cooperative enterprise, will find this book interesting and informative.

Such a book, attempting to cover the entire field of cooperatives, must of necessity have its limitations if examined in search of the answer to particular questions or procedure under the law of a given state.

Agriculture marketing associations form the largest field of cooperative enterprises, and the text and case references of this book are primarily devoted to that subject, although the author deals with cooperative organizations of various types and purposes, such as "consumers' cooperatives, marketing cooperatives, business purchasing cooperatives, workers' productive societies, financial cooperatives, insurance cooperatives, labor unions, trade associations and self-help cooperatives."

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2. See his letter of September 23, 1902, Vol. 1, p. 106. Pollock replied, "The notion that what is brilliant cannot be sound is dear to our friend the reasonable man, who in the flesh is a Philestine pig, on the general principles of his pig-piety."

It is of more than passing interest to note that since the cooperative movement was first introduced into this country in 1875 by the adoption by the National Grange of the so-called Rochdale principles, there has been practically no change in those fundamentals, and if a commercial activity is governed by them it is a cooperative, whether incorporated or not, and regardless of the type of corporation law under which it may be incorporated. They are: (1) limited interest on capital investment; (2) refunds (to members) in proportion to purchases or sales (of members); (3) charge of local prevailing prices; (4) one vote for each member (in control); and (5) regular and frequent meetings (of the members)."

Organizations founded upon these principles have found their place in the industrial life of this nation. Operating as a cooperative they have found favors both with the lawmaking power and judicial branch of our government. The basis of such preferment, as quoted by the author, was stated by Justice Brandeis in the following words:

"But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of cooperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure. That way is clearly open. For the fundamental difference between capitalistic enterprise and the cooperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation." (Dissenting opinion in *Liggett Co. v. Lee*, 288 U. S. 517, 579 (1913))

It has been the purpose of Mr. Packel, in the brief space of 264 pages—"to give a broad and comprehensive picture of the movement so that the problems confronted by each type can be interrelated and compared." Giving a broad and comprehensive picture of the movement, the author first outlined the procedure in the formation of the corporation. In doing this he has not confined himself to the legal problems usually involved, but has set forth step by step the organization work prior to incorporation.

The book contains a comprehensive discussion of the various types of cooperative laws available for organizing cooperatives. The author is in accord with the prevailing opinion, among those interested in the cooperative movement, that the non-stock cooperative law, now found upon the statute books of practically all the states in the union, are preferable for organization purposes. Reference is made to the uniform cooperative marketing law, approved by the National Conference of Commissioners on uniform state laws and by the American Bar Association. This law is not available in Missouri. While this state passed an agricultural cooperative law in 1919, providing for the issuance of capital stock (now Article 28, Chapter 102, Missouri Revised Statutes, 1929), in 1923 there was adopted by the Missouri legislature the cooperative non-profit, non-stock act (now Article 23, Chapter 102, Missouri Revised Statutes, 1939). Both of these laws still remain upon the statute books of Missouri, practically in the same form as when passed. Most of the cooperative institutions in Missouri are organized under one or the other of these two acts. The 1923

non-stock act is patterned after the so-called Bingham cooperative marketing act and in many respects its provisions are similar to the uniform cooperative marketing law approved by the American Bar Association in 1936. Both cooperative laws upon the statute books of Missouri recognize and provide for organizations formed under their provisions to conform to the basic principles of a cooperative, cited by the author early in his work.

This book devotes a chapter to the subject of management of cooperatives, and one to conducting the cooperative enterprise. In this department the author can furnish little of practical value to those engaged in the operation of cooperatives. The successful management of a cooperative calls for the same sound business management as any other commercial venture. A successful cooperative does not exist in the absence of good management. It is to be regretted that the secret of good management cannot be found in books.

A chapter is devoted to financing cooperatives. Since the loaning power usually dictates its own rules as a condition precedent to granting a loan, little benefit can come from such a study other than to those who are interested in the abstract mechanics of methods of finance which have been used by other cooperatives.

The book closes with a chapter devoted to "Distribution of Benefits and Losses" and "Government and Cooperatives." These two chapters constitute the meat of this book insofar as the legal profession may be concerned. This is so because most legal questions arise as a result of action taken in the distribution of profits and losses, or the use and effect of various federal and state laws in the operation of the cooperatives. It has long been the practice of both the State and Federal Governments to grant certain privileges to cooperative organizations which are not enjoyed by other private institutions. Exemption from anti-trust laws, tax exemption, and wage and hour act exemption are current illustrations.

The fundamental test of a cooperative, aside from membership control, is usually found in its method of distribution of funds resulting from sales and purchases. It is not strictly proper, as the author remarks, to call such funds profits. They represent the excess that has been retained by the cooperative to guarantee operating expenses, and when such charges have been ascertained and paid, such surplus in a cooperative rightly belongs to and should go to the members on a patronage basis. Out of this operation legal questions arise, such as the right of non-members to patronage dividend; the extent of business the cooperative may do with non-members; the right of the cooperative to tax exemption and, based upon its treatment of members and non-members, whether a cooperative may qualify for loans from the Bank for Cooperatives. These and many other questions have been catalogued by the author with citations of our appellate and supreme court on the various subjects discussed.

It is doubtful if the author of this book intended his work exclusively for the law office or the layman interested in the cooperative movement. Rather

will the book find its most useful place in the classroom as a part of a course on Cooperatives.

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RUBEY M. HULEN

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THE MACHINERY OF JUSTICE IN ENGLAND. By R. M. Jackson. Cambridge: The University Press, 1940. Pp. viii, 342.

This is a detailed exposition of the administration of justice in England in both civil and criminal cases. It is the work of an English lawyer who is also lecturer in law at Cambridge University, and is based upon a careful study of available published material in the form of statutes and reports of governmental commissions, as well as upon close contact with "law in action." It is, in short, a painstaking and judicious effort to describe the English legal system in the light of its historical, social, and economic background. As such, it should be welcomed by American lawyers and social scientists.

The author believes that "the best introduction to law is a study of the institutions and environment in which lawyers work." With this thought in mind, he has included in addition to the more formal descriptive and factual chapters, material upon such important topics as the personnel of the law, the cost of the law, and the outlook for legal reform. (His discussion, for example, of proposals for the creation of a ministry of justice and for reconstruction of the court system are among the most interesting sections of the book.)

Mr. Jackson's method is in the main descriptive. He sticks close to the facts and is content to let the reader draw his own conclusions. He is more interested in attempting to explain *how* the English system of law administration works than he is in pinning labels on it or foisting upon us his own opinions as to whether it is better or worse than some other system. This technique has much to commend it. In the opinion of the reviewer, it is infinitely preferable to much of what passes for "analysis" in more "controversial" and "suggestive" treatments of the problems involved in law enforcement, but which is in reality little more than a compound of the predilections, prejudices and idiosyncrasies of the individual commentator.

The book is fully indexed and should be a valuable reference work. It can scarcely be called a "popular" book to be read as a matter of general interest, but for anyone who is concerned with the vital problems of civil and criminal justice and who wishes to learn more about English methods, it is thoroughly worth reading.

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PENDLETON HOWARD

**SOCIAL SECURITY AND LIFE INSURANCE.** By Paul Cramfield, Erwin Gaumnitz, and W. Bayard Taylor. Madison, Wisconsin: Security Press, 1940. Pp. 202.

Government-sponsored or managed programs for old age or unemployment benefits have threatened the incomes of many insurance salesmen. This book apparently is designed to supply them with arguments and data so that they may convince their "prospects" that individual contracts with private insurers to supplement the government program are essential for adequate protection. Within its narrow width it contains a primer on the nature of the many types of personal insurance issued by private insurers, a summary of the features, obligations and benefits of the government security program, a resumé of the risks commonly incurred, and sample programs by which insurance may be used to complement the security benefits to broaden the needed protection. Considerable emphasis has been placed upon the types of settlement options available under the several insurance contracts.

The book is decidedly non-technical and the discussion necessarily not detailed. The thesis seems obvious and the materials can be found in greater elaboration elsewhere. This is not to say that the book is not perfectly sound in fact or theory, and it may serve a useful purpose for individuals struggling with problems of personal finance or for insurance agents eager to assist them.

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