

## Book Reviews

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## Book Reviews

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**Lincoln's Manager, David Davis.** By Willard L. King. Cambridge. Harvard University Press, 1960. Pp. 383. \$6.75.

There have been one-poem poets and one-novel novelists, and Mr. Justice David Davis of Maryland and Illinois may well be called a one-opinion judge. But that opinion was joined by Justices Nelson, Grier, Clifford and Field to make it the voice of the majority in *Ex Parte Milligan*;<sup>1</sup> and Chief Justice Chase and Justices Wayne, Swayne and Miller concurred on the main points and in the result. *Milligan*, like many other classics, is often mentioned but less frequently read. Perhaps it is worth while at the outset of comment on this very good life of Davis to recall the detail of "what may well be the profoundest adjudication ever to come from the [Supreme Court]"<sup>2</sup> — including Davis' exceptional exertions in the case not only in the Supreme Court but on circuit.

Lambdin P. Milligan was an Indiana lawyer who held high rank in the Sons of Liberty, a secret order subsidized by the Confederate States to subvert the Northern war effort. Union General Henry B. Carrington, commanding in Indiana, managed to infiltrate Union agents into the Sons, and on evidence developed in this way Milligan and others were arrested and charged with conspiracy to seize United States arsenals, release rebel prisoners, arm them and march with them to join the Southern armies, etc.

Though the civil courts were open and jury process available in Indiana, Milligan was tried by a military commission under color of martial law. He was found guilty and sentenced to be hanged. He then petitioned the United States Circuit Court at Indianapolis for *habeas corpus*. There sat Justice Davis on circuit and District Judge David McDonald, recently appointed on recommendation of Davis himself. Davis had frequently stated his view that military trials like Milligan's were unconstitutional. Yet he realized that were his court to grant the writ, the commanding general would probably ignore it and proceed with the execution.

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<sup>1</sup> 4 Wall. 2 (U.S. 1866).

<sup>2</sup> FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE (1958), 216.

Davis had a hunch, however, that if the case could somehow be expedited to the Supreme Court, the military would hesitate to proceed before a final adjudication. The rule was that if two judges on circuit disagreed they could certify the matter to the Supreme Court. Without much difficulty Davis persuaded the new judge to "disagree" with him and three questions went to the Supreme Court.

There arguments opened March 5, 1866. On the last day of term, April 3, Chief Justice Chase announced the decision: the writ would issue; Milligan would be turned over to the civil courts; the military commission was without jurisdiction. The opinions supporting the Court's ruling would be available in December, when the new term opened.

On December 17, 1866, Mr. Justice Davis announced for the Court that

"The importance of the main question [here] cannot be over-stated; for it involves the very frame work of the government and the fundamental principles of American liberty."<sup>3</sup>

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions [including trial by jury] can be suspended during any of the great exigencies of government."<sup>4</sup>

Davis and the majority went on to an even bolder limitation on military claims — this is where he lost the minority — but as stated, the Court was unanimous on the points required to decide the case. At once the "radical" Republicans launched one of the historic assaults on the Court, but *Milligan* is the law of the land to this day.<sup>5</sup>

David Davis was born in Cecil County, Maryland, March 9, 1815, in his grandfather John Mercer's plantation mansion (still standing) overlooking the Bohemia River. He graduated from Kenyon College in 1832, studied law as an office clerk in Lenox, Massachusetts in 1833, entered what was to become the Yale School of Law at New

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<sup>3</sup> *Supra*, n. 1, 109.

<sup>4</sup> *Supra*, n. 1, 120-121.

<sup>5</sup> *E.g.*, *Reid v. Covert*, 354 U.S. 1, 30 (1957).

Haven in 1834 and in 1835 departed for the west to settle in Illinois. There he succeeded almost at once at the bar and began the shrewd land speculations which were to make him an early millionaire. In 1847 he went as a Whig to the Illinois legislature and in 1848 was elected judge of the Eighth Illinois circuit, where he served the fourteen years that were to decide his place in history.

Lawyers on this circuit in Davis' time included a remarkable galaxy of "Plutarchian" figures — Orville H. Browning, Leonard Swett, Stephen A. Douglas, Lyman Trumbull, Jesse W. Fell, Abraham Lincoln. With all of them Davis established easy relations and with Lincoln he developed an intimate friendship. When in 1860 Lincoln was a candidate for the presidency on the Republican Party ticket, it was Davis who put his talent for organization to work in his old friend's behalf. To Davis, in Fell's opinion, "we are under the greatest obligation for [Lincoln's] nomination. . . ." It is this relationship which the biographer chooses to emphasize in his title, and it is true that Davis was up to his ears in politics, on and off the court, most of his life. Still, for lawyers, it is the judicial part of his career which will be of prime interest.

Lincoln nominated his old friend to the Supreme Court in 1862, and there Davis did conscientious, if somewhat plodding and not notably scholarly work, for fifteen years. His opinions were brief and plain — *Milligan* alone shone out. The press of the Court's business increasingly distressed him, but with fruitful results: only less impressively than in *Milligan* he left his mark in American judicial history by early advocacy of relief through a system of intermediate appeals; this became law in the Federal Circuit Court of Appeals Act (1891) five years after his death.<sup>6</sup>

In 1872, while still on the Court, Davis tried unsuccessfully for the presidential nomination on the liberal Republican ticket. He finally resigned in 1877 when elected to the Senate from Illinois. Strongly Independent, he held the balance of power in an even division between Republican and Democratic Senators. He was active all during these years and later as counsel and advisor of the Lincoln family, and handled the widow Lincoln's affairs during the time of her declining sanity.

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<sup>6</sup> Despite the assistance of the Circuit Courts of Appeals the pressure of Supreme Court business has now intensified to a point comparable to what it was before the Act of 1891. Cf. Strong, *The Needs of the Supreme Court*, 131 *North American Review* 460 (1881), with Hart, *The Time Chart of the Justices*, 73 *Harv. L. Rev.* 84 (1959).

Mr. King has told this story of an industrious, zealous, loyal and just, rather than a gifted or brilliant man, with steady skill and an avalanche of circumstantial detail. He has burrowed deeply into the voluminous papers of Davis, Lincoln, Trumbull, Fell and others, emerging with new evidence and hitherto unpublished material on many critical points. He demonstrates pretty well that Lincoln did not traffic in cabinet promises to win the Chicago nomination. He shows that private and contemporary correspondence greatly alters the story told by Swett in 1887 about the manner of Lincoln's naming his old friend and political manager to the Court. The book carries an appreciative Foreword by Allan Nevins and will doubtless stand as the definitive biography of a great Maryland lawyer.

C. P. IVES\*

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**The World of Law.** Edited by Ephraim London. New York. Simon and Schuster, 1960. Two volumes, pp. 1472 \$17.50.

These books might well have been called or subtitled "To the law with love;" for Mr. London, the editor, has chosen most of the selections from books which one can well imagine have become his warm friends throughout his years of reading and study. He shows himself to be neither overly sanctimonious nor overly sentimental in his selections, although there is certainly a place for sentiment in this atomic world (it has been said to add the flavor to life). His tastes show a remarkable catholicity, and although it is easy to accuse him of some small sins of exclusion or inclusion, the general effect of the books is calculated to give the reader a rich varied experience, a sweeping view over the centuries of the pageant of law and literature. Here one can find in full measure pictures of "the trial," sometimes replete with trickery, sometimes with tactical brilliance, always with drama and excitement; gray pictures of "the cowed and meek"; bright pictures of the paupers who have fought the good fight for justice equal to that accorded to the princes. Elsewhere

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in the selections one can find profound analyses of the judicial process in the words of Hand, Cardozo, Brandeis, and others; and one finds also the unbelievably passionate and courageous words of Gandhi, Joan of Arc, and Zola.

In the words of the dust jacket, "Here are those who practice the law, and here are those who preach it; those who make it and those who break it; those who write it and those who write about it." The two volumes are called respectively *The Law in Literature* and *The Law as Literature*. One suspects that this was merely a convenient dichotomy so that it would be possible for the publisher to produce two separate volumes of portable weight, for the distinction is a tenuous one and there is a constant blending and cross-fertilization of the two categories throughout the two volumes. As to another distinction, Mr. London quotes Disraeli in his Introduction to the effect that that complex dandy-author-statesman was depressed by the law but exalted by literature. The editor questions the validity of this glib distinction and seems to have presented us with these books to prove his point. Here is a happy blending that adds even more richness to the meaty archives of each. He says in concluding his Introduction, "It was my intent to present a gathering or collection of writing centered in the Law, each of such excellence that it may be described as literature."

Somewhere in Gilbert and Sullivan (also represented in *The World of Law*) one finds the statement that "the law is the embodiment of everything that's excellent." One suspects that the Lerner and Loewe of their age probably used the statement more for purposes of rhyme than for any other reason, for it is far from accurate and gives a false picture of the often maligned profession which we follow. The law has its errors, its imperfections, its delays, and its frustrations. Our trials have their ridiculous aspects; the adversary nature of the trial has been severely criticized; we see all kinds of perjury ranging from the subconscious delusory type to the wilful purposive type; in many places politics enters and causes a shattering of the law school ideals. But from the Sermon on the Mount through the Magna Carta to Learned Hand's address on Liberty there is much of which we can be justifiably proud. The progress of the humble individual man at least toward some degree of dignity and personal security, in a way parallel to the progress of man towards physical health brought about by the medical profession, is the true glory and majesty of the Law. And these

things are shown throughout the book, with a bright light illuminating the good and bad of the law, its saints and sinners.

Mr. London shows unfailing good taste and a fine sense of variety in his choices of the various gems. In addition to several already mentioned, no picture of the book would be of value without listing some others: Damon Runyon's keyhole view of the somewhat salacious divorce trial of "Daddy" and "Peaches" Browning; Mencken's knothole view of the Scopes trial; Frankfurter's sharp analysis of the Sacco-Vanzetti trial, with its dubious result still the subject of research and soul-searching; Camus' devastating condemnation of capital punishment; and many others. One's literary memory is jogged. One is reminded of the tragedy of Camus' early death by the excellence of this piece. And Frankfurter's essay recalls the two sonnets of Edna St. Vincent Millay on the Sacco-Vanzetti trial, which one would like to have seen as a sort of footnote to the main article—

"As men have loved their lovers in time past  
And sung their wit, their virtue and their grace,  
So have we loved sweet Justice to the last,  
Who now lies here in an unseemly place."

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There are other items in these galleries — miniatures like an O'Henry short story and Frankfurter's Advice to a Young Man and a poem by Auden; and larger paintings done in broad slashing De Kooning strokes with deep colors, like Darrow's summation in the *Sweet* case (perhaps the *Loeb-Leopold* summation has been overworked), and Mr. Justice Jackson's Nuremberg summation, so timely with the *Eichmann* case now in progress. As we read the eloquent closing sentence of Jackson's long statement, the pictures of the trial and the memories of the tragic Nazi blot on modern civilization rush back into our recollection: "If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime." And there is a sort of companion piece to this — Rebecca West's unbelievably photographic recounting of the Nuremberg trial. There is humor too — in the form of Dickens' Daumier-like writings, in A. P. Herbert, in a selection from Lewis Carroll's *Alice*, in Mark Twain's work and in Balzac's. Drama in the more conventional sense is repre-

sented by a selection from *The Winslow Boy*; by Wouk's *Caine Mutiny*, a picture of the psychopathic Queeg; and by others throughout the two bulging volumes.

For the most part these books leave the reader with an emotional impact. But there is also a tremendous intellectual stimulation giving rise to new thoughts and dynamic new ways of thinking out the problems of modern life and particularly modern courts. One thread which seems to run through the whole tapestry of the books gives a picture throughout history of the development of the "adversary" and often "combat" type of trial which we at least of the Anglo-American tradition have come to know. We see the changes which have occurred over the years. We see the growth of trial by jury and we can almost *feel* the growth of what has been called the gnarled oak of the common law. We have come far since trial by combat and trial by ordeal. We have seen the development of pre-trial techniques, the burgeoning of administrative agencies, and the relaxation of the strict rules of evidence. As Jerome Frank points out in the selection from *Courts on Trial* and quoting Wigmore, the contentious trial method "has contributed to lower the system of administering justice and in particular of ascertaining truth in litigation, to the level of a mere game of chance. . . ."

Another common theme running through the books is one which gives some insight into the mysteries of the nebulous profession of judging, what Learned Hand calls somewhere the "awful task" of judging. Mencken defined a judge as "a law student who can now mark his own examination paper." But to explain how a decision is born is not simple. Cardozo attempts it but modestly says that his beautifully reasoned prose is merely an attempt "to state the formula." In the selection from *The Nature of the Judicial Process* he begins:

"The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a hundred times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. . . ."

Mr. London is obviously devoted to his profession and his devotion is contagious. We lawyers have no succinct oath analogous to the Hippocratic oath of the physicians. Being essentially garrulous people, the lawyers perhaps need many "words, words, words," but the total impact of the words found in these books is to bring forth a sense of exaltation, not a self-satisfied sense of perfection, not a feeling that "all's right with the world," but a comfortable knowledge that in spite of Hummel and Howe and their counterparts we also have Holmes and the Hands and *their* counterparts. *These* are the people who superimpose on cold legalism a structure which includes philosophical, economic, and sociological elements. The Law is far from an exact science and, in the words of Holmes, "it cannot be dealt with as if it contained the axioms and corollaries of a book of mathematics." This type of thinking, fortunately widespread among the profession, is one of the greatneses of the Law. This spirit too pervades the pages of these volumes.

The editor is a practicing attorney who participated in the Nazi trials after having served in the Army in World War II. He has also taken part in a number of important Supreme Court cases. He has constructed his books with flavor and tone and they can be read with pleasure and edification by all.

HENRY L. ROGERS\*

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