

Book Reviews

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Recommended Citation

Book Reviews, 23 Md. L. Rev. 378 (1963)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol23/iss4/9>

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Book Reviews

Justice Oliver Wendell Holmes: The Proving Years, 1870-1882, Vol. II. By Mark DeWolfe Howe, The Belknap Press of Harvard University Press, Cambridge, Massachusetts: 1963. Pp. 295, including Index. \$5.00.

The recent adoption by the Faculty Council of the University of Maryland Law School of the requirement that all students must, before graduation, take a course in either Jurisprudence, Legal Process or International Law reflects the growing concern that far too many lawyers, busily immersed in a swamp of increasingly complex statutes, regulations and rulings, have little, if any, exposure to a broader perspective of their profession. This concern cannot be dismissed as merely the disdainful sneer of the academician at the harrassed practitioner who, for example, must never forget that Congress in its psychological wisdom has decreed that a man is considered to own the stock of his brother for purposes of applying the personal holding company rules but that he is not the owner of his brother's stock for purposes of applying the stock redemption rules. Indeed, it is the harrassed practitioner himself who is beginning to become even more vocal than the professor about the lack of intellectual order in his profession. The chief difficulty, however, in trying to acquire a "jurisprudential perspective", for both the student and the lawyer, lies in the fact that most books on jurisprudence are deadly.

Professor Howe has furnished the antidote. For his second volume, in what promises to be one of the monumental biographies of this generation, is quite a lot more than the story of Holmes' life from 1870 to 1882—it is also the story of the revolution in American jurisprudence, related in a charming manner. No more delightful introduction to the philosophy of law can be found.

Holmes' last fifty years—from 1882-1902, as an Associate Justice and later Chief Justice of the Supreme Judicial Court of Massachusetts, and from 1902-1932 as an Associate Justice of the Supreme Court of the United States—are well known. His brilliant dissents in the "economic due process" cases, in which the Court ruled unconstitutional legislation creating minimum wages and maximum hours and abolishing "yellow dog" contracts, have represented for over twenty years the unanimous views of the Supreme Court.¹ His opinions in the area of free speech have been

¹ Ferguson v. Skrupa, 372 U.S. 726 (1963).

the starting point for many of the recent Supreme Court opinions on the First and Fourteenth Amendments. To laymen he has probably been the best known American judge.

Holmes' pre-judicial years are not so well known. To most, these years contain but a few vague references to his father, the Autocrat of the Breakfast Table; his attendance at Harvard College and Harvard Law School;² his participation in the Civil War, in which he was thrice wounded, once almost fatally, and perhaps even to his fleeting encounter with Abraham Lincoln.³ Yet, the real excitement of those early years lay in the development and maturation of a philosophy of law that became the foundation for fifty years of judicial opinions. His seemingly facile lines such as "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*", "General propositions do not decide concrete cases", "To have doubted one's own first principles is the mark of a civilized man", "With effervescing opinions, as with . . . champagne, the quickest way to let them get flat is to let them get exposed to the air", "I at least go on very comfortably without the belief that I am in on the ground floor with God or that the cosmos, whether it wears a beard or not, needs me in order to know itself . . . I merely surmise that our last word is probably not the last word, any more than that of horses or dogs", did not suddenly spring forth full-blown in his later years. What Professor Howe has given to us in this book is a definitive insight into the intellectual development of the foundations out of which these few lines and hundreds of judicial opinions ultimately sprang.

In 1870, the starting point of this volume, Holmes opened a law office with his younger brother; he became the co-editor of the *American Law Review*, which, at the time, was the most important legal periodical in the United States; he continued his work as editor of the 12th edition of Kent's *Commentaries*, which was the Nineteenth Cen-

²Holmes' initial impression of the law was as follows: "Law, of which I once doubted, is now my enthusiastic pursuit . . . one good thing about it is that it makes play of what otherwise would be work, e.g. Metaphysics. Such spongy stuff as Sir William Hamilton, for instance, after a little pile of Contingent Remainders or Pleading goes down like macaroni. You give a little suck and pwip!! You've swallowed it and never known it." HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870 (Vol. 1, 1957) 203.

³"On the afternoon of July 11, 1864 . . . Holmes' eye was caught by the outrageous sight of a tall civilian blandly surveying the battlefield while bullets smashed into Fort Stevens. In the heat of the moment, Holmes shouted, 'Get down, you damn fool, before you get shot.' At the moment when the explosive order came from his lips, Holmes was wholly unaware of who it was [that he addressed] 'but a sharp look after his exclamation made him aware.'" *Id.*, 168.

tury lawyer's counterpart of *American Jurisprudence*, and he began his service as University Lecturer on Constitutional Law at Harvard College. The term "editor", used in describing Holmes' duties with the *American Law Review* and Kent's *Commentaries*, was, as Howe shows, a misnomer, and one can only begin to appreciate the full scope of Holmes' many activities when it is realized that he was probably the most prolific contributor to the *American Law Review* and that his "editorship" of Kent's *Commentaries* demanded that he review practically the entire corpus of the law, both before and after the previous edition.

Howe's picture of Holmes during the 1870's is almost that of a semi-recluse, whose dedication to the law was a consuming passion. "The pallor of his face made him a melancholy sight."⁴ Howe quotes Mrs. Henry James (the elder), who described an occasion in the spring of 1873 on which Holmes dined with the James family:

"His whole life, soul and body, is utterly absorbed in his last work upon his Kent. He carries about his manuscript in his green bag and never loses sight of it for a moment. He started to go to Will's room to wash his hands, but came back for his bag, and when we went to dinner, Will said, 'Don't you want to take your bag with you?' He said, 'Yes, I always do so at home'."⁵

Marriage ostensibly had little effect on his habits. "Two days before his marriage Holmes was reading Heineccius, *Recitationes in elementa juris civilis*, and three weeks after the event, he had finished Kant's *Elements metaphysiques de la doctrine du droit* and had completed the writing of his second major essay on classification of the law."⁶ Holmes did manage a brief respite from his labors during the summer of 1874 when he and his wife visited England and the Continent. Only during a brief period such as this did Holmes reveal the qualities of gaiety, romanticism, zest for living and gifted conversation in which he could not indulge while devoting all his efforts to the law. Kenneth Campbell has remarked that when Holmes was in England he was quite unlike his celebrated friend and fellow Harvard graduate, Henry James, of whom it was said that he was "just a little too far away to hear what the duchess was saying." Holmes had the duchess listening to *him*.

When Holmes and his wife returned to Boston, Holmes, who by then had completed his work on Kent's *Com-*

⁴ HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882 (Vol. 2, 1963) 22.

⁵ *Ibid.*

⁶ *Id.*, 9.

mentaries and had relinquished his editorial position on the *American Law Review*, plunged into practice by entering the partnership in Shattuck, Holmes, and Monroe. The rigor of his intellectual endeavors did not, however, cease. When he was not working on cases for his firm, he was writing a series of essays for the *American Law Review*.

These essays formed the backbone for the Lowell Lectures on *The Common Law* which he delivered at the Harvard Law School at the end of 1880 and which were eventually published in March, 1881. Professor Howe's book closes with Holmes' appointment as an Associate Justice of the Supreme Judicial Court of Massachusetts, an appointment which he accepted only three months after he had assumed the duties of Professor of Law at the Harvard Law School.

The largest portion of Professor Howe's book is concerned with an analysis of the revolutionary nature of *The Common Law*. This slender volume, which has been through over 45 printings, will surely retain its place as one of the landmarks of jurisprudence. As Howe puts it, Holmes "was the first lawyer, English or American, to subject the common law to the analysis of a philosopher and the explanation of an historian."⁷ The elaborate historical research of Maitland, Stephen, Thayer and Ames, and the founding of the *Harvard Law Review*, the *Law Quarterly Review*, and the Selden Society were all events that occurred shortly after the publication of *The Common Law*. The philosophical analyses that have dominated jurisprudence since 1881 have, to a large extent, taken many of their basic premises from *The Common Law*.

An adequate appreciation of the significance of *The Common Law* can only be obtained by a recognition of the arid state of jurisprudence in the middle of the Nineteenth Century. The domination of natural law and natural rights theories, with their insistence on the divine and ethical sources of law, had easily appealed to the religious colonists and to framers of the Declaration of Independence. All men are "endowed by their Creator with certain inalienable rights"—it would have been heresy to attack such a doctrine. It was an era when Chief Judge Buchanan of Maryland was able to write in transcendent tones:

"... [T]here is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, (in this country at least) the character and genius of our government, the causes from which they sprang, and the purpose for which they were estab-

⁷ *Id.*, 137.

lished, that rises above and restrains and sets bounds to the power of legislation which the legislature cannot pass without exceeding its rightful authority."⁸

The influence of such lofty themes of natural law eventually and inevitably began to decline, for several reasons: the excesses of the French Revolution, which had, at least philosophically, sought its justification in natural rights theories; the rise of Utilitarianism, whose leader, Jeremy Bentham, once wrote, "To maintain that there is a natural right and to impose it as a limit to positive laws, to say that law cannot go against natural right, to recognize, in consequence, the right which attacks law, which overturns and annuls it, is at once to render all government impossible and to defy reason"⁹ and the particular need in the United States, by the middle of the Nineteenth Century, for an ordering and systematization of the legal materials which had developed since the founding of the country, especially in view of the fact that the only scaffolding, other than the one created by natural law, was based on the intricate procedural writs, which Bentham, in another of his endeavors, had also destroyed.

One of the philosophies which gained some following in this atmosphere was "analytical jurisprudence", whose chief proponent was John Austin. Austin vowed to create a logically consistent system by describing the law "as it is" rather than as it "ought to be"; he felt that law "as it is" could be described merely as the will of the sovereign. Another was "historical jurisprudence", whose leaders were Savigny and Maine, who urged that law could only be understood by tracing its history back to its Roman roots.

Holmes' brilliance, as Professor Howe demonstrates with great clarity, consisted of his ability to reveal the deficiencies of all of these theories of jurisprudence. Early in the 1870's, Holmes pointed out that analytical jurists were erroneously disregarding such forces as tradition and public opinion. Holmes completely demolished Austin's theory of a logically self-contained system in a "book notice" which he wrote for the *American Law Review* in 1872, which also foreshadowed Holmes' well known "prediction theory" of the law:

"The judges have other motives for decision outside their own arbitrary will, beside the commands of their

⁸ *Regents of the University of Maryland v. Williams*, 9 G. & J. 365, 403 (1838).

⁹ I BENTHAM, WORKS (1843) 136.

sovereign. And whether these other motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor's wife, are not a ground for prediction, and are therefore not considered."¹⁰

Holmes, who had originally been inspired by the analytic faith, found more kinship in the methods of the historian. Many years later he wrote: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."¹¹ The method of *The Common Law* was precisely to bare the historical antecedents of the rules which had become axiomatic in the Nineteenth Century. Howe traces Holmes' theories in each of the subjects which occupied his attention: torts, criminal law, contracts and possession. Holmes, influenced greatly by his friend, Henry Adams, revealed that the source of much of our law was Teutonic, not Roman, as Savigny and Maine had supposed; by doing so, Holmes was able to demonstrate that the presuppositions on which many rules of the common law had been formulated were inapposite.

Holmes' most frequently misunderstood contribution to jurisprudence was his theory that liability, despite the language of judicial opinions, was not dependent on moral culpability, as the natural law theorists would have it, but on the failure to live up to an external standard. Howe patiently describes the development of this notion of Holmes, first in the area of civil liability, then in criminal liability. The seminal influence of Holmes' theories on the external standard of liability are, of course, revealed in the doctrine of the "reasonable man" in the law of torts and in the repudiation of the contract doctrine often referred to by that unfortunate expression — "the meeting of the minds"¹².

¹⁰ 6 Am. L. Rev. 723, 724 (1872).

¹¹ Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

¹² *Supra*, n. 4, 233.

Howe captures the drama of these great shifts in jurisprudential theory—and anyone who can dramatize jurisprudence deserves unrestrained praise. The only dissonant note which this reviewer found in the book was Howe's denigration of the influence of pragmatism and its founders on Holmes' thinking.

The founders of pragmatism, all graduates of Harvard University, were living in Cambridge in the 1860's. (Indeed, Charles Darwin once remarked that there were enough brilliant minds at Harvard in the 1860's to staff all the universities in England.) Around 1870, Charles Saunders Peirce, a lecturer in logic and the philosophy of science, and a man whom Whitehead once called "a very great man . . . the essence of [whose] thought was originality in every subject that he taught", gathered together a group of remarkable young scholars to discuss contemporary intellectual problems. The result of Peirce's efforts was the famous "Metaphysical Club", which he described about thirty-five years later in the following passage:

"It was in the earliest 'seventies that a knot of us young men in Old Cambridge, calling ourselves, half-ironically, half defiantly, 'The Metaphysical Club', for agnosticism was then riding its high horse, and was frowning superbly on all metaphysics—used to meet, sometimes in my study, sometimes in that of William James. It may be that some of our old-time confederates would today not care to have such wild-oats sowing made public, though there was nothing but boiled oats, milk and sugar in the mess. *Mr. Justice Holmes, however, will not, I believe, take it ill that we are proud to remember his membership . . . it was there that the name and doctrine of pragmatism saw the light.*"¹³

¹³ WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* (1949) 19-20 (emphasis added). In a delightful fragment written on the back of a letter in 1907, Peirce claimed that "The Metaphysical Club" was "a name chosen to alienate all whom it would alienate. Its constitution was equally effective, for it contained in a single clause forbidding any action by the Club as a collective body, this preventing it from wasting the only intrinsically precious element in the world, as so many other societies waste it, in the idle frivolity they call 'business,' which moreover since without action there could be no officers and in particular no secretary and so no acknowledged record of debate, to gentlemen desirous of distinguishing themselves or of taking patents as it were upon such ingenious combinations of ideas as they might contrive, an adequate motive was presented to hold their peace and abandon the arena of debate to those who only sought to draw as near to the truth as they could. It was quite the most successfully organized body of students I ever had the benefit of joining—a model worthy of imitation." *Id.*, 21.

Besides a Harvard degree, all of the members of The Metaphysical Club had one thing in common—a sense of the epoch-making importance of Darwin's *Origin of Species*, which had been published in 1859. Darwin's thesis, that the order of species was the result of an evolutionary process based on the chance variations of individual organisms, involved a repudiation of the notion that the universe, when it was created, had been completely planned according to a preconceived system. Darwin showed that higher organisms had evolved as a result of chance variations in order to meet certain physiological needs which lower organisms were unable to fulfill. The relevance of the Darwinian hypotheses of evolution and the contingencies of nature is that they were applied by the founders of pragmatism to subjects other than biology to create a new doctrine, generally referred to as "pragmatism".

William James, also a member of The Metaphysical Club, once wrote:

"He [the pragmatist] turns away from abstractions and insufficiency from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns toward concreteness and adequacy, towards facts, towards action and towards power. That means the empiricist temper regnant and the rationalist temper sincerely given up. It means the open air and possibilities of nature, as against dogma, artificiality, and the pretenses of finality in truth."¹⁴

The philosophy of pragmatism summarized in this quotation has been reflected in many ways in Holmes' philosophy of law. The natural law theorists had enshrined ethical fixed principles and abstractions. The analytic jurist created a closed system based on logic. For practically all legal philosophies, the law was indeed "a brooding omnipresence in the sky", and no system of jurisprudence could attain respect unless it could claim with complete certainty that it had discovered the "true unchanging law".

Holmes, however, could write that a "certainty generally is illusion, and repose is not the destiny of man."¹⁵ Although

"[T]he language of judicial decision is mainly the language of logic . . . [And] the logical method and form flatter that longing for certainty and for repose which is in every human mind . . . [B]ehind the logical form

¹⁴ WILLIAM JAMES, PRAGMATISM (1907) 51.

¹⁵ *Supra*, n. 11, 466.

lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form."¹⁶

In an essay on "Natural Law", Holmes opened as follows:

"It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity, which he collects under the head of natural law."¹⁷

Instead of looking for an *a priori* answer to legal problems, Holmes pleaded for the legal philosopher to turn to the consequences of an idea; his emphasis on the consequences rather than the antecedents of an idea was also one of the dominant thoughts originally expressed in The Metaphysical Club, chiefly by Peirce. Holmes' notion of defining contractual obligations, not in terms of the duty of performance, but rather in terms of the risk of non-performance, furnished a specific illustration of his application of these pragmatic ideas to the common law.¹⁸ His "clear and present danger" test in the free speech cases is nothing but a refusal to say that the doctrine of free speech is an absolute dogma. "The character of every act depends upon the circumstances in which it is done . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."¹⁹ Howe finds in Holmes' "distrust [in *The Common Law*] of metaphysical abstractions, whether derived from Kant or from Hegel, a pragmatist's preference for concreteness."²⁰

This is not the place to multiply the instances in Holmes' writings of the pragmatic temper. Suffice it to add that perhaps the best known passage in American legal philosophy, the opening lines of *The Common Law*, give further evidence of Holmes' pragmatism:

¹⁶ *Id.*, 465-466.

¹⁷ 32 Harv. L. Rev. 40 (1918).

¹⁸ *Supra*, n. 12, 238.

¹⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²⁰ *Supra*, n. 12, 238.

"The object of this book is to present a general view of the Common Law. To accomplish this task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow man, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."²¹

Despite the repeated strain of pragmatism in Holmes' writings, Howe attributes little influence to Charles Peirce, William James, Nicholas St. John, Chauncey Wright and the other "members" of The Metaphysical Club. Howe may perhaps ascribe too much significance to the fact that Holmes had asserted to Morris Cohen that, as late as 1891, he had not "heard of pragmatism."²² The word "pragmatism" however was probably not used at all—and it certainly never appeared in print—until the very end of the 1890's when William James began to use it. More to the point are Holmes' recollections of Chauncey Wright, one of the stellar members of the Club. In writing to Sir Frederick Pollock, Holmes wrote, "Chauncey Wright, a nearly forgotten philosopher of real merit, taught me when young that I must not say necessary about the universe, that we don't know whether anything is necessary or not."²³ To Morris Cohen, Holmes reiterated: "That we could not assert the necessity of the order of the

²¹ HOLMES, *THE COMMON LAW* (1881) 1. Howe interestingly points out that this passage is a paraphrase from a disparaging review which Holmes had published in *American Law Review* in 1880 of Dean Langdell's *Selection of Cases on the Law of Contracts*, "Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as a system. He is, perhaps, the greatest living legal theologian. But as a theologian, he is less concerned with his postulates than to show that the conclusions from them hang together. . . . If Mr. Langdell could be suspected of even having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law." *Supra*, n. 12, 155-157.

²² *Supra*, n. 12, 75, citing *Holmes-Cohen Correspondence*, 9 *JOURNAL OF THE HISTORY OF IDEAS* (1948) 3, 19.

²³ 2 *HOLMES-POLLOCK LETTERS* (Howe Ed., 1941) 252. (Letter of August 30, 1929.)

universe I learned to believe from Chauncey Wright. I suspect C. S. P. [Peirce] got it from the same source."²⁴ Perhaps Professor Howe has not chosen to attempt an illumination of the "influence" of The Metaphysical Club on Holmes' thinking because there are only very few scraps of written evidence of the discussions held in the Club, and Howe has, no doubt, too assiduously attempted to avoid the fictionalized portrait which Catherine Drinker Bowen gave of Holmes in *Yankee from Olympus*.

In any event, this very negligible omission in no way detracts from the fact that Professor Howe's book shows, in its analysis of the early development of Holmes' philosophy of law, that, as Holmes himself put it, "a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear himself out after the unattainable."²⁵ One can only hope that, although six years elapsed between the publication of the first and second volumes of this biography, Professor Howe will be able to present the next volume, with no loss of charm, before six more years have passed.

SHALE D. STILLER*

Poverty and the Administration of Federal Criminal Justice
 — Report of the Attorney General's Committee on
Poverty and the Administration of Criminal Justice
 February 25, 1963. Pp. 154.

At the request of the Attorney General, a distinguished committee of lawyers, scholars and judges has considered the impact of poverty on administration of the criminal code in the federal courts. It has concluded that in several critical, but correctible, areas the poverty of an accused places a heavy and unfair weight on the scales of justice. Based on a two-year nationwide study, with special emphasis on four representative federal districts, the Committee has made far-reaching proposals for reform, some of which are now before the Congress.

²⁴ *Holmes-Cohen Correspondence*, 9 JOURNAL OF THE HISTORY OF IDEAS (1948) 3, 34-35.

²⁵ HOLMES, *The Profession of the Law*, COLLECTED LEGAL PAPERS (1920) 30.

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"Too little, too late" fairly characterizes the Committee's evaluation of the existing federal system for providing the financially handicapped criminal defendant with adequate means of self-defense. Although the Committee shares the admiration of many observers for the effective services often performed by uncompensated court-appointed counsel, it feels that non-compensation sometimes results in the appointment of inexperienced practitioners to cases demanding more developed skills. The present system also places "unconscionable burdens" on particular lawyers, many of whom sustain out-of-pocket losses.¹ "More fundamental, however, are the conditions under which assigned counsel are required to operate, for these limit the effectiveness of the most proficient and experienced lawyers who participate in the defense of financially disadvantaged persons."² Failure to give assigned counsel the resources with which to litigate may have the "devastating" consequence of inducing guilty pleas or severely handicapping the conduct of the defense at trial.³ Delay in appointment of counsel until arraignment in a district court deprives the accused of advice on whether to waive or insist upon a preliminary hearing and usually forecloses the opportunity to bring special circumstances to the attention of the United States Attorney at the pre-indictment stage.⁴ Present bail administration, furthermore, seriously hobbles the person of inadequate means. He is often deprived of both liberty and livelihood during the crucial period of pre-trial preparation. And the making of bail may itself entail the commitment of financial resources essential for preparation of the defense. "Moneys urgently required to establish the defendant's case are thereby diverted to the purchase of pre-trial liberty."⁵ The poor, in short, get poorer.

The Committee recommends legislation, now the substance of the proposed Criminal Justice Act of 1963 and currently under study by and on the floor of Congress, delegating to each judicial district the authority, with approval of the judicial council of the circuit, to devise a plan of adequate representation utilizing some or all of the following options: 1. Compensation of court-appointed counsel at a rate not to exceed \$15.00 an hour and reimbursement for expenses reasonably incurred; 2. Establishment of a full or part-time federal public defender, to be

¹ Report, 29.

² *Id.*, 26.

³ *Id.*, 26.

⁴ *Id.*, 24-25.

⁵ *Id.*, 70.

appointed for four years by the judicial council and empowered to hire assistants and an investigative staff; 3. Compensation and reimbursement to legal aid societies, bar association groups and private defender organizations which furnish attorneys pursuant to the chosen plan. The Committee recommends, and the pending legislation provides, that an accused is to be advised of his right to counsel, or to court-appointed counsel if he is financially unable to obtain counsel, at his first appearance before a United States commissioner or district judge. Each district's plan is also to provide for furnishing investigative, expert or other services to impoverished defendants.

Other recommendations of the Committee are designed to free the financially-handicapped accused from the inequities of bail administration. It recommends more frequent release of defendants on their own recognizance, a system of supervision of persons at liberty pending trial, and authorization for bail-setting officials to accept as security cash or other property less than the bail amount, to be returned to the accused upon his performance of the bail obligation.

On a broader plane, the report adds to the growing literature of bench and bar a critical, eloquent return to fundamentals.⁶ The problem of poverty is not a matter of public charity or *noblesse oblige*; nor is it solely an issue of inequity and unfairness to an individual accused. At stake is the viability of the adversary system and the effective challenging of official decision which lies at its heart. The government's obligation to act, furthermore, does not "presuppose a general commitment on the part of the federal government to relieve impoverished persons of the consequences of limited means wherever or however manifested." Poverty of the accused is irrelevant to and often impedes the just administration of the criminal law. In a process initiated by government, therefore, which has as its object the imposition of severe sanctions on the accused, government "may properly be required to minimize the influence of poverty on its administration of justice."⁷

STEPHEN H. SACHS*

⁶ Note, 76 Harv. L. Rev. 579 (1963).

⁷ *Id.*, 9.

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