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Review of “Prohibition, Legal and Illegal,” By Howard Lee McBain

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Book Reviews

PROHIBITION, LEGAL AND ILLEGAL, by *Howard Lee McBain*. New York: The Macmillan Company, 1928. Pp. ix, 171.

Professor McBain's little book attempts two tasks: (1) "To explore the possibility of legally altering our prohibition policy within the stern commandment of the eighteenth amendment," whose alteration or repeal is a political impossibility, and (2) "To assess some of the effects that national prohibition has had upon our federal system of government and upon our cherished bill of rights." The book, the author says, "deals with law. It is not concerned with the social or economic aspects of prohibition, with its wisdom or its folly, with its good or evil results."

It was foolish of Professor McBain to pretend that he was concerned solely with law as distinguished from policy. No one knows better than he that the two cannot be divorced. He says as much when he states (p. 4) that "When all is said, . . . the proper sphere of individual liberty is nothing more nor less than the changing sphere of expediency," and (p. 7) "Whether in popular parlance or in solemn judicial discourse, there is no criterion for fixing the metes and bounds of individual liberty other than the criterion of expediency." Of course there is not; and Professor McBain's whole book is shot through with his views of expediency, which dictate his conclusions upon any number of points. The chief difficulty is that the author, having ostensibly cast out all but pure law from his consideration, nowhere feels obligated to undertake a balanced survey of the facts upon which his judgments depend.

View of Expediency Number One leads to the major assumption of the first part of the book, that no law about which people differ sharply in opinion and which affects large numbers of them can be enforced or ought to be kept upon the books. For, he asserts dogmatically, "Respect for law is not to be had by exhortation. It derives either from a reasonably wide agreement as to the laws' [*sic*] restrictions or from general indifference to or ignorance of these restrictions . . . [and] from nothing else." Therefore the quest for a way out. But the quest is not entered upon until View of Expediency Number Two, coupled with a tenuous interpretation of a Supreme Court decision, has led to a declaration that Congress has failed to live up to its sole, probable "moral obligation" (p. 32) to provide for really effective enforcement of the eighteenth amendment.

View of Expediency Number Three leads the author to reject any solution of the prohibition question which would leave any portion of the liquor traffic unregulated. View Number Four leads him to think that a modification of the Volstead Act to permit a two and one-half per cent alcoholic content in beverages would be futile, since (p. 76) "even the most moderate wets want wine and beer that are in fact intoxicating. . . . And they will be satisfied with nothing less."

In the second part of the book View of Expediency Number Six leads

Professor McBain to state (p. 104) that the fourth amendment "is being swept blithely into the discard" by searches and seizures upon suspicion for the purpose, "not of prosecuting the guilty, but of seizing and destroying liquor." View Number Seven leads to the statement (p. 153) that—although not, of course, as a matter of law—"A word must be said in behalf of the very occasional violator who has the misfortune to be prosecuted under both the state and the federal law."

Despite its unexpressed premises, however, Professor McBain's book is illuminating and valuable. His statement of the constitutional difficulties in the way of modification is accurate and complete, and his conclusion that there is no satisfactory way out leaves us, at least, with a picture of the situation we must face. His exposition of the constitutional guaranties in relation to prohibition enforcement will be understandable to the layman and informing to the lawyer. His numerous "wisecracks" will amuse or annoy according to the disposition of the reader.

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CASES ON THE ADMINISTRATION OF THE CRIMINAL LAW, Selected and Arranged by *Edwin R. Keedy*. Indianapolis: The Bobbs-Merrill Company, 1928.

Prior to a decade ago there was a notable tendency in American law schools, even the best law schools, to pay almost exclusive attention to those branches of the law that were most lucrative in private practice. Vast improvements were made in pedagogic method and in marshaling and editing material for study. But the method was chiefly applied and the published material was chiefly used in turning diligent students into highly paid corporation lawyers. In the law schools of those days there was not as much sensitiveness to public welfare as there was in the bar associations of those days. There has been a great change. Perhaps the change started before the World War and before Alfred Z. Reed, of the Carnegie Foundation for the Advancement of Teaching, began his study of American training for the "public profession of the law." However this may be, the external evidences of the change have been seen only in the last ten years. The great change is apparent if we consider criminal law as taught in American law schools a dozen years ago and the same subject as taught today. Criminal practice is no more lucrative today than it was a dozen years ago. The social importance of criminal practice is no greater today than it was a dozen years ago. The change is in the mental attitude of law school faculties. "Sociological jurisprudence" has done its work.

Professor Keedy's case book on the administration of criminal law is an admirable illustration of the new attitude toward the public aspect of American jurisprudence. Until recently the subject itself was almost totally neglected in law schools. Today those law schools that do not pay some attention to the procedural aspect of criminal law are constrained to apologize for their neglect. That the welfare of society is concerned with existing rules of criminal procedure is admitted by all. Since this is true,