clusions materialize, is well expressed in letters to Judge Samuel Treat of St. Louis; these letters are generously sprinkled through the pages of the book. It is a credit to Miller as a judge that he wasted no time and allowed the bar to waste none. A colloquy between Miller and a St. Louis attorney is reported as follows:

> "Damn it, Brown, come to the point!"
> "What point, your Honor?"
> "I don't know; any point; some point."

It is fair to say that no judge was more patient until he had been put in full possession of all the facts and considerations pertaining to the case in hand; but when he was certain of these he did not allow the time of the court to be consumed in useless and immaterial discussion.[20]

Miller's life was full of incident and color, and Professor Fairman has presented a treatment, the impact of which is not small. Reading this book is well worth while. Professor Fairman has forced us willingly into his debt; he has presented an interesting and commendable treatise of the judicial history of that vital period of 1862-1890 when new problems which pressed for new solutions sprang forth with hopeless abandon.

WALTER FREEDMAN.†

THE JUDICIAL PROCESS IN TORT CASES. By Leon Green. Second edition. St. Paul: West Publishing Company, 1939. Pp. xxi, 1356.

About a dozen years ago Dean Green, then a member of the Yale Law faculty, wrote a monogram of book length entitled *The Rationale of Proximate Cause*. Besides being an extraordinarily skillful piece of writing, the work was boldly iconoclastic. It challenged one of the supreme idols in the House of Torts—the idol of *proximate cause*. It asserted that the fetish was a misnomer to begin with: the invocation of *proximate cause* in nine out of ten cases was not for the purpose of resolving the question of causation, as was currently supposed, but rather to determine fundamental issues of legal liability that had nothing whatever to do with the matter of causation. These issues, obviously not issues of fact such as a jury is theoretically called upon to decide, were peculiarly within the province of the court and demanded the exercise of the highest function of the judge. To submit them to the jury under the guise of *proximate cause* was not only to confuse the real and ordinarily uncomplicated issue of causation (normally determined quite easily by the "but for" test: "Would the plaintiff have sustained the damage if the defendant had not done what he did?"), but, even worse, to obliterate the important distinction between the proper functions of judge and jury. In order to preserve that distinction intelligently and practically, Dean Green suggested a new method of analysis for determining tort liability in cases where the chief problem was that which was currently concealed under the phrase *proximate cause*, and as an aid in the handling of that analysis he offered a novel pattern for the classification of tort cases.[1]

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20. See editorial in Central Law Journal of July, 1877.

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1. Green, *Judge and Jury* (1930) c. 1.

The first edition of Dean Green's casebook on Torts, published in 1931 and pointedly entitled *The Judicial Process in Tort Cases*, was based on the classificatory pattern thus suggested by him in his previous writings. As was to be expected, the book presented a wide "departure from the usual casebook study." In vain would a student look for a grouping of cases under such familiar headings as Proximate Cause, Negligence, Contributory Negligence, Last Clear Chance, Assault and Battery, Fraud, and the like. In their place he found such startling categories as Surgical Operations, Keeping of Animals, Manufacturers and Dealers, Builders, Contractors, and Workmen, and, under the larger headings of Traffic and Transportation, such subdivisions as Highway and Railway Traffic, Waterway Traffic, Passenger Transportation, Freight Transportation, etc. In other words, the categories of the conventional casebook, categories based upon legal concepts and legal rules, had given way to categories based upon large and striking factual distinctions whose significance could be apprehended as readily by laymen as by lawyers. And if, perchance, the critic were to ask, How can the student learn his legal doctrines and theories from a classification like this that ignores such doctrines and theories? The answer no doubt would be: "The point of view here is rather that of observation and inspection than of establishing the validity of any one rule or doctrine or theory as against another. The competition of cases themselves must do the latter, if it is desirable that it should be done."[2]

The publication of that first edition quite naturally evoked widespread discussion and controversy. Reviewers, on the whole, were loud in their praise of the book's interesting collection of cases as well as its central objectives. Even the novelty of its scheme of classification was cordially if not enthusiastically received, a fact which spoke eloquently for the progressive and experimental spirit that had come into the ranks of the law teaching profession. But in the chorus of comment that greeted the book one note was sounded almost universally—a note of doubt as to whether the book was practically adaptable for the teaching of tort law to first year students. Was it pedagogically sound? That seemed to be the big question. To that question, raised eight years ago, the publication of the present second edition is perhaps somewhat of an answer. Evidently Dean Green has proved at least to his own satisfaction, and presumably to his publisher's, that the book is suitable for its special purposes, for he has used it continuously in his own course in Torts at Northwestern, and the present edition, despite some renovation and re-editing of materials, follows substantially the outlines of the original work.

Of the few structural changes that are to be found in the new edition, there is one that deserves more than passing notice. Even those who have in the past applauded Dean Green's excursions from the beaten path will lift an eyebrow at his present treatment of the cases that were grouped in the first edition under the large subdivisions of Relational Interests and Abuses of Governmental Power. In the conventional casebook those cases would fill the categories of Defamation, Malicious Prosecution, Interference

2. Green, *Judge and Jury* (1930) 14.

with Contract, Employment, and other relations. In his first edition, Dean Green considered them important enough to be alotted some six hundred pages. In the present edition, those cases are completely eliminated from the text and merely cited in footnotes to annotate about forty pages of the editor's own analysis of the problems involved. Though one welcome result of this case deletion has been a reduction in the size of the book (the first edition ran well over 1800 pages of small print), its wisdom will surely be questioned. Certainly he editor's explanation is hardly compelling—that the interests involved in the excised cases "are entirely too many, too difficult of treatment and too important to be summarily dealt with." One naturally answers, If they are important, and precisely because they are so difficult, why not rather eliminate some of the cases and materials on topics relatively less important and less difficult? Nor will the editor's suggestion that they be treated, if possible, in a separate course on Torts, as is done at Northwestern, appeal to the many teachers of torts, who, like the present reviewer, are confined by curricular exigencies to one three-hour course for two semesters. With due respect to all the many merits of the present edition, this reviewer must regard the change as a serious obstacle to the more extensive use of the book for class-room purposes.

ISRAEL TREIMAN.†

PUNISHMENT AND SOCIAL STRUCTURE. By George Rusche and Otto Kirchheimer. New York: Columbia University Press, 1939. Pp. xiv, 268.

Most of what has been written on the subject of punishment has been concerned with penal theory: the philosophical justification of various theories of retribution, deterrence or reformation. A refreshingly new approach is found in this monograph, which might be described as a study of the history of punishment from the viewpoint of economic determinism. Its thesis is that both crime and punishment are affected mainly by economic developments, and that society at every stage of development has devised methods of punishment which correspond to the current system of production. This reviewer is not inclined to challenge that idea. If others are, they will have a difficult time to rebut the mass of evidence which Messrs. Rusche and Kirchheimer have here assembled.

They trace the development of punishment starting with the early middle ages, when the task of criminal law was primarily to keep the peace between equals, a task which could be performed almost entirely by the imposition of fines. The great increase in population in later medieval times and the resulting increase in poverty led to an increase in crimes against property. Fines were out of the question as punishment for these impoverished criminals, and corporal punishment and the death penalty became increasingly common. No other way seemed to offer itself for society to get rid of dangerous persons. It was a penal system obviously the product of a society in which there was no shortage of labor. As Professor Thorsten Sellin says in his Foreword to this book, "The sanguinary punishments and tortures of old are no evidence of bloodthirstiness or sadism on the part

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