

our courts have heaped upon it." The other is characteristic of our common-law methodology. Except for the first section of the *Restatement* and certain judicial dicta, there is an assumption of a general rule of non-liability and the insistence upon a showing of specific grounds for recovery, thus limiting liability to certain classes of cases. The German Civil Code, on the other hand, starts with a general principle of recovery and denies it only if grounds for denial appear. This difference of approach has multiple aspects, for in addition to enlarging the area of recovery, the German method makes it easy to make out a prima facie case, a matter of some practical significance. Our method appears frequently in our system, as in the growth of tort law, in the contemporary development of promissory estoppel, and so on. Eventually we may come to the formulation of general grounds of liability, but not until generations of plaintiffs have been denied "justice" in the process.

While Dawson's book is of somewhat limited utility, it is one which should be known to every scholar in the fields of Restitution and Comparative Law. But even for the specialist it is hardly to be recommended that "Dawson" replace "Conan - Doyle" at the bedside.

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SEX AND THE LAW. By Morris Ploscowe.¹ New York: Prentice-Hall, Inc. 1951. Pp. 310. \$3.95.

If it be the aim of law to provide an adequate system of social control, then the reader of this compact little book will be convinced that our legislative and judicial minds are far from achieving this desired aim. In very down-to-earth, non-technical language, Judge Ploscowe has dissected the social scene, and in a very matter of fact manner bores into the evils eating away at the social body, as only one of wide experience can do. Perhaps the title of the book is misleading, in that the author's exposition and criticism reach far beyond the ambit of sex and its immediate effects.

Starting with a more sober subject, the marriage status, Judge Ploscowe hits at the basic difficulties inherent in contemporary law dealing with the formation of the marriage contract. There is no doubting that the marriage contract is one of the most sacred of institutions, whose consequences should endure for life, and one much more complex than the simple commercial agreement. Yet a lunatic may in many cases enter into a valid contract to marry, provided he understands the nature and consequences of the marriage and the responsibilities entailed. This same individual would not be competent to make a binding contract to sell his automobile or a tract of real estate. Some states adhering to the common law will permit a boy over fourteen and a girl over twelve to marry; other states with more stringent age requirements will not void marriages entered into by a party under-age less the incapable party applies for such action. Thus one can readily see that the law cannot serve the interest of the state when it treats the entrance into marriage (as the author puts it) with about the same

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amount of dignity and formality as the acquisition of a dog license. Inject common law marriage into the scene, and one is faced with an abominable relationship inconsistent with any appreciable progress in marital legislation.

To add to the marriage confusion is the traditional approach to divorce, which in no way comes to grips with the fundamental issues involved in marital discord. Based as it is upon the tenuous notions of the adversary system, geared to an exchange of adversary pleadings and mud slinging verbage, dramatized in a courtroom imbroglio of threats and counter threats, our traditional approach can only miss the boat. This diseased member of society might well respond to humane and studied treatment, but faces amputation before the first pangs of anger and resentment can be soothed. Consider also the travesty of the *ex parte* proceeding, wherein one spouse with the confiding blessings of the other, perjures himself on the witness stand, swears before God that he has been wronged and abused, and in an atmosphere of pious fraud, hoodwinks the state into granting him freedom from the evil of domestic perdition. The people know, the judge knows, the whole world knows that the injured and faultless party is a rare creature in matrimonial litigation, but the law and the judiciary are blind to decency and common sense. In this field of perfunctory justice, with no thought given to reconciliation or mature organization, there is no hope for sustaining a healthy society able to cope with pressures from alien philosophies.

Another facet of life too often overlooked in the rush of legislation is the lot of the illegitimate child who arrives on earth, not only stained by original sin, but condemned by laws derived from ignorance and lack of conscience. Modern psychology teaches that rejection is one of the surest enemies of mental fortitude; yet our well meaning legislatures, in denying the illegitimate a sense of human dignity, have seeded a tree burgeoning with malcontents. In most jurisdictions today, the illegitimate, unlike his legitimate contemporary, claims little right to support or inheritance, finds little of that security that only parental acceptance can afford. In short, he is still the bastard of the common law. Judge Ploscowe has suggested that all children should have equal claim upon their parents; and certainly in the eyes of the moral citizen, this proposal is not asking the unreasonable. In fact, one wonders why our law makers have persisted in their ignorance these many years.

Having digested the ills of marriage, divorce and annulment, the author next focuses his attention upon the problems posed by conduct more directly related to sex drives, namely, the crimes of rape, adultery, fornication, sodomy and indecent exposure. Forcible rape, as defined by common parlance, is undoubtedly a vicious criminal act which demands heavy penal sanction, and yet in dry legal language, the term forcible rape is likely to suffer considerable dilution. So often the complaining witness is not a stranger to the defendant, in fact, may be very friendly with him. She may have dated him frequently, imbibed heavily with him, and surrendered generously to his amorous advances. When the man attempts to impose his will a little too forcibly, she may coyly feign opposition and offer token resistance, only to succumb to the pressures of her own passion; but she

may very well scream rape when the act is complete. Granted there is "some" resistance here, but the woman has not put forth serious effort to deny the man his pleasure. Only by the wildest stretch of the lay imagination would one come to the conclusion that the woman had been raped; yet there are courts in this day and age that would countenance such a decision and relegate the man to years of confinement in a state penitentiary.

Even more anomalous is the case of the seventeen year old boy who has sex relations with a girl of his own age who is more worldly-wise than he and actually the aggressor. Assume that a state statute fixes eighteen as the age at which consent becomes irrelevant, and further that the girl is given to bribing tendencies. It is at once apparent that the boy, naive as he may be, is without a solid defense in the world once it has been proved that the act of intercourse was a reality. It goes without saying that such a situation defies common sense; yet many an unctuous legislator has opened the door to senseless prosecution of the type described. The State of New York has very sensibly made it possible to treat sexual intercourse of boys under twenty-one with girls under eighteen as a misdemeanor rather than a felony, and the maximum punishment is prescribed as one year instead of ten years, as formerly enacted. There are other states which have taken account of the fact that intercourse with a girl who is chaste and of good morals is different in character from intercourse with a promiscuous girl. These are worthwhile additions to a patchwork of legal sanctions, but even they do not explain away the enigmatic state of affairs that allows the young woman of marrying and child bearing age to scream rape after having granted full and passionate consent.

Should the fornicator or the adulterer, the homosexual or the sodomist feel the brunt of prosecution? Judge Ploscowe believes that the criminal law has been most ineffective in dealing with these abnormal subjects. According to his thesis, the fornicator or the homosexual cannot be changed by law, rather only by the more personal influences of religion, education, psychiatry and social work. This does not mean that he countenances such practices, but rather that he believes that legal protest is futile and should be abandoned in cases wherein threats to the public peace and security are negligible. If adults desire to lead sexually erratic lives, they may carry a stain of moral guilt; if mature homosexuals wish to partake of abnormal sex pleasures, they may need clinical advice; but none of these should be singled out as penitentiary subjects. On the other hand, any such activity carried out in a wanton, brazen manner should be suppressed by punitive measures. Male and female prostitution must be curbed; the sex maniac, as a potential danger to the human race, must be confined; but only these extremities should feel the full boot of the law.

The author's argument is very plausible, but it is also true that many of our sex laws are derived from understandable attempts by legislative bodies to support the basic premise of family stability. If one is to believe in the sanctity of marriage and the home, and the procreation of the race, one almost automatically decries the type of conduct that will corrode this domestic tranquility. If the law were designed to set a sane moral pattern for subsequent behavior, and administration were to stem from men of

discerning eyes, perfection would be achieved. But bad administration, welling out of narrow perspective, has made futile any effort of appraising the laws themselves in an unprejudiced light.

The sexual psychopath laws² were passed with a view toward bettering the lot of the sex delinquent; yet results achieved are not so very encouraging at this early date. Realizing the glaring inadequacies in the modern penal sanction, and jostled by public pressure and emotion, the legislators have poured a rash of spirited legislation on the legal market, aimed at halting the moral decline. Unfortunately psychiatrists and neurologists are not agreed as to what constitutes a sexual psychopathic personality; hence any definition is subject to adverse criticism. More unfortunate is the fact that many minor sex delinquents are relegated to the limbo of psychopathy and walled in institutions hopelessly ill-equipped to minister to their ills. As a result, these luckless, abnormal individuals are denied precious freedom, while medical experts haggle over their hair-splitting definitions.

Such in brief is a review of Judge Ploscowe's contribution to the law and sex, but by no means a full index of the rich factual material presented by him. It is indeed regrettable that many of these errors, so obvious to a discerning imagination, cannot be remedied by those who create the law. As Dean Pound has pointed out in the introduction to this volume, there is definite need of permanent bodies, with security of tenure and adequate facilities, to ferret out the crippling laws and administrative methods born of panic and indiscretion. This reviewer agrees with Dean Pound, when he states that the book will have made its mark if it makes the public, and particularly the lawyer, social worker, and criminologist, conscious of the disorganizations which our law has only feebly attempted to organize.

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2. *E.g.*, Mo. REV. STAT. §§ 202.700-202.770 (1949). The constitutionality of the Act was upheld in State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950).

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