

cial personage. Brooks rebuts with the barb that many judges have been fighters—most of them on the wrong side—but that the subject of his book was a judge who was on the right side, sociologically. Mr. Brooks has the satisfaction of knowing that there were other judges who were contemporaries of Mr. Justice Clark who agreed with Clark. Among them were the late Gilbert Roe, law partner of the elder Senator La Follette, who expressed similar views in a book entitled *Our Judicial Oligarchy*. Another adherent of this group of judges was Mr. Justice Wannamaker of the Ohio bench.

The reviewer enters this discussion concerning the merits of Walter Clark as a judge with the observation that it was well that Judge Clark lived when he did. A man with his social philosophy, openly expressed as he expressed it, would be persona non grata to the political machines which control the poll-tax South today.<sup>7</sup> Hence, if living a generation later it would have been "Lawyer" Clark rather than Judge Clark.

One of the most valuable features of the book is a bibliography of Clark's writings. The author had access to the late jurist's manuscripts in the University of North Carolina library and, hence, wrote from primary historical sources.

MALCOLM M. YOUNG\*

**A Rationale of Criminal Negligence.** By Roy Moreland. Lexington, Kentucky: University of Kentucky Press, 1944. Pp. viii, 175. \$2.25.

Discussions of criminal negligence are still needed and this one, by a member of the faculty of the Law School of the University of Kentucky, is especially welcome because it deals in one handy volume<sup>1</sup> with the concept as it is used in the definitions of manslaughter, murder, and assault and battery, and in statutory modifications of those crimes. The references are not always up to date and some of the conclusions are not as precisely accurate as a more lengthy discussion could make them, but the problems are discerned, judicial methods of dealing with them described sufficiently, and solutions offered.

The author assumes that there is such a thing as criminal negligence; that courts know what it is, though they may not be able to articulate their knowledge; that it need not be discovered but only better described; and that he is not suggesting a substantive reform but only a better phraseology.

The fundamental difficulty is thought to be that "judges have not frankly faced the issue whether criminal negligence is objective or subjective."<sup>2</sup> Most of them have actually applied, except for murder, the objective standard, borrowed from tort law, saying that "civil and criminal negligence are the same in kind." But most of them have required for criminal liability a higher degree of negligence than for tort liability, thereby raising a second major problem, that of describing this higher degree. The courts have not been able to formulate a test for it. The author submits one for manslaughter and criminal battery; another (subjective) for murder. He doubts the wisdom or effectiveness of the "negligent homicide" statutes, and offers no formula for the lower degree of manslaughter that they attempt to define.

Assuming that a satisfactory formula has been provided for civil cases, the author

<sup>7</sup> North Carolina abolished the poll tax as a requisite for voting during Clark's lifetime.

\* Of the North Carolina Bar.

<sup>1</sup> Originally published as a series of articles in 32 Ky. L. J. 1, 127, 221 (1943-44).

<sup>2</sup> P. 27.

builds on it, as presented in the Torts Restatement. He believes that his formula for manslaughter and battery eliminates the mental element; that only behavior or conduct is involved; and that the justification for this is that "the law is primarily interested in maintaining the general security, not in awarding punishment for blameworthy mental attitudes."<sup>3</sup> Just how the fact that the chief ultimate aim of the law is not punishment, if that be a fact, completely eliminates the mental element from the factors to be considered in determining whether a person is to be subjected to measures of social defense is not obvious to the reviewer.

And one is led to suspect that it is not perfectly clear to the author, for he makes the word "recklessly" the key word of his formula. After considering the various words and phrases that have been used by English and American courts and by texts writers, he concludes that "the concept of reckless conduct most nearly coincides with the feelings of the ordinary judge or jury as to that negligence which merits punishment as a crime. The term has another advantage over its rivals in being the one most commonly employed by the courts."<sup>4</sup> It is true that the Torts Restatement may have attempted to fit the word into an objective standard, but its authors do not claim that the mental element is thereby wholly eliminated.<sup>5</sup> Those who would make all crime merely an act may have gone too far in their zeal to eliminate punitive treatment; they seem to assume that the law now has but one end and method, and that the only function of *mens rea* is to establish blameworthiness. The author is careful to avoid that error<sup>6</sup> and it must be remembered that he is stating an objective standard. It may very well be that the word "recklessly" is the best word available to keep judges and jurors from being too objective, from reducing the standard for criminal liability to that for tort, from eliminating the mental element entirely. It is probably no more difficult to appraise recklessness than it is to appraise reasonableness on the basis of what the actor should have known, especially if his lack of knowledge is due to inattention rather than to ignorance.<sup>7</sup>

This leads one to wonder whether the fundamental cause of judicial failures is, as the author says, a refusal to face frankly the issue whether criminal negligence is objective. Perhaps it is a failure to face frankly the question whether it is objective in an evidential rather than in a policy sense<sup>8</sup>—or both, for here again the law need not be

<sup>3</sup> P. 36. For this proposition he includes in his citations Holmes's remark, "as the aim of the law is not to punish sins, but is to prevent certain external results . . . ." In the reviewer's opinion, the interpretation put upon this remark by many who cite it would make it one of the most inane statements in famous legal literature; and perhaps, even as intended, it is more misleading than helpful.

<sup>4</sup> P. 44. See also Robinson, *Manslaughter by Motorists*, 22 Minn. L. Rev. 755, 783 (1938).

<sup>5</sup> 2 Restatement of Torts (1934) § 500, p. 1293 and Comments b and g.

<sup>6</sup> P. 39, note 150.

<sup>7</sup> Is *Bussard v. State*, 233 Wis. 11, 288 N.W. 187 (1939) such a case? Is *Granflaten v. Rohde*, 66 S.Dak. 335, 283 N.W. 153 (1938)? In the Wisconsin case it is intimated that character as evidenced by the circumstances of the particular crime is the significant thing. Ignorance is hardly a character defect. It is said that inattentiveness is significant for the determination of character only if it is habitual. Michael and Wechsler, *Criminal Law and Its Administration* 201 (1940). How would habitual inattentiveness be proved under the present law of evidence?

<sup>8</sup> See the analysis of Holmes's Theory of Objective Liability, in Hall, *Interrelations of Criminal Law and Torts*, 43 Col. L. Rev. 753, 760 (1943). Turner clearly puts it on an evidential basis. *Mens Rea and Motorists*, 5 Camb. L. J. 61 (1933).

limited to a single reason or basis. The difference may be material, for if it is in an evidential sense, injustice may be made less frequent by the allocation, as well as a loading, of the burden of proof. The difference may be material for other reasons, even though the circumstances will usually provide a basis for application of an objective standard in either sense of the word.<sup>9</sup> If the author is using the term "objective" in a policy sense, really intending to eliminate mens rea, it may very well be that he is suggesting a change in the law.

His main purpose, however, is to clarify and standardize the law. He has little faith in the wisdom or effectiveness of the "negligent homicide" statutes that seek additional convictions through changing the name of the crime and narrowing the scope of the issues.<sup>10</sup> The reviewer agrees with the implication that the jurors who, in cases of inadvertent conduct, have refused to convict, even though the law would permit them to do so (and the judges who have insisted upon advertence?) are wiser than the groups that press such legislation. The reviewer also agrees that the phrase, "conduct deserving punishment," is significant and helpful. In fairness to the jury they should be told what they are doing. The word "reckless," falsified by the qualification that it need not be personal and actual, alone will hardly tell them. It can be assumed that they will understand and correctly appraise the value of a sojourn in a modern, i.e., contemporary, prison for ignorant, or stupid, or inattentive, although well-disposed, individuals.

The author's rationale, so far as made explicit, does not carry him deeply into the ends and methods of the criminal law. He sticks to words in common legal use and remains at the "legal level," and he may be inviting the use of tort cases that were controlled by aims irrelevant, or worse, to those of the criminal law. Nevertheless, the work is far from superficial and will be helpful to all who desire the conclusions of one who has given a difficult problem some earnest and creative thought.

ALFRED L. GAUSEWITZ\*

---

**Questioned Document Problems, The Discovery and Proof of the Facts.** By Albert S. Osborn, revised and edited by Albert D. Osborn. Introduction by Dean Roscoe Pound. Albany: Boyd Printing Co. 1944. Pp. xxviii, 486. \$6.00.

In preparing a review of *Questioned Document Problems* the reviewer is at once struck by the opening sentence of the introduction by Dean Roscoe Pound, which reads: "A book by Mr. Osborn on the problem of proof as to questioned documents needs no introduction by anyone. His name is sufficient guarantee of matter which judges and lawyers and all who have to do with such problems must look into and, in the words of Captain Cuttle, when read 'make a note on't.'" To which statement needs only to be added that any review is likewise superfluous.

Combined herein is a valuable supplement to Mr. Osborn's earlier works, *Questioned Documents* and the *Problem of Proof*, which should be included in the reference library of all lawyers who may be called upon to defend or impeach a questioned document. This volume is made up of a combination of previously published papers, sup-

<sup>9</sup> Michael and Wechsler, *Criminal Law and Its Administration* 196-97 (1940).

<sup>10</sup> P. 134.

\* Professor of Law, University of Wisconsin.