

responding increase in the substantive due process on the state level. A recent article has recalled our attention to this area.¹¹ This reviewer realizes that our constitutional history has demonstrated that, strangely enough, Hamiltonianism and John Marshallism have served liberalism well; and that paradoxically, too, Jefferson's "states rights" theory has been perverted to the service of money changers. He hopes, however, that state "substantive due process" will not provide the refuge afforded by the pre-Roosevelt Court for economic laissez faire masquerading in the disarming robes of "natural law" (Darwinian style).

Professor Freund has presented us with a well-written stimulating, and objective work. What it lacks in integration of subject matter, it more than makes up in reader interest and appeal. I dare say neither the partisans of the Right nor the Left will particularly appreciate his effort. The Right will writhe at the cavalier way in which he relegates the gilded age of judicial hyper-protection of "property rights" to the discard heap. The Left will be equally uncomfortable with his picture of a Supreme Court to whom "civil liberty" doesn't always mean "civil license." Those, however, who wish to understand more intelligently the "cult of the robe" (as Judge Jerome Frank has called it), and who prefer to have knowledge of the workings of a judiciary in a democracy rather than merely to give emotional obeisance thereto, will enjoy this book, and perhaps be enlightened. A recent writer has suggested that "the nature of the American government depends upon the opinion and the principles of the men who constitute the Supreme Court. . . . Since they are men, not gods, they are presumably subject to mundane influence, and a study of American government must therefore include a study of the tastes and temptations of judges."¹² This still may come as a shock to some. Whatever the virtue of "shock treatment," Professor Freund's work is an excellent initial dose for those who wish eventually to attain mature understanding of American constitutional law in action.

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War and Civilization. By Arnold J. Toynbee, selected by Albert V. Fowler
London: Oxford University Press, 1950. Pp. xiv, 165. \$2.50.

A Plan for Peace. By Grenville Clark. New York: Harper & Bros., 1950. Pp. xii, 83. \$1.00.

In a preface to Mr. Fowler's selections, Professor Toynbee expresses the opinion that war explains the breakdowns of civilizations. To one reader of the volumes of Mr. Toynbee's *Study of History*, from which the selections are made, the observation causes difficulty.

¹¹ Paulsen, "Natural Rights"—A Constitutional Doctrine in Indiana, 25 Ind. L.J. 123 (1950).

¹² Agar, *The Price of Union 194* (1950).

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For one thing, in the second volume, dealing with Challenge and Response, the controlling factor in the origin of civilizations, Professor Toynbee devotes 108 pages to the study of military blows and military pressures as challenges and stimuli in the origin and growth of civilizations and groups. It is true that many of his examples come from periods which are not, in his ultimate chronological scheme, periods of origin or growth. He seems to be making the point that his temporal schemes are not to be taken too seriously, and that a period may contain sub-periods of growth even though the general tendency is toward breakdown and disintegration.

War may thus contribute to the origins, and, it seems, to the growths of civilizations as well as to their breakdowns and disintegrations. It is particularly the war against representatives of other civilizations which contributes to creating civilizations, and the war within a civilization which contributes to its breakdown and disintegration. This is the view expressed in terms by Professor Toynbee. Nevertheless, he includes among the challenging wars, for example, the wars of Napoleon, with their ultimate stimulating effect upon the Prussian spirit. It seems possible that the intra-civilization Napoleonic Wars stimulated the nineteenth century Western European Civilization as a whole somewhat as the extra-civilization wars of Greeks against Persians may have stimulated fifth century Hellenic Civilization. Moreover, two of Mr. Toynbee's principal examples of destructive wars within civilizations—a theme to which he gives 120 pages—are wars waged by Charlemagne and Tamerlane. They come at such an early period in the lives of the civilizations involved as to cause serious difficulty for the thesis.¹ The third set of wars examined fully in connection with the theme of breakdown, the Assyrians' wars against Babylonia and other members of their own civilization, coincided partly with what is taken to be the growing period of the civilization. Moreover, Mr. Toynbee has troublesome doubts about the appropriate treatment of the phases of this civilization in relation to its predecessor, the Sumeric Civilization, which raise a question whether it was more than just a peculiar revival of that earlier civilization, ready for breakdown from its beginning. The Greeks fought vigorously among themselves from the origin through most of the breakdown of Hellenic Civilization.

A secondary element in Mr. Toynbee's theory is the view that advances in

¹ Mr. Toynbee is again doubtless suggesting that his temporal schemes are not rigid. Early in the development of the Western European Civilization Charlemagne's wars were striking examples of the intra-civilization wars which characterized its history. The mediaeval wars of Popes and Emperors, the Thirty Years' War, the Napoleonic Wars, the World Wars have perhaps at once expressed the life and contributed to the difficulties of our civilization. Tamerlane's attack on the centers of his own culture at the expense of his attempt to extend his power over central Asiatic Nomads limited the development of Iranian Civilization and so of Islamic Civilization as a whole. Professor Toynbee, writing in 1939, observed that if Tamerlane had concentrated his power against the Nomads, large portions of Asia ruled from Moscow might be ruled instead from Samarkand. We may appreciate the force of the observation today as we appraise the rather weak position of Iran in its significant geographical and strategic relationship to Russia.

military technique by increasing the range of destruction contribute to breakdown and disintegration. He does not, however, make a convincing case for the coincidence of technical advances with transitions to breakdowns, and insofar as they have accompanied stages of breakdowns and disintegrations, their quantitative effects are problematical.

The reviewer can only infer that Mr. Toynbee's genius has enabled him to develop a thesis, or at least a pattern, more subtle than he knows. The volumes of his story are full of half-articulate skepticism about the religion² and the sense of rhythm which appear superficially to play so large a part in his theory. There is vigorous criticism of eugenic accounts of history. There is an effective though somewhat exaggerated running criticism of explanations of history by technological and economic factors. In spite of what has just been said about the present selections and the fascinating treatments of the relationships between wars and civilizations,³ in the end the theory which emerges from Mr. Toynbee's *History* is a theory of morale—a psychological theory of origin, growth, breakdown, and disintegration. It is not the characteristics of wars, but reactions to wars, which have determined the course of civilizations. Wars of all sorts may stimulate people who have fresh interest and confidence in their civilizations; whereas in periods when confidence is declining, similar wars may perhaps contribute to the decline in the powers of adjustment and creation which are the marks of a vigorous civilization.

It should be clear that such a theory of history does not by any means exclude the possibility that man will be able to develop the art of war to a point where war may accomplish the destruction of one civilization, of all civilizations, or of human life itself. In 1931, in a famous passage, Freud expressed the opinion that mankind had then reached some such point. Persons familiar with the new science, when they speak carefully, tell us that it is at least conceivable that we are approaching some such point now. However that may be, there are many who view the possibility of another war with the peculiar kind of distress that afflicts mortals whose societies are in imminent danger.

In *A Plan for Peace*, Mr. Grenville Clark estimates the course of the possible war between the United States and Russia and outlines the simple means

² The present selections will give the reader an incomplete view of the place of religion in Mr. Toynbee's scheme. The possibility, which one may feel from the start, that the *History* is concerned as much with the psychological and anthropological functions of religion as with its other aspects is confirmed by the modernism of the last Annex in the sixth volume.

³ There is little consideration in the *History* of the factors in the persistent human disposition to engage in wars, but there are many illustrations of the disposition and its general distribution. The Mayan Civilization alone has left rather few indications of war-making activities. It is the least understood of all civilizations. If it should turn out to have been pacific at any stage, as now seems unlikely, it might be an interesting exception to the general rule. With few if any exceptions, primitive and civilized societies alike, so long as they are healthy, have effective power, and are able to reach one another, engage in homicidal fighting. Cancer has been no harder to treat than wars yet in neither case do we give up the effort to understand and prevent the destructive events.

needed for its prevention. Mr. Clark was a leader in the organization of military training during both wars against Germany. He is a New York lawyer known to many younger men as an extraordinarily wise and friendly chief as well as a vigorous and independent member of that somewhat mis-named group called corporation lawyers. He is by no possible stretch of the imagination anything which even Senator McCarthy could call a Communist sympathizer. Yet, as late as September, 1950, the date of his preface, he thought peace with Russia highly desirable and quite possible.

He invites the layman to make his own estimate of the military situation. In particular, he calls on the State Department to make its estimate, without fear of competition from the professional military men. Mr. Clark observes that in a conversation in 1933 Secretary of State Stimson, a civilian, made an almost perfect estimate of the course of the war of 1939. To stimulate laymen, including the State Department, Mr. Clark makes his own prognostication. Everyone should read it. In a masterpiece of understatement, he follows his account of the probable course of a new war with five conclusions of which the fifth is as follows: "The West would probably be able to obtain favorable terms even after a short war and would also probably prevail in a long war. But in either case, the moral consequences, apart from any physical losses, would be serious and the postwar responsibilities great."⁴

Emphatic in his disapproval of anything which could be called appeasement, Mr. Clark urges that, while keeping up our guard, we can—or could in September, 1950—still take effective measures for the preservation of peace. The measures depend on universal disarmament over a twelve-year period under a system of inspection and a strengthened United Nations. The development of disarmament would automatically solve all the other serious political issues which poison relationships between the United States and Russia: Germany, Eastern Europe, Western Asia, the Far East, Japan. Mr. Clark proposes amendments to the United Nations Charter designed to create a world government with powers limited to those necessary for maintaining a modest police force in a disarmed world.

Enough has been said to indicate the character of his diagnosis and the simple common sense of the remedy proposed. We have had indeed, ever since 1932, drafts of treaties adequate to deal simply with the simple administrative problems of disarmament. Why have they not been put into effect? What is the real difficulty with the creation of the rather simple administrative devices necessary for a limited world government?

Mr. Clark, in dealing with "certain obstacles" to his approach, includes "recriminations" and the question "Will the Russians negotiate?" In answering the latter question, Mr. Clark, deriving some support from Winston Churchill's consistent advocacy of negotiation, has the following interesting statement: "It cannot be denied that the Western World has come to distrust

⁴ Page 33.

profoundly the Russian willingness to abide by agreements. For different reasons, but sufficient for themselves, the Russian regime seems to have a similar mistrust of the West. These conditions, therefore, make it essential that sure guarantees of observance be provided."⁵

At several points, Mr. Clark, while insisting on the moral strength of the American position, recognizes that our suspicions may have contributed greatly to Russian suspicions of our purposes. His observations recall one of Mr. Truman's speeches in the campaign of 1948. Addressing the American Legion in Miami, the candidate in effect promised to take steps to dispel "the present poisonous atmosphere of distrust which now surrounds the negotiations between the Western Powers and the Soviet Union." Instead, he turned immediately on his inauguration to the policy of "overwhelming force" which in the past three years may have cost us the peace for which the President has worked. Mr. Clark, like Mr. Truman in 1948, seems to have isolated the general character of the phenomenon which so far has made the hope of world government a poet's enthusiasm or a lawyer's draft.

The difficulty is psychological, not administrative. The real obstacle to Mr. Clark's simple and sensible solution is that combination of pugnacity and fear, but mostly pugnacity, which contributes to the formation of suspicion. There is an occasional simple marauder in history, like Genghis Khan; but the commonest situation is one in which a number of peoples and their leaders are expressing unconscious dispositions, whether innate or conditioned, in the permitted mutual hatreds of foreigner for foreigner.

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Public and Republic: Political Representation in America. By Alfred de Grazia.

New York: Alfred A. Knopf, 1951. Pp. xiii, 262. \$3.50.

Dr. de Grazia's topic of representation is very old but also very new. We are called upon today to discuss ward representation and world representation; to discuss state representation and the national legislature; and many other diverse forms of representative agencies. We must deal with the initiative and referendum and with a hundred bewildering varieties of proportional representation. Furthermore, we must deal with private governments as well as public governments; with corporations, with unions, with countless societies, representing interests which are territorial, professional, religious, grouped in endless forms, demi- and semi-political. And again we find demands for "representation" in administrative agencies far and wide.

We may diligently inquire: just what does a representative body do? What's what and who's who in representation? In our system the executive may also be a representative. The mayor, governor, the President of the United States is

⁵ Page 66. See also pages 36, 49-50, 52, 55, 59, 62-63, 64-67, 71.

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