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Edward J. Bander. With A Preface by the Author
and an Introduction by Roscoe Pound. - THE
AMERICAN LAW OF TREASON:
REVOLUTIONARY AND EARLY NATIONAL
ORIGINS. By Bradley Chapin.

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Book Reviews

MR. DOOLEY ON CHOICE OF LAW by Edward J. Bander. With A Preface by the Author and an Introduction by Roscoe Pound. 1963. Michie Company, Charlottesville, Virginia. 231 pages. \$4.95.

In the year 1893, 26 years old and a veteran newspaper reporter of eight years, Finley Peter Dunne was enjoying a drink in the saloon of James McGarry in Dearborn Street near the office of the Chicago Tribune. Jay Gould had died that day and McGarry made some amusing remarks that Dunne, using McGarry's brogue, converted into an article for the Sunday Chicago Post, attributing them to "Col. McNerry."

At the time Dunne was on the Chicago Evening Post. He and his editor, Cornelius McAuliff, were fighting the Chicago City Council. Thinking it might be dangerous to call an alderman a crook, Dunne hit upon the idea of having a comic Irishman in dialect do so. Dunne revived "Col. McNerry" to bludgeon the bribe-taking members of the Council. It was an instant success; the victims, feigning amusement, dared not complain.

All but James McGarry. He complained to John R. Walsh, the banker who owned the "Evening Post." At Walsh's request, Dunne had "Col. McNerry" returned to Ireland and invented Martin Dooley, placing his saloon on Archer Avenue, one of Chicago's four old plank roads, called by the Irish "Archey Road." To the regret of "Mr. McKenna," McNerry's listener, Dunne substituted "Mr. Hennessey"—"Hinnissy" as Mr. Dooley always pronounced it.

Dunne achieved international fame and left Chicago for New York and London, when Dooley gave "Hinnissy" a book review of "Tiddy Rosenfelt's" history of the "Rough Riders." When "Hinnissy" remarks that if "Tiddy" wants to blow his horn "lave him do it," Mr. Dooley agrees, but in his punch line says that if he were "Tiddy," he'd call the book "Alone In Cubia."

You would think that when he read this, Teddy Roosevelt would have become Dunne's mortal enemy, but this was not so. "Tiddy" regretted to say that his family and intimate friends were delighted with the piece and insisted on meeting him. Dunne became his best friend and was wined and dined at the White House.

As Franklin P. Adams (F.P.A.) has said, Dunne was "an artist" and a perfectionist who was never satisfied with his product. Compelled to write in dialect, he spent hours on a few words, particularly the punch line endings. This is why his imitators have failed so miserably. F.P.A. is right when he tells us that "few popular writers ever wrote more maliciously." This was because Dunne, an Irish rebel, resented in-

justice, and detested sham and hypocrisy, with the selfish stupidity that invariably accompanies them.

As a baseball reporter, Dunne watched "Billy" Sunday on the Chicago White Stockings and gave the name "Southpaw" to a left-handed pitcher, because his left arm faced South Chicago. As a police reporter covering Chicago's courts and politics, he also saw a great deal of lawyers. It was natural then that Mr. Dooley should discuss lawyers across his bar with "Hinnessy." But not until Edward J. Bander wrote this anthology, was there one book in which Mr. Dooley's best articles on lawyers were collected. What John Stuart Mill does for Jeremy Bentham and the D'Oyly Carte Opera Company for Gilbert and Sullivan, Edward J. Bander does here for Dunne. Elmer Ellis' "Mr. Dooley At His Best" (Scribner's, 1938 and now out of print), Ellis' life, "Mr. Dooley's America" (Knopf, 1941), and Philip Dunne's recent "Mr. Dooley Remembers" (Little, Brown, 1963) are great (See my review 13 CATHOLIC U. L. Rev. 86) but from different points of view.

This book about Mr. Dooley is by a lawyer for lawyers, every one of whom should own it. It is remarkable in that as a young Jewish boy in Boston, Ed Bander came to know the Irish the hard way, by wearing an orange tie and green "yamakey" on St. Patrick's Day. After riding the Destroyer Escort from the Gilberts to Sagami Wan, Tokyo, Bander returned from the wars to marry a "Shix—as" of a prominent Concord family who knew Henry Thoreau "as a local loafer." They have three children; two play the accordion; one, the piano. After Boston U. Law School, Cuyahoga Juvenile Court, Harvard Law Library, and the United States Court of Appeals, First Circuit, Ed Bander is now Assistant Law Librarian at New York University Law School.

Without spoiling the fun for you let me give you a few samples from his grand book.

In an excruciatingly comical piece, Mr. Dooley tells why he'll never be a witness for a friend again. In a weak moment he agreed to testify to "Lake Michigan droppin' through Harrigan's ceiling." On cross, Dooley was held in contempt, called a thief and accused of kidnapping little Charlie Ross.

How often do you friends who become witnesses complain in the same way to you today?

Mr. Dooley pays his disrespects to the Fifth Amendment with this one:

Lootgert, "a large German man," was tried for "puttin' his wife into a breakfas' dish." A crackpot "Perfesser" confused the "pure-minded pathrithes" on the jury but "no wan" was so "crool" as to ask "what anny wan means," least of all whether Lootgert did it.

and his prescient disrespects to the *Durham* case with this:

When "Haughty son iv wealthy fam'ly steals watch from awful Hogan," an expert testifies that "when he hooked the watch," he was suffering from "tomaine excelsis," "warts," "bozimbals," and "hoptocoliographophiloplutomania or what the Germans call tantrums." Before and after he was a "magnificent specimen." The witness cannot imagine how he stayed "featherheaded" long enough to swipe a watch.

Another yarn I love is this one which is better even than the one Arthur Train's Mr. Tutt tells:

When Schmidt sued Dooley's friend, Darcy, for libel, Dooley landed on the jury. The first ballot was six to five for "Darsay." Dooley got them down to "illevn to one" but "a little man with whiskers," "shtd out brave fr Schmidt." Dooley was sure h'd hold out because he was "wanst a night watchman and could sleep on th' top iv a pole." Remembering he loved cards, Dooley played him "wan game iv siven up." "Th' foreman made out a verdick." "In th' inthrests of law an' justice an' not to skin th' little man but to up-hold th' constitution," Dooley "turned the jack."

As for Judges, when the "lively lawyer that's wurrucked twinty hours a day" becomes a Judge, Mr. Dooley tells us he can't "think out iv a hammock." And that Judges would "step livelier if they were paid be th' piece." Charlie Desmond is saying the same thing in New York today.

Teddy Roosevelt invited Booker T. Washington to dinner at the White House. Dooley explains the political consequences to "Hinnissy:"

Thousands iv men who wudden't have voted for him undher anny circumstances has declared that under no circumstances wud they now vote fr him.

Describing the visit Dooley said Booker was not the first Washington to "et" there; none of "th' Prsidents before Lincoln" fell out of their frames; Booker "used proper discrimination between th' knife an' th' fork;" and that, an "invintory iv the spoons showed" "that he had used gintlemanly resthrait." It made Dooley jealous. He would like to go even if he "had to black up."

This I trust is enough to whet your appetite and convince you that this book is a gold mine of "Dooleyana."

There is bound to be a new edition. In it, I would eliminate the three "Imitations" and substitute "Mr. Dooley Discovers A Unanimous Dissent" by James Marsh of the Philadelphia Bar (44 A.B.A.J. 585). This is the only imitation that is any good.

The glossary is great, with two exceptions. It is disorganized in the index and very incomplete. "Words and Phrases" deserves expansion.

These are minor faults. The book in every line shows the ten years Edward J. Bander has devoted to it. We get what he paid for.

Dunne's Centennial comes in 1967. Bander now has over 500 Dooley pieces. He seeks a Foundation grant to index them all on microfilm and place them in one library. To date, he has been unsuccessful. We hope one comes to his aid so that future generations may enjoy "Mr. Dooley" as we have. Dooley is for the ages.

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THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS. By Bradley Chapin. Seattle: University of Washington Press, 1964. pp. viii, 164, Index. \$6.00

In this slender, but carefully-researched volume, Professor Chapin has sought, by clarifying the practical operation of the law of treason during the Revolutionary and early National period, to illuminate the process whereby an English concept became an integral part of the American Constitutional structure.¹ By focusing on the political ferment of the period, and its impact on "The Law in Action," he has made a valuable contribution to a better understanding of the origins and growth of an important instrument which safeguards the American Democratic system.

In 1944, Professor Willard Hurst reported that ". . . records of trials for treason are scant and do not contribute as much as the statutory material to outlining the attitudes taken towards the crime."² His analysis of the records available to him led to the conclusion that ". . . there were some significant signs of the growth of an opinion that 'treason' must be more carefully defined and limited. Taken in the context of the period as a whole, however, this note of skepticism was still subordinate to a broad and impulsive use of 'treason' as the means by which to ward off what were viewed as extreme dangers to the security of the states."³

As a consequence of Professor Chapin's researches, however, the question may be raised whether this conclusion has not been too broadly stated. In the Bibliography, 75 cases heard between 1777 and 1782 are cited. From them a new picture, less harsh than that drawn by the statutory provisions, emerges. The most significant feature to emerge from a consideration of these cases is the manner in which trials for treason were conducted during this period. A remarkable example of this attitude is the response of the revolutionary army officers who were requested by the State of New York to hear treason charges by courts martial: "State prisoners should and ought to be tryed (sic) by a court of this State where they should have all the priviledges (sic) of the Law. . . ."⁴ Private citizens were equally reluctant to accept the required commissions of Oyer and Terminer. The only alternative, therefore, was to issue the commissions, which were required by statute, to the regular justices, and to bring prosecutions before them.

Once brought before the regularly-constituted courts, trials were conducted with scrupulous regard for the proprieties, as is the current practice. Counsel were appointed, and the rules of criminal procedure applied, the rigours of the evidentiary provisions had to be complied with, and the specific onus resting upon the prosecution in treason cases had to be met before the courts would convict. After conviction, pardons were generously granted, and, taken in all, the records reveal a respect for the requirements of due process and individual liberty which was truly remarkable. It must be borne in mind that throughout most of this period the suc-

¹ U.S. CONST., ART. 3, §3.

² Hurst, *Treason In The United States*, 58 HARV. L. REV. 266, 246 (1944).

³ *Id.* at 272.

⁴ CHAPIN, p. 64.

cess of the Revolution hung in the balance.⁵ The danger to the country was much more immediate than the threats to the national welfare of the mid-Twentieth Century. As Professor Chapin aptly observes:

From the viewpoint of the advocate of an extreme policy, the procedure here described exhibits a law of diminishing returns. The policy in regard to traitors became more cautious as the process approached execution. . . . Drastic purges and violent assizes were not a part of the Revolution. There was no reign of terror. The record is one of substantial justice done.⁶

The only flaw in the conduct of the Revolutionary Governments was their liberal use of Bills of Attainder, Confiscatory Statutes and other means of forfeiture to sequester the property of persons guilty of treasonable practices. Professor Chapin attempts to explain this practice as due to “. . . the depth of feeling against the old official class.” However, he leaves the question of their “justice” open, as being unanswerable.

The other problem about which this book provides valuable information is an explanation of the cautious attitude adopted toward the definition of treason at the Constitutional Convention.

In a letter written in 1792, Thomas Jefferson, at the time Secretary of State, set out his views on political prosecutions:

Treason . . . when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government*, and acts against the *oppressions of the government*; the latter are virtues; yet they have furnished more victims to the executioner than the former; real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny, have been the chief martyrs of treason laws in all countries.⁷

That this attitude reflects the policy of the drafters of the Constitution, in their formulation of the “Treason” clause, which was one of “. . . preventing use of the criminal law as an instrument of competition for political power” has been convincingly argued.⁸ In this book Professor Chapin illustrates the Colonial and Revolutionary abuses brought about by a broad definition of treason. This tempered the attitudes of the drafters of the Constitution.

By 1767, British policy towards their recalcitrant colonists had become clear—they sought to break the back of resistance by regarding it as conduct of a criminal nature, and prosecuting the ringleaders for Treason. To this end they sought to employ the Statute of 35 Henry VIII, in order to bring the most articulate complainants to England to stand their trial. Accordingly, the provincial Governors were ordered to gather evidence for trials to be held in London.

This policy was regarded by the Colonists with distaste, and was one of the

⁵ It was only in 1781, with Cornwallis' surrender at Yorktown, that it can be said that the Colonists had clearly gained the ascendant. See NEVINS AND COMMAGER, *HISTORY OF THE UNITED STATES*, 99-100 (1960).

⁶ CHAPIN, pp. 70-71.

⁷ *THE WRITINGS OF THOMAS JEFFERSON*, 211, 215 (Library ed. 1903).

⁸ Hurst, *supra* note 2, at 444.

grievances contained in the Declaration of Independence—"For transporting us beyond seas to be tried for pretended offences." This experience was a significant factor in shaping the attitude of the Constitutional Convention towards developing the concept of treason in relation to political expression.

Following the outbreak of hostilities, the Revolutionary states found themselves confronted with wavering allegiance on the part of their residents. For internal protection, a series of statutes were passed, on the recommendation of the Continental Congress. As Professor Chapin observes:

"This first public act to declare George III the enemy explicitly defied the sovereign and was a de facto declaration of independence."⁹ These statutes drew heavily on the English precedents, both statutory and case law. Thus the exigencies of war produced the ironic position of persons claiming allegiance to the Crown being prosecuted according to statutory terms drawing their meaning from terms of allegiance to that same Crown.

Turning to the period following the Revolution, Professor Chapin does not attempt to grapple with the many technical problems which arise from the Constitution,¹⁰ but instead confines himself to a narrative description of the Pennsylvania Whiskey and Tax insurrections and the trial of Aaron Burr,¹¹ in relation to the climate of opinion prevalent, the passions it aroused, and the impact of Marshall's opinion on his contemporaries. In doing so, he raises questions pertinent to our time.

In the light of Marshall's dictum in the *Bollman* case, that ". . . there must be an actual assemblage of men to constitute a levying of war,"¹² the decision of the Court in *Dennis v. U.S.*¹³ would appear to raise more questions than it settles. Marshall's opinion arrested the tendency of expanding the doctrine of constructive treason, which became law in the cases following the Pennsylvania rebellions.

In *Dennis*, the defendants had been charged with 'advocating the overthrow of the Government,' under the Smith Act.¹⁴ The Court chose to treat this as an attempt:¹⁵ "We reject any principle of governmental helplessness in the face of preparation for revolution." They went further, and treated the defendants' conduct as a conspiracy. If, as the Court held,¹⁶ there was a 'clear and present danger' of subversion, it may be argued that this was 'levying war' against the United States.¹⁷

If the "Treason clause" is considered in the historical context presented by Professor Chapin, a pattern is seen to emerge—the clause would then be read as having an extensive application, to cover all cases of internal political protest, and to restrict the classes of punishable conduct. To put the problem differently: does the clause define a specific crime, of an extremely serious nature, or does it extend to a sphere

⁹ CHAPIN, p. 37.

¹⁰ See Hurst, *supra* note 2, at p. 395 *et seq.*

¹¹ *United States v. Burr*, 25 Fed. Cas. 2, 55, 1, Nos. 14, 692a, 14, 693 (C.C.D. Va. 1807).

¹² *Ex parte Bollman*, 4 Cranch 75 (1807).

¹³ *Dennis v. U.S.*, 341 U.S. 494, (1950).

¹⁴ For the terms of the Indictment see 71 S.Ct. at 860.

¹⁵ *Id.* at 863.

¹⁶ *Id.* at 866-869.

¹⁷ *U.S. v. Burr*, *supra* note 11. See *Cramer v. U.S.*, 325 U.S. 1, 25, 38 (1944).

of activity vital to the survival of the American democratic process?¹⁸

If the former interpretation is adopted, a multiplicity of lesser offences, such as the one forming the basis of the charge in *Dennis*, may be enacted. The result of this would be to render the provision of the Constitution ineffective. On the other hand, the broader test does not answer the question: what conduct constitutes "Treason"? It cannot be determined by the nature of the punishment imposed: this is left to the discretion of Congress.

If the provisions of Art 3, Section 3 are read together with the first amendment, it appears at least arguable that they reflect a policy of removing fetters on freedom of Speech and Press, to allow the free expression and interchange of political beliefs. The only limitation on this freedom would appear to be the duty not to actively obstruct or hinder the enforcement of the Government's policy by an "overt act." This has been held to be "constructively levying war."¹⁹ If Dennis had so behaved, then he should have been tried for treason, and afforded the right provided him by the Constitution. If his behavior fell short of this offence, then he nevertheless was exposed to charges of Breach of the Peace, Nuisance, or even Assault,²⁰ but his behavior limited to the expression of views short of overt conduct would appear to be protected by the First Amendment.

In *Cramer v. U.S.*²¹ Mr. Justice Jackson described one of the policies underlying Art. 3, Section 3 as guarding against ". . . perversion by establishing authority to repress peaceful political opposition."²²

The question turns on the word "peaceful." If the Court meant by this that the views being expounded had to be non-violent before they were constitutionally protected, then one wonders how groups advocating war with Russia, Cuba et. al. would fare? The court would be obliged to determine each time on how "peaceful" the aims of the litigants before it are. On the other hand, if by "peaceful" is meant the manner of expression of the views, an effective criterion has been established—this would be protected under the "overt act" requirement of Treason. In this manner, were the Communist Party to indulge in violence and civil disobedience, the "constructive war" doctrine would adequately cover the situation.

In the light of the historical limitations on the constitutional definition of treason as outlined in Professor Chapin's book, reexamination of the *Dennis* case is necessary.²³ The Supreme Court cannot avoid the constitutional implications of prosecutions like that in *Dennis* by avoiding the issues.

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¹⁸ See HURST, *op. cit.*, *supra* note 4.

¹⁹ Burr's case, *supra* note 17.

²⁰ DESSON, CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER, pp. 636, 746, (1948).

²¹ 325 U.S. 1 (1944).

²² *Id.* at 27.

²³ Other cases raising this question are *U. S. v. Foster* (D. C. N. Y. 1949), 9 F.R.D. 364; *Yates v. U.S.*, 356 U.S. 298 (1957); *Scales v. U.S.*, 260 F. 2nd 21 (1958); *Aff'd* 367 U.S. 203; *Rehearing den'd.*: 366 U.S. 978.