

## *All the King's Men*

**The Supreme Court from Taft to Warren**, by Alpheus Thomas Mason, *Baton Rouge: Louisiana State University Press, 1968. 293 pp. \$6.95.*

**Poverty Is Where the Money Is**, by Shirley Scheibla. *New Rochelle, N.Y.: Arlington House, 1968. 280 pp. \$5.95.*

THESE BOOKS complement each other. Professor Mason's suggests the climate of attitude generated over recent years by our ultimate guide to civic virtue and political morality; Mrs. Scheibla's presents a picture of consonant phenomena at ground level in the annual one-and-a-half-billion-dollar "war on poverty," which, well intended, proceeds in waste and culminates in pandemic turbulence. The Scheibla survey is more facts and figures than philosophic interpretation: but the reflecting reader will have no trouble relating what she describes to the improvising jurisprudence that Mason celebrates.

His book is a revised and somewhat enlarged edition of a work published and reviewed here ten years ago. (Mason was McCormick Professor of Jurisprudence at Princeton University.) Its premise is that the Warren Court's decisions touching crime, education, prayer, and, at another level, the legislative self-determination of the states are only mirror images of the "Old Court's" rejection of minimum wage laws and other Federal intrusions on private business. There is little sense of

something graver than mere pendulum swing, of something beyond the tattered rhetoric of human rights vs. property rights that property is a human right, the erosion of which simply channels economic command back to government and so revives that merger with political authority which is the contemporary intellectuals' favorite way of risking tyranny. In the Mason view, the Taft Court was bad because it was pro-property, the Hughes court was better because less pro-property, the Stone Court had trouble finding a middle way, but the Warren Court has achieved "positive responsibility" and judges "by the light of reason."

And the evidence? There is a somewhat soberer new chapter at the end of this edition, but Professor Mason modulates not at all his earlier cheer that "among the more significant aspects of the Warren Court decisions, especially in the civil rights orbit, is the unblushing way in which certain justices take sides on burning issues. . . ." Warmed by its undoubted humanity, Mason applauds the unanimous decision in *Brown v. Board of Education* as a conspicuous example of

how an unelected, politically irresponsible body can accomplish what Congress was "powerless" to achieve. . . . With this decision certain of the most sacred temples in the realm of judicial witchcraft crumbled. Exorcism was out of style. Even the observance of *stare decisis* [the rule of precedent] was rudely shaken; the notion that social facts are met for the legislature but not for the Court, was ignored; the distinction between *judgment* and *will*, already tenuous, was honored only in the breach.

The Constitution, in short, was held to be very much—and only—what these particular judges said it was. It is a commentary on the values of the day that friends, not critics, of the Court attribute this behavior to it.

Still, the position was not without difficulty, as the more perceptive bystanders observed at the outset. No member of the

Warren Court had confided to the Senate committee on confirmation that he would shake the rule of *stare decisis*, ignore the distinction between judgment and will, take note of social considerations meet only for legislators, and do, though unelected and politically irresponsible, what Congress had been "powerless" (or perhaps unwilling, just because elected and so responsible) to do. No Warren justice had announced reservations when he took his oath to support and defend the elaborately tri-partite Constitution.

Even friends of the Warren Court were to admit qualms at later stages. Anthony Lewis, a former reporter of the court for the *New York Times*, agreed that "Earl Warren is the closest thing the United States has had to a Platonic guardian, dispensing law from a throne without any sensed limits of power except what is seen as the good of society." Apparently intended as praise, this seemed at least faint, even in a time as confused as ours. Joseph Kraft, another newspaper champion of the Warren Court, saluted "judicial intervention and ruling by intuition," but—coming to the heart of the matter—found that they "have been pressed to the point where the Court's moral sanction is in doubt. . . ."

Not that the difficulty was new in politics—Edmund Burke had stated it as well as anybody some 200 years before:

What can sound with such horrid discordance in the moral ear as this position, that a delegate with limited powers may break his sworn engagements to his constituents, assume an authority never committed to him to alter all things at his pleasure; and then, if he can persuade a large number of men to flatter him in the power he has usurped, that he is absolved in his own conscience and ought to stand acquitted in the eyes of mankind. . . . ?

But there was another and more chastened Burke, a Burke less intransigent toward alteration of all things at pleasure, even alterations which he feared and abhorred. "The evil is stated, in my opinion,

as it exists," he wrote at the end of a long discussion of the Revolution in France; but

if a great change is to be made in human affairs, the minds of men will be fitted to it; the general opinions and feelings will draw that way. Every fear, every hope, will forward it; and then they who persist in opposing this mighty current in human affairs will appear rather to resist the decrees of Providence itself than the mere designs of men. . . .

Are the bolder and perhaps more perceptive defenders of the Warren Court right in saying it has responded to a great change to be made in human affairs, a mighty current decreed by Providence itself? Over and over we are told that the justices would not have re-worked the constitutional distribution of powers between state and federal governments and between legislature and courts had states and legislators themselves leaned with some "mighty current." The Court's self-propelled ascent to Platonic guardianship was, it is insisted, in the nature of emergent things that released judges sworn to more restrictive pledges. And it must be conceded that enough opinion and feeling now draw that way to require study more than scorn.

The older Constitution, after all, was drafted explicitly as a curb on power, and so drawn by men who had suffered under plenary government. Not energetic federal superintendence over all, but government which yielded as much as it wielded power, was their aim. By express intent such a government not only would not, but could not grow crops, guide wages and prices, feed, house, educate, employ and doctor ever wider segments of a 200 million population, raise the lowly, reduce the arrogant, erase class and race lines, orchestrate birthrates, finance, rebuild, administer and police some scores of cities across the continent, and this last without diminishing by one jot the military muscle required by the primal duty of government which is to defend against predators from abroad. A govern-

ment of check-and-balance, divided horizontally among fifty-one quasi-sovereignities, and vertically in each of the fifty-one between rigidly coordinate executive, legislative, and judiciary departments—such a contrivance of multiple inhibition must clearly fail to cope with what is now asked of government.

But "the true image of a free people . . . is that of a patriarchal family, where the head and all the members are united by one common interest and animated by one common spirit," wrote Henry St. John, Viscount Bolingbroke, some years before the Philadelphia Convention, summarizing the best in mediaeval thought. "That to approach as near as possible to these ideas of perfect government, and social happiness under it, is desirable in every state, no man will be absurd enough to deny." The nurturing state, the nation as family, the sense of sure status as against the risks of contract, the universal dependence on the wisdom, guidance and compassion of what Bolingbroke called the Patriot King, are very old models. If we recede beyond Bolingbroke to the Plantagenets, we know how the king ruled with the help of his friends in the *curia regis*—*curia* is court, and the friends are courtiers. We know how the courtiers gradually hived off by function into specialized committees of which the first to jell was the judiciary—the Courts of Exchequer, of Kings Bench, of Common Pleas. We know that in another hundred years the king and curia were calling in the gentry and magnates from the shires and towns to act with them in what we now recognize as a proto-parliament. The mediaeval king did not dispense to his metaphorical children a welfare as magnificent as modern states provide, but the bounty of services we know of helps us to identify the ultimate seed.

Yet now as then the functions assigned to government shape the tools for their discharge. A constitution formed by fear of the king would change as people forgot that kings can be unkind. The intricate checks, the sharp and jealous specializations of

function would decompose into older, fuzzier forms. The legislative power, last of the three modes to differentiate, would be the first to falter, blur, and blend back into the judiciary. The king's judges, in their turn, would regress into the inchoate company of courtiers, judging on occasion, legislating on occasion, advising and interpreting on occasion, mediating and conciliating on occasion. They would serve increasingly at the king's pleasure—as a justice recently served until detached to be ambassador to a foreign court. A justice might be tolled off to settle a wage dispute between a council minister and a great labor magnate. He might head a commission of inquiry, convey the king's ire to a wayward subject, warn the people by lecture or paperback how he might be likely to judge a matter expected to come before him. In sum: legislative and judiciary would subside in a new king-and-council, disposing instant, undefined and of course benevolent power (“Fortunately,” wrote Anthony Lewis, “[Chief Justice Warren] is a decent, humane, honorable, democratic Guardian.”) to maintain life and happiness among the people, and such liberty as could survive in the chinks between larger purposes. Property, that limiting and divisive concept, would decline and Bolingbroke warned that the Patriot King “will put himself at the head of his people in order to govern, or more properly to subdue, all parties”—a first step, no doubt, being the imposition on all parties of the same platform under interchangeable candidates.

And there is no question that a legislative court could respond to some of the more stubborn contemporary problems. The modern trade unions, differing little from the old guilds, now wield a power which even their leaders find it difficult to temper. Property combinations in restraint of trade have long been outlawed, but the guilds are unrestrained. In a recent strike they withheld copper, a vital metal, in an effort to force a tighter monopoly bargaining on the copper industry. But an officer of the National Relations Board, imagina-

tively attuned to the new times, recalled a section of the national labor relations law which prohibited unfair practices by labor unions. Could the courts be persuaded that monopoly bargaining demands were an unfair labor practice? A petition was forthwith filed in Federal District Court. Almost at once the unions withdrew the monopoly demand and the strike was settled.

But the case continued and may reach the Supreme Court. There in the new-old model Mason has applauded, sit legislator-judges, appointed and hence beyond rebuke at the polls by labor or other voters, prepared, so Mason assures us, on occasion to honor only in the breach the old distinction between judgment and will. Of these, five would suffice to improvise an anti-monopoly rule against unions, and of these five, just one, casting the swing vote, could enact what for five decades a majority of the elected representatives of the people in two awkwardly checked-and-balanced houses had been “powerless to achieve.”

True, there might be difficulties, the like of some already manifest in the wake of cases already decided. “[The judge’s] authority and his immunity depend upon the assumption that he speaks with the mouth of others,” wrote Judge Learned Hand, having in mind no doubt the rule of *stare decisis* which Mason was amused to see so “rudely shaken.” “The momentum of [the judge’s] utterances,” Hand went on, “must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it”—the Constitution, it seems, is more than the say-so of the judge or judges. And then an ultimate warning: “If it is supposed permissible for [the judge] covertly to smuggle into his decisions his personal notions of what is desirable . . . compliance will then depend much more upon resort to force, not a desirable expedient when it can be avoided. . . .”

Not that the new plenary state, any more than the old Patriot King, would lack force to hand, as needed, and sufficiently. After all, the manifestation of the Warren years

most apparent to the unlearned and the non-analytical was the employment of regular army troops to enforce court orders and police American cities. Can this be the outward and visible sign of that inner and moral fault foretold by Burke, deplored by Kraft, and diagnosed by Hand? As to that, it is clearly for time and the course of full-flowing events to tell. But the evidence will certainly include Professor Mason's account of a new *curia regis* whose fisc is administered with the Tudor-like caprice and rapacity that Mrs. Scheibla reports.

Reviewed by C. P. IVES