



EX ANTE

THE WONDERFULLY WEIGHTY CASEBOOK

The typical law school casebook is weighty. Not only in the sense (to borrow some weighty-definitional terms from the *OED*) that it “weighs a good deal,” but also that it is “[h]ard to bear or endure without failing or giving way; oppressive, burdensome.” Casebooks tend, in other words, to be heavy and dense, and a pain in the brain to read and understand. They are big gray bricks of printed pedantry. But perhaps those are necessary attributes of books that are weighty in the sense that they are designed to “[p]roduc[e] a powerful effect” on law students – a type notoriously difficult to “influence or convince” without “forcible, telling, potent” arguments. Properly wielded, a big gray brick does indeed produce a powerful, influential effect. Generations of law students can attest to that.

Enter the counterexample: Langbein, Lerner, and Smith’s new *History of the Common Law: The Development of Anglo-American Legal Institutions*. At 1,184 pages, it is a typical law school casebook in the sense that it “weighs a good deal.” But it fails to meet the second measure of casebook typicality – it is noticeably *not* “[h]ard to bear or endure without failing or giving way; oppressive, burdensome.” Rather, it is a pleasure to read. It is a wonderfully useful and entertaining casebook. The organization is so logical . . . the primary-source readings are so discriminatingly selected and intelligently edited . . . the commentary is so clear . . . the illustrations – yes, illustrations! – are so numerous and appropriate and well-captioned . . . the overall design is so tasteful . . . that this casebook may become the first ever that law school graduates will transfer from their

knapsacks to their coffee tables, rather than to their recycling bins. Recalling reading it will be a pleasure; displaying it to guests, even those who are not lawyers, will neither confuse nor offend them.

And so the *History of the Common Law* fails to live up to traditional casebook standards of oppressiveness, burdensomeness, and grayness. We predict, however, that it will nevertheless “[p]roduc[e] a powerful effect” on law students, “influence[ing] or convinc[ing]” them “telling[ly]” and “potent[ly]” (and eloquently and charmingly), rather than “forcibl[y].”

This is not a review. We will not go on at length to justify our evaluation of and predictions about the *History of the Common Law*. Instead, we offer the following small excerpt from Chapter 10 (“The Growth of Defensive Safeguard”), Part 2 (“The Challenge of Urban Law Enforcement”), Section C (“The Reward System”), Subsection 2 (“The Thieftakers and the Reward Scandals”):

Beginning in 1692 and extending into the eighteenth century, English governments pursued another major initiative [the authors have just wrapped up a discussion of early policing] to increase the level of prosecution of certain serious felonies. The crown offered large monetary rewards, both statutory and by proclamation, to persons who successfully prosecuted such cases. . . .

2. THE THIEFTAKERS AND THE REWARD SCANDALS

The reward system called forth mercenary proto-police, known as thieftakers, who lived close to the London underworld on which they preyed. In a notable study of the thieftakers active in London in the decade from the mid-1740s, Ruth Paley found that “all had strong ties to the capital’s criminal communities. Almost all had some kind of criminal record.” Many were linked to criminal gangs, which engaged in extortion and blackmail as well as prosecutions for reward. Many thieftakers worked in pairs or groups, both in the field and in presenting pretrial and trial evidence.

1. The incentive to false witness.

Thieftakers responding to reward offers had no particular interest in distinguishing between the innocent and the guilty. The danger intrinsic in the reward system was described in a tract published in



Thieftaker Instructing His Son. The close connections between the thieftakers and the London underworld evoked unease among contemporaries. In this cartoon, from about 1765, a thieftaker instructs his disreputable-looking son about the Ten Commandments, one of which reads, “Thou shalt steal.” The noose at the right reminds the viewer that these policing entrepreneurs earned their livelihood by getting persons convicted and hanged as felons.

1738, which cautioned that persons prosecuting rewardable offenses might “perjure themselves to accuse innocent Persons, when they are sure to get forty or fifty Pounds for each Convict.” There was persistent concern among law enforcement authorities that juries would sense this danger and discredit reward-based prosecutions. As early as 1696, only months after the enactment of a statute offering rewards for convicting counterfeiters and coiners, Isaac Newton, the fabled mathematician and natural philosopher, who was then serving as the Warden of the Mint, wrote to the Treasury that “the new reward of forty pounds per head has now made Courts of Justice and Juries so averse from believing witnesses, and Sheriffs so inclinable to empanel bad Juries, that my Agents and Witnesses are discouraged and tired out by the want of success and by the reproach of prosecuting and swearing for money.” Half a century later, Henry Fielding, who was trying to build his force of Bow Street runners, funded in part from reward money, chafed at the “foolish Lenity of Juries” in reward cases. Some juries, he complained, strained to defeat rewards by down-valuing stolen goods below the threshold sums required in the re-

Ex Ante

ward statutes, “often directly contrary to Evidence” The incentive to false witness inherent in the reward statutes gave rise to major scandals evidencing the danger.

Next come the reward scandals, which are fascinating.

• *See weighty*, OED ONLINE (2d ed. 1989; vis. Aug. 16, 2009); JOHN H. LANGBEIN, RENÉE LETTOW LERNER, AND BRUCE P. SMITH, *HISTORY OF THE COMMON LAW* 674, 677-78 (Wolters Kluwer 2009) (footnotes omitted).

SOME WISDOM OF BARNEY FRANK

In his capacity as chairman of the Financial Services Committee in the U.S. House of Representatives, Barney Frank made an opening statement at a hearing on July 21. (The subject of the hearing is irrelevant for our purposes.) He made two especially enlightening observations. First, on the subject of email he said:

I have looked carefully at the deliberations we have seen about the Bank of America-Merrill Lynch issue. And our colleagues on the Government Reform Committee have had a number of hearings on that. I must say one of the most interesting and potentially instructive things that came out [of] it was Secretary Paulson’s explaining that he could not produce e-mails, because he has never sent them. That is a practice I recommend to many others. I follow it myself.

Second, on the subject of economics and tenure he said:

Not for the first time, as a – a – an elected official, I envy economists. Economists have available to them, in an analytical approach, the counterfactual. Economists can explain that a given decision was the best one that could be made, because they can show what would have happened in the counterfactual situation. They can contrast what happened to what would have happened. No one has ever gotten reelected where the bumper sticker said, “It would have been worse without me.” You probably can get tenure with that. But you can’t win office.

• *See Barney Frank on Politicians and Academics*, INSIDER HIGHER ED, www.inside-highered.com/news/2009/07/22/qt#203932 (vis. Aug. 14, 2009); *The House Holds a Hearing on the Semi-Annual Report of The Fed on Monetary Policy*, WASH. POST, www.washingtonpost.com/wp-dyn/content/article/2009/07/21/AR20-09072101505.html (vis. Aug. 14, 2009) (transcript).