South Carolina Law Review

Volume 17 | Issue 5 Article 11

1964

BOOK REVIEWS

BOOK REVIEWS

THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION. Edited by Professor Harry W. Jones. (Prentice-Hall, Inc., 1965. pp. 177. $1.95.)

The Twenty-seventh American Assembly (a national, nonpartisan educational institution, incorporated in the State of New York) was in session at Arden House from April 29-May 2, 1965, working on the subject *The Courts, the Public, and the Law Explosion.* The Assembly's final report and its eighteen recommendations are published in The Journal of the American Judicature Society.[1]

The handbook edited by Professor Jones contains the "position papers" prepared as background reading for the Assembly, and for subsequent use by regional and local Assemblies, college and university classes, and for general reading. These papers well indicate the range and thrust of the Assembly's consideration of the subject. They are: The Business of the Trial Courts, by Professor Milton D. Green; Court Congestion: Status, Causes, and Proposed Remedies, by Professor Maurice Rosenberg; After the Trial Court—the Realities of Appellate Review, by Geoffrey C. Hayard, Jr.; Criminal Justice: The Problem of Mass Production, by Dean Edward L. Barrett, Jr.; The Trial Judge—Role Analysis and Profile, by Professor Harry W. Jones; and Judicial Selection and Tenure in the United States, by Glenn R. Winters and Robert E. Allard. Of especial interest and value are the comments of Professor Jones in the introduction to the handbook, in which he gives us in remarkably brief scope the impact of the several papers upon the general subject.

The eighteen recommendations of the Assembly included a unified court system in each state with effective administrative management; increase of judicial manpower, especially in criminal courts; merit selection of all judges, with programs of judicial education, adequate compensation, mandatory retirement at seventy, and procedures less cumbersome than impeachment for involuntary retirement and removal; increased financial support for law enforcement agencies and probation and parole services; exploration of the problems incident to the vast volume of automobile injury cases, including consideration of the elimination of the fault principle and establishment of ma-

1. 49 J. Am. Jud. Soc'y 16-19 (1965).

chinery for administrative compensation, as in industrial accidents; new measures for the handling of bail and pre-detention matters, accused indigents, minor misconduct including traffic violations, and other than regular criminal court channels for alcoholism and narcotic addiction cases. In civil cases generally, the Assembly recommended that the right of trial by jury should be retained, although observing that there is need for reform in the administration of the jury system.

The most important single recommendation is that citizens's committees on the courts be established in all parts of the country to enlist the informed and active support of the public in the cause of judicial reform. "Justice is everybody's business, and every American has a stake in the fair and efficient operation of our courts."

It cannot be gainsaid that public understanding of the problems of the administration of justice, both procedural and substantive, and the active support of lay interest and opinion is of great value and often essential in accomplishing law reforms. The recent enactment of the new corporation law code in South Carolina bore witness to the benefits from lay and professional co-operation, and progress to date indicates that the same sort of mutual understanding and support will be needed to accomplish the early enactment of the Uniform Commercial Code, now pending for consideration in the general assembly. On the other side of the page, the fate of the Code of Civil Procedure as recommended by the State's Judicial Council attests to the difficulties attendant upon the handling of law reform almost entirely by the legal profession alone, with no lay representation in the planning or presentation to the general assembly.

Our Judicial Council, created by statute,[2] is composed of twenty-one members, of whom fifteen are *ex officio*, mainly judicial and legislative. The Chief Justice is authorized to appoint the other six members, at least four of whom shall be members of the bar.

The duties of the Council include, first, a continuous study of the administration of justice in the state, and the organization and functioning of all of the courts, and of agencies exercising quasi-judicial powers, and, second, the function of making recommendations of changes in the law or in the organization of such courts and agencies.

2. S.C. Code Ann. §§ 15-2101 to -2110 (1962).

It is well worth the consideration of the general assembly that the Judicial Council be enlarged to provide specifically for substantial lay membership, as the means of reflecting the interest of the public generally in the administration of justice and the idea that every South Carolinian "has a stake in the fair and efficient operation of our courts."

In considering a study of the shortcomings of the courts and the other administrative agencies in which controversies between government and individuals or between private litigants are adjudicated, we should not overlook the fact that the bulk of the justice administered in our country is handled by practicing lawyers in law offices. The late Justice Jackson said, "It too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice." Imagine the vastness of the court and agency machinery that would have to be provided and kept in efficient operating condition were this not the case!

This book as a whole, however, does much to point up the basic problems confronting our legal institutions. The above references to South Carolina show the timeliness of *The Courts, The Public and the Law Explosion.* While the Assembly's resulting recommendations could be more definite, this work is a good start toward an enlightened appraisal of the problems and an approach to solutions that must soon be made.

ROBERT MCC. FIGG
Dean, School of Law
University of South Carolina

DEFERRED COMPENSATION FOR KEY EMPLOYEES. By Clark C. Havighurst. (Callaghan & Company, 1964. pp. 337. $12.50).

Mr. Havighurst's book is intended to serve a dual purpose; to constitute a guide for businessmen needing a basis for their planning, and, by the inclusion of footnotes and memoranda of law, to simplify and explain for lawyers some of the related problems and innate complexities. Of additional value to the latter are the table of cases, table of citations of the Internal Revenue Code of 1954 and of Revenue Rulings and a comprehensive index which, in that order, comprise the final pages of the volume. At the close of a number of the chapters there are appended memoranda of law. The attorney called upon to assist in the selection and draftsmanship of any of the plans discussed in the book will find these memoranda both interesting and valuable.

Here, then, is something more than a text book. This is a primer interwoven with an advanced course on understanding, first, the desirability of effectuating plans for deferred compensation for key employees and, second, how such plans can become realities of mutual value through the establishment of pensions, profit-sharing, and the use of insurance as a component of either of the foregoing. The businessman or lawyer making use of this book for guidance will not find himself in a morass of theory. Practical considerations are dominant.

Key employees are defined (though not in a single sentence) as those persons throughout the organization whose capable performance of their tasks materially contribute to the successful operation of the business, whether theirs be executive, artistic, engineering, designing, production, or sales talent, or talent of any other kind. The primary problem of the small business in relation to such employees is finding a way to keep them, despite the higher salaries and attractive fringe benefits a larger company can afford and offer. Deferred compensation can assist the employer in this endeavor. Its use allows the employee to spread his compensation from years of higher income to those of lower; can supply incentive to his efforts; and provide him better opportunity to build an estate for transmittal to his family. Also it can secure for employer and employee worthwhile tax advantages.

Part two of the book is devoted to qualified pension and profit-sharing plans, and is an introduction to plans of that sort that

can "qualify" for tax benefits under the IRC. In the area of determining whether a proposed plan qualifies it is suggested that the IRS freely dispenses advice and issues advance determinations that make possible a high degree of certainty, a status that is not hurt by the safeguard of obtaining a "qualification letter."

The various requirements for qualification, six in number, are well set out. The plan itself must be a pension plan, a profit-sharing plan, a stock bonus plan or a bond purchase plan. Further, it must display the required characteristics of the plan selected. In other words, the basic requirements for each type of plan must be met: length of service may be a factor, salary rate another. Often recognition is accorded service antedating adopting of such a plan. Cost is a prime consideration from the standpoint of the employer. Age of retirement and accelerated retirement at a lower pension are to be decided and appropriate provision made therefor.

Havighurst devotes the latter chapters to "First Steps in Planning a Qualified Program"; "Handling Pension and Profit-Sharing Costs"; "The Tax Treatment and Utility of Keogh Plans"; "The Characteristics and Tax Treatment of Non-Qualified Arrangements"; and "Stock Related Deferred Compensation Programs." Each chapter is divided into a dozen sub-topics directed at supplying the salient considerations that should be given the respective subjects, the reasons therefor and the means of solving the concomitant problems or of minimizing adverse consequences.

Final consideration is given by the author to arrangements for employees to obtain stock of the employer, not from the standpoint of supplying incentive but as comprising deferred compensation. As a result of 1964, IRC amendments "small businesses must now consider seriously the advisability of adopting a qualified stock option plan as a method of key employee compensation." Almost needless to say, the qualified plan must meet a substantial number of statutory requirements. In exceptional cases, advantageous use may be made of the stock option device by small companies that are "on the march" and whose stock values will increase. For companies differently situated the device is less valuable, and perhaps impractical. The reader is left with the impression, doubtlessly intended, that the numerous disadvantages, discussed at length, make the basic plan, and its variations, unfitted for situations usually to be dealt with,

but in the unusual situation, the device may be productive of good results.

In summary, this book is based upon a wealth of material which must have been subjected to extended study and analysis, and the arrangement of the subjects and clarity of the text make it a clarifying explanation of numerous complexities that to the uninitiated could easily pose a not otherwise to be resolved "do-it-yourself project."

S. AUGUSTUS BLACK
McKay, McKay, Black & Walker
Columbia, South Carolina

IN A FEW HANDS: MONOPOLY POWER IN AMERICA. By Estes Kefauver. (Pantheon, 1965, pp. 239. $3.91).

Some three months after Senator Joseph McCarthy opened on February 9, 1950, in the ill-fated television production titled "Communists in Government," Senator Estes Kefauver impresarioed a competing attraction: "Organized Crime in America." McCarthy surely never discovered any communists; Kefauver did not identify any undetected criminals. But while Mccarthy pursued a phantom to his own destruction, Kefauver more wisely had chosen for the subjects of his inquiry a motley of affluent, silk-suited, blue-jewelled characters whose backgrounds reeked of criminal activity and for whom the viewing public developed not sympathy, but revulsion. Senator Kefauver was a smash hit. His sensitive interpretation of the role in which he had cast himself—that of the always-gentlemanly but ever-tenacious "Spokesman for Law, Order and Decency," given to understatement—catapulted him from relative obscurity into such national prominence that, but for the opposition of President Truman, he would likely have been the Democratic party's nominee for president in 1952. He ultimately had to settle for second billing on the Stevenson ticket four years later.

Having found the role of public inquisitor suitable to his taste and talent, Senator Kefauver next launched a tedious investigation in 1957 into "Big Business" which, like "Organized Crime," is an ever-popular whipping-boy. As Chairman of the Senate Subcommittee on Antitrust and Monopoly, he steered this investigation for six years, until his death in 1963. He left behind twenty-nine large, dust-collecting volumes of testimony which have thus far failed to afford sufficient evidence of monopolization or other antitrust violation to warrant even a single prosecution.

Following his 1950-1951 investigation, Senator Kefauver authored *Crime in America* (Doubleday, 1951). "With the assistance of Irene Till," there has now appeared a posthumous publication of Senator Kefauver's comments on the facts developed by his more recent protracted inquiry. *In a Few Hands: Monopoly Power in America* is notable mainly as a thumb-nail synopsis of what he learned about Big Business.

In this little book, the spotlight is first focused on the ethical drug industry. It is charged, mildly, that this industry is beset by two evils: product patents, and the ignorance and/or connivance of doctors who prescribe high-priced, trade-name medi-

cinals rather than cheaper generic equivalents. The Senator clearly makes out a case that the industry exacts unconscionably high prices from sick Americans for some of its products. But he makes out no violation of existing laws and he suggests no corrective legislation. If, as he apparently believed, drug patents result in exhorbitant prices, perhaps government should—by the condemnation procedure—buy out the patent holders and make the formulae freely available for general production. The Senator is reticent to suggest anything so drastic, however, and is content to flagelate the absence of "competition," his wooden god. This is particularly disappointing because of the Senator's long and successful experience as a patent lawyer.

The attention he gives to the automobile industry proves even less satisfying. He develops the thesis, already well understood, that competition in that industry is not in product price but in product appeal. The buyer is attracted not by price, but by horsepower and tail fins, and this the Senator deplores. His lamentation that there is no "real competition" in the automotive industry blithely ignores the recently interred bodies of Kaiser-Frazer, Willys, Studebaker and Packard, and fails to explain away the fact that Ford Motor Company's market position fell from well over fifty per cent in the 1920's to a much smaller share ever since. An automobile salesman would be aghast if told he is not really competing for sales with the next-door salesman of a rival car. But even if there is a real rather than an imagined absence of competition in the industry, the Senator has not suggested that there is violation of existing antitrust law nor has he suggested any change in the law or offered any additional legislation.

His complaint against the steel and baking industries is the shop-worn complaint against the laws of economics which tend to bring about a standardization of prices for standardized products, and price leadership. These phenomena had long since been noted and have long been under the constant surveillance of the officials who administer our antitrust laws. It is apparently the national policy to "live with" price-product uniformity and price leadership. Indeed, in some quarters, these phenomena are numbered among the benefits derived by consumers from the bigness and efficiency of American business.

The reader of *In A Few Hands*, it must be conceded, does not put down the book until he has read it through. But the reason for this is that the reader anxiously anticipates that the Senator

will, in the final chapter, make some concrete recommendations aimed at bettering the conditions he bewails. The reader's hopes are unfulfilled, as he is rewarded only with platitudinous generalities and reaffirmations of the Senator's faith in the "competitive system." As was the case in his *Crime in America*, Senator Kefauver has seemed content merely to point his finger at what he regards as curves in the road and leave the driving to us.

The discerning reader will conclude, it is believed, that Senator Kefauver's basic, underlying discontent is with bigness in business. He evinces strong nostalgia for the corner apothecary, the corner bakeshop and the days of the Moon, Marmon and Apperson Jackrabbit. He seems to prefer the good old days to the present enjoyment of the economic benefits and values that indisputably are provided by modern big business and which include, among others, the following:

1. Big manufacturing plants, up to a point,[1] enjoy certain economies of scale which translate into lower unit costs and lower prices to consumers.

2. Large firms, because of the size of their financial, personnel and physical resources, are able to engage in ventures beyond the reach of small firms. This was convincingly proved in World War II.

3. Because of their greater resources, large firms are often better able to withstand short-term adversity. They thus exert a stabilizing effect in and on our economy.

4. Large firms which are integrated vertically (one of Senator Kefauver's pet peeves) have a steady, reliable flow at each stage from raw materials to retailing. This enables them to plan their expansion with assurance and makes them a reliable source of expansion for the whole economy.

5. Because of their greater capability to do independent research, large firms are a major source of technological progress which directly benefits the consumer in price, quality and range of choice.

1. It is probably true, as testimony before Senator Kefauver's sub-committee reaffirmed, that the several divisions of General Motors, as an example, could be severed from the mother company and operated as independent corporations without loss of efficiency. Such a fragmentation is not urged in responsible quarters, however, as there is no reason to believe that such a breakup would yield any benefits to consumers that are presently being withheld. In short, bigness alone, in and of itself, is not considered evil or antipathetic to public interest.

For the student of such matters, the Senator's book will serve a useful purpose. A reading of it will enable him intelligently to decide whether he should tackle the twenty-nine volumes of data accumulated by the Senator's subcommittee regarding the structure and practices of selected segments of the American business community.

WILLIAM A. CLINEBURG
Assistant Professor of Law
University of South Carolina

LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT. Edited by Donald B. King and Charles W. Quick. (Wayne State University Press, 1965. pp. 446. $12.50).

This is a symposium of the work of eleven contributors in addition to its editors. Some of the articles were previously published in *Wayne Law Review*; others are published here for the first time. The scope of the work and the occasion for its publication are well expressed in the first paragraph of the preface:

> During the past century, the law has played a major role in the quest for civil rights. Both positively and negatively, it has been instrumental in defining the rights of the Negro in almost every realm of life. At this point in history, a little over a hundred years after the Emancipation Proclamation and coincident with approval of the Civil Rights Act of 1964, it seems fitting to commemorate the legal struggle and efforts directed toward the goal of equality.

We need to begin with a definition of terms. What are "civil rights"? Definitions in reported decisions are not consistent. Webster's definition, while lacking legal accuracy, may be best for our purpose. Civil rights are there defined as "those rights guaranteed to the individual by the 13th and the 14th Amendments to the Constitution of the United States and by certain other [sic] acts of the Congress."[1] The difference of opinion—and, regrettably, this has been adversary proceeding throughout its course—has been as to what constitutes civil rights. To illustrate, from *Plessy v. Ferguson*[2] in 1896 until *Brown v. Board of Education*[3] in 1954, the separate and equal doctrine defined the extent of the rights of individuals under the constitution. Racial segregation was then lawful and the denial of the right of racial integration was not a denial of a civil right. *Gideon v. Wainright*,[4] and *Escobedo v. Illinois*,[5] recognize the civil right of one accused of a crime to counsel, to the dispair of lawyers who dislike assignment to indigent defendants. Until the recent enactment by the Congress, a draft registrant might legally intentionally destroy his draft card. Now it is unlawful for him to do so. If the constitutionality of that act should be ques-

1. WEBSTER'S NEW 20TH CENTURY DICTIONARY (2d ed. 1957).
2. 163 U.S. 537 (1896).
3. 349 U.S. 294 (1954).
4. 372 U.S. 335 (1963).
5. 378 U.S. 478 (1963).

tioned (and we may expect that it will be), it will be urged that the act has deprived Americans of a civil right. The opposing position will be, not that denial of a civil right is justified, but that no civil right to destroy a draft card exists.

The term "civil rights movement" is descriptive of an important force in recent American history. But it has been a movement to extend and to expand the long-established definition of civil rights, not, as the authors of this book infer, a movement to demand the recognition of rights heretofore defined.

This book suffers, as do most symposia, from repetitiveness. While it is primarily concerned with civil rights as related to racial discrimination, it is not completely limited to that area. In the section entitled "Justice," Editor Donald B. King treats the recent series of United States Supreme Court decisions reversing convictions on account of lack of legal counsel, the rejection of confessions received after extended imprisonment and the like cases in vindication of civil rights.

Otherwise, the publication deals with the subject as it affects American Negroes. The book is well written and generally is reportorial rather than argumentative. The section dealing with civil disobedience, in its attempt to find moral justification for acts in violation of laws and to excuse demonstrations planned and directed for the sole purpose of inciting or inducing violence, appears to this writer to be properly apologetic. I fail to see that the deliberate provocation of violence is less culpable than the violence it provokes.

The book treats accurately and fully the campaign of litigation assaulting the doctrine of *Plessy v. Ferguson*.[6] The assault upon this doctrine which might be likened unto a military campaign that was brilliantly conceived and flawlessly executed and has resulted in its complete annihilation. Historians of the future may well find in this series of opportunities, in which the Supreme Court of the United States adopted and exercised the activist role, a turning point in American constitutional government and perhaps the greatest development in this system since *Marbury v. Madison*.[7]

To a lawyer the sections of the book dealing with the "Overall View" and "Education" will be of the greatest interest. The other subdivisions devoted to voting, employment, public accom-

6. 163 U.S. 537 (1896).
7. 2 U.S. (1 Cranch) 137 (1803).

modations, transportation, housing and association have less to do with litigation. The practice of separate accommodations in interstate transportation was terminated by orders of the Interstate Commerce Commission following the *Brown* decision. Orders of other executive departments have been more effective than court decisions in the area of employment and housing. It was not until the Civil Rights Act of 1964 that significant progress was made in public accommodations except for governmentally owned or sponsored facilities.

While the campaign of litigation attacking the separate but equal doctrine was in progress, another program was developing. The two programs were parallel, involved many of the same leaders and are often confused. This was the program of propaganda (in its true and not derogatory sense) conducted for the purpose of developing public sympathy for the American Negro. The program has effectively enlisted the active support of many people, including many of the organized churches of America. So well has this program been developed that at this writing the public sentiment of the majority of Americans seems to support strongly any measure identified with the civil rights movement. The book does not emphasize this phase of the civil rights movement, however, to this writer, the distinction is important. The doctrine of *Plessy v. Ferguson*, which for the full time of its existence gave legality to racial discrimination, has been completely wiped out in the courts within the framework of the American Constitution. It is not conceivable that its doctrine will ever be restored by judicial process. But as the leaders in the civil rights movement look to the future and express hope that all lines of distinction among Americans can be erased, they must rely upon a continuation of the present favorable atmosphere of public sentiment. If they are considering only the rights of the American Negro, they are considering the rights of some eleven per cent of the population and no more than eleven per cent of the electorate. While public sentiment will continue to favor equality, it will not continue to favor preferential treatment of any minority. It will not continue its sympathy for any group of people who do not demonstrate worthiness.

Since this book was published, the Voting Rights Act of 1965 has become law. This act and portions of the anti-poverty legislation tend to favor preferential treatment for a minority. Recent acts of extreme violence do not demonstrate worthiness. While

the separate and equal doctrine will not be restored, the Civil Rights Act and the Voting Rights Act are the work of a Congress. Another Congress can repeal them.

If the leaders of the Civil Rights Movement are truly desirous of affording equal opportunity to all Americans, they will be deeply concerned with this matter. The discipline exhibited by the complete discontinuance of "demonstrations" after the simultaneous riots in Los Angeles, Chicago and Springfield, indicates that they have some power to move in this direction.

It must be mentioned that one of the contributors to this book is Marion A. Wright, a native of South Carolina, a graduate of its Law School, admitted to practice in its courts and who practiced with distinction for many years in a coastal county. In dealing with the long-supposed right of the owner of public accommodations to select his customers, he cites the lament of "Marse Henry" Watterson of Louisville:

> "Things have come to a helluva pass
> When a man can't cudgel his own jackass."

He concludes that now "a man can't." His legal position is unassailable.

William L. Watkins
Watkins, Vandiver, Kirven & Long
Anderson, South Carolina