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# RECENT PUBLICATIONS

BAKKE, DEFUNIS, AND MINORITY ADMISSIONS: THE QUEST FOR EQUAL OPPORTUNITY. By Allan P. Sindler. New York: Longman Inc., 1978. Pp. xi, 358. \$12.50.

Allan P. Sindler, the dean of Berkeley's Graduate School of Public Policy, has prepared a factual and interpretive compendium of opposing viewpoints as they relate to the *DeFunis* and *Bakke* cases. At the outset, the author discusses appropriate "means" of correcting racial imbalance in education. He notes that the primary dispute lies between admissions criteria based primarily on individual merit and methods that would increase minority representation more rapidly. In Chapters Three to Five, Sindler describes the admissions programs at the Universities of Washington and California-Davis, and the respective experiences of Marco DeFunis and Allan Bakke that preceded their litigation. Then, documenting the disparity in academic qualifications between accepted minorities and rejected nonminorities, Sindler addresses the broad issue before the courts. Is the reservation of academic "places" for minorities an inherently two-track system, which operates as an illegal quota to exclude "better-qualified" applicants; or may a school utilize race as a basis for selection in order to fulfill other commitments to society?

After setting forth these viewpoints, the author considers broad arguments for and against selection based primarily on academic qualifications. A return to purely scholastic criteria would almost inevitably vitiate the gains of minorities to date. But Sindler questions whether the legitimized use of racial "target" figures might encourage the government to regulate race preference even more rigidly, ultimately curtailing the institution's freedom to experiment with admissions policy. He reminds the reader of alternatives, such as early spotting of potential professionals, that would lessen dependence on corrective measures at the admissions stage.

The author includes a "layman's" guide to the thicket of equal protection law, and then discusses the state courts' treatment of *DeFunis* and *Bakke*. Sindler also attempts to place the "ends and means" of racial preference in broader perspective. He is troubled by the question when, if ever, these programs may be deemed successfully concluded, by their potential for fragmenting society and stigmatizing minorities, and by the seeming inability of the adversary system to aid the legislative process in finding an acceptable middle ground, or "less intrusive means."

In analyzing *Bakke*, the author shares the disappointment of many scholars in its ambiguous impact. Nevertheless, while *DeFunis* and *Bakke* fall short of the affirmative action guidelines envisioned by Sindler, he has used them to good effect in framing questions of continuing relevance in this field.

THE CONSTITUTION AND CHIEF JUSTICE MARSHALL. By William F. Swindler. New York: Dodd, Mead & Co., 1978. Pp. xiii, 414. \$17.95.

In 1976 the Bicentennial Committee of the Judicial Conference selected as its chief bicentennial project the production of a film series entitled "Equal Justice Under Law," which portrays the role of John Marshall's Supreme Court in American constitutional history. This book, although not itself a product of the Bicentennial Committee, is intended to supplement the film series, but it serves equally well as a general introduction to the jurisprudence of the Marshall Court.

The author is well-suited for the task. Professor Swindler chairs the Publications Committee of the Supreme Court Historical Society and serves as an advisory editor to the Papers of John Marshall. He has also served as a consultant to the Bicentennial Committee's film project.

The book, like the film series, focuses on the five constitutional cases generally regarded as the most important decided by the Marshall Court: *Marbury v. Madison*, *United States v. Burr*, *Trustees of Dartmouth College v. Woodward*, *McCulloch v. Maryland*, and *Gibbons v. Ogden*. In Part One Swindler introduces the historical background of each case, including the major personalities involved; analyzes the reasoning in the Court's opinion; and illustrates the impact of each decision on the course of American history. While Swindler's work is directed at the general public and attempts no new critical analysis of the Marshall Court's major decisions, it should prove helpful to lawyers unfamiliar with early constitutional law.

Part Two sets out an annotated text of the Constitution as it appeared during Marshall's career. The annotations, which serve to illustrate the construction of various parts of the Constitution by the Marshall Court, are based chiefly upon Justice Story's *Commentaries*. Also included is a chronology of constitutional development from 1801 to 1835, which places in perspective the major legal events of the Marshall era. Part Two concludes with a complete voting record of the Supreme Court in the thirty-four constitu-

tional cases decided by the Marshall Court.

In Part Three Swindler presents the texts of the opinions in the five major cases discussed, as well as the documents and lower court opinions that were most relevant to the Court's decisions. The affidavits and depositions of the protagonists in the *Burr* drama are particularly interesting; few court documents of today, for example, threaten "[p]alsy to the brain that should plot to dismember, and leprosy to the hand that will not draw to defend, our union!"

The volume concludes with an appendix that includes a selection from Chief Justice Burger's 1972 Bentham Club Lecture on the doctrine of judicial review. The more serious student of constitutional law might benefit from the selected bibliography of works on John Marshall and the Supreme Court, also included in the appendix. A sixteen page section of illustrations and photographs helps to bring alive some of the personalities and places that played a role in the history of the Marshall Court. This section includes portraits and brief biographical sketches of the eighteen men who served at one time or another as Associate Justices on the Marshall Court.

**CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT.** By Jethro K. Lieberman. New York: W.W. Norton & Co., 1978. Pp. 247. \$10.95.

Jethro K. Lieberman begins his analysis in *Crisis at the Bar* with the contention that the legal profession's ethical system is in total disarray. He emphasizes that the breakdown in the system and the concomitant lack of public trust in the profession results not from a lack of adherence to the ethical code but from adherence to a code that is unethical. For example, the author presents the "Watergate" lawyers as more faithful than traitorous to the profession's ethical system. Reviewing the origins and history of the ethical system from the English common law to the Code of Professional Responsibility, Lieberman finds that the impetus for the system has been a desire to maintain a self-perpetuating monopoly of wealth and privilege rather than a sense of public responsibility or morality. The currently eroding prohibitions against advertising and competitive pricing have been the keystones of an ethical system designed to serve the bar's elite at the expense of the lower stratum of the bar and the public.

According to Lieberman, the changes in the ethical system reflected in the adoption of the Code of Professional Responsibility and its subsequent amendments emerged only when the bar was

faced with overwhelming external pressures for reform. The resulting changes were almost invariably compromises between the old selfishness and the new push for an acceptance of social responsibility. Lieberman examines the two areas—group legal services and legal clinics—in which the pressure for change and the resistance to it have been almost equally strong. According to the author, both developments threatened the bar's tradition of charging substantial fees for useless or insignificant work. Lieberman finds the established bar's bitter opposition to these developments particularly unfortunate since he believes both developments were in the public interest. He argues that the bar's efforts to prevent or hinder the introduction of group plans and clinics through its codes of conduct resulted in a perversion of "ethics" that damaged the ethical system in the eyes of both the public and the practicing bar. Moreover, this damage heightened the inclination of lawyers to perceive rules of conduct as obstacles to be manipulated and circumvented. Lieberman suggests that since the Code of Professional Responsibility and its precursors have served as a vehicle of self-aggrandizement, the failure of lawyers to accept their social responsibility as officers of the court and guardians of the public trust is not surprising.

Lieberman believes that the spectacular failure of the present system requires immediate and extensive reform. He describes the current Code of Professional Responsibility as "a pastiche of loquacious moralisms and obscure footnotes." The history of self-regulation, according to Lieberman, indicates that the regulators' fundamental concern has become the self-perpetuation of a monopoly and that the interests of society are considered only to maintain the facade of altruism. His proffered solution is to replace self-regulation with an ethical and disciplinary system designed and operated by the public or its representatives. Lieberman also recommends that the legal profession renounce its pursuit of wealth. He argues that the pursuit of wealth is incompatible with the maintenance of an ethical system for lawyers and concludes with the warning that unless lawyers begin to take the steps necessary to restore public trust and confidence, the very existence of a private bar in this country will be jeopardized.

THE DUTY TO ACT: TORT LAW, POWER AND PUBLIC POLICY. By Marshall S. Shapo. Austin: University of Texas Press, 1977. Pp. xxi, 203.

In *The Duty to Act: Tort Law, Power and Public Policy*, Professor Marshall Shapo examines tort law as an example of the law's

concern with the use of power. Defining power to include physical force and the ability to control people's destinies in particular circumstances, Shapo focuses on how duties arise from the control and exercise of power in two contexts—the obligations of private persons and the duty of governments to act to save citizens from various kinds of injury.

The first part of Shapo's work analyzes the obligations of private persons. The author first examines a series of continuing relationships, including those arising in employment, commercial, and educational settings, before turning to the more fortuitous relationships created by emergency conditions. Relying on case law analysis and public policy objectives, the author develops the principle that persons who can use energy, ability, or information to aid others in serious peril without significant inconvenience or harm to themselves should do so. Although this principle departs from the traditional common law view that no one may be held liable in tort solely for failure to act, Professor Shapo urges that the responsibilities of power demand respect for the value of an imperiled life and require action when one can save another without serious risk.

In the second section of his work, devoted to governmental duties, Shapo first examines the conventional applications of tort doctrine to several functional contexts, ranging from traffic control and highway design to police duties in varied situations. He then explores those areas of health, education, and welfare to which tort concepts might be profitably extended. Shapo's analysis of the law dealing with governmental duties is based upon a comparison with the law of private obligation and presents a vigorous argument for an expanded view of public duty.

HANDLING FEDERAL ESTATE AND GIFT TAXES, 3d ed. By Joseph Rasch. Rochester, N.Y.: Lawyers Co-Operative Publishing Co., 1978. Pp. xvii, 484; 543; 595. \$112.50.

The third edition of this treatise was written in response to the significant changes that have occurred in the estate and gift tax provisions of the Internal Revenue Code since the date of the second edition, most notably those changes contained in the 1976 Tax Reform Act. The treatise retains the emphasis on practical application present in the earlier editions. In a manner understandable to one with little or no knowledge of federal estate and gift tax law the treatise begins with a treatment of what knowledge is required to file a tax return, proceeds with a treatment of how to prepare and file a tax return (with examples of tax forms and sample computa-

tions), and ends with a treatment of procedures to be followed in representing clients before the Internal Revenue Service and in the federal courts.

The first two volumes are divided into five main parts. Part I, *Estate Tax: Citizens or Residents of the United States*, contains chapters on general principles of federal estate tax, gross estate, taxable estate, and computation of tax. Part II, *Estate Tax: Nonresidents not Citizens*, contains one chapter dealing with federal taxation of estates of nonresidents who are not citizens of the United States. Part III, *Practice and Payment of Federal Estate Tax*, contains chapters on preparation and filing of a federal estate tax return, payment of federal tax, and collection procedures. Part IV, *Gift Tax*, contains chapters on general principles of federal gift tax, transfers subject to federal gift tax, federal gift tax exclusions and deductions, the compilation of federal gift tax, and the practice and payment of federal gift tax. Part V, *Tax Litigation*, contains chapters on preliminaries to estate or gift tax litigation, practice in the United States Tax Court, and actions for refund.

The third volume contains four appendices to be used in conjunction with the first two volumes. These appendices contain the estate and gift tax provisions of the Internal Revenue Code, estate tax regulations, gift tax regulations, and the Rules of Practice and Procedure of the United States Tax Court.

**PATTERNS OF AMERICAN LEGAL THOUGHT.** By G. Edward White. Charlottesville, Va.: The Bobbs-Merrill Co., 1978. Pp. xix, 389.

In *Patterns of American Legal Thought*, Professor G. Edward White gathers ten of his previously published articles on the history and development of American legal thought into a single volume. In publishing this collection he seeks to offer a perspective on what he considers significant forces in the development of American legal thought. He contends that many present studies too readily adopt traditional techniques of historical analysis that so frequently focus on the "legislative session" or the "economic marketplace." Professor White encourages legal historians to abandon this traditional legislative and economic analysis and adopt new methods of inquiry into legal history. He identifies three patterns in American legal thought that he argues have been overlooked by legal historians—the influences of scholarly thought, the contributions of individual judges, and the role of the Constitution.

The role of scholarly thought is discussed in three articles that

chronicle the evolution of Professor White's analysis of this pattern. Initially, he viewed legal scholars as technicians whose role was merely to adapt to the law concepts generated by prevailing social conditions. By the third article, however, Professor White perceives scholarly thought as a force implementing its own views on social policy rather than simply reflecting its environment.

The second pattern recognized by Professor White is the ability of individual judges to influence the course of American legal thought. Using two articles, one a discussion of the contribution made by Justice Brandeis to the development of administrative law, and the other a discussion of the career of Justice Holmes, Professor White establishes that at least some judges have left their personal mark upon American legal thought.

The final pattern that Professor White identifies is the importance of the Constitution in guiding the development of our legal thought. The author supports this thesis indirectly by reproducing his critique of Richard Kluger's history of the *Brown v. Board of Education* decision; the critique emphasized the importance of communication between the Court and the American public. The next article analyzes the extent to which constitutional protections ought to be extended to the choice of personal lifestyles. Though these two articles do not address the suggested pattern directly, Professor White's conclusion that the Constitution is a "nebulous but 'fundamental' source of law" is nonetheless implicit in both.

Professor White in this book makes a logical presentation of his work that enables readers to study the author's own patterns of thought. By focusing on patterns that do not fall within the traditional methods of studying legal history, he hopes to inspire others to explore untried approaches. He concludes with the concern that the discipline will stagnate unless it ceases to rely upon the few "approved" modes of analysis and becomes more tolerant of less orthodox approaches.

**RECOVERY OF DAMAGES FOR LOST PROFITS.** By Robert L. Dunn. Tiburon, Cal.: Lawpress Corporation, 1978. Pp. vii, 280. \$40.00.

Noting the absence of a comprehensive analytical work on the recovery of lost profits damages, Robert L. Dunn seeks in this book to provide the practicing attorney with a resource tool that would significantly reduce research and other preparation in claiming or defending against lost profits damages. The result is an extensive compilation of case law in the area of lost profits recovery that



attempts not only to treat the significant issues likely to be encountered by the commercial litigant but also to identify major trends and to provide guidelines for both defendant's and plaintiff's counsel.

The first three chapters trace the development of the three major prerequisites to recovery of lost profits damages—proximate cause, reasonable certainty, and foreseeability—and in hornbook fashion identify the general principles and tests as they apply to both contract and tort litigation. Chapter four, devoted to the special problems encountered in seeking lost profits damages of an unestablished business, concludes that the “new business” rule that traditionally had barred recovery of lost profits to an unestablished business is being replaced with a rule of evidence—“the unquestionable principle that damages for loss of profits must be proven with reasonable certainty and the evidence must support that finding by the trier of fact.” Chapter five contains a detailed description and analysis of the methods of proof and kinds of evidence available in the litigation of lost profits suits and argues for a relaxation of rules on admissibility coupled with an expanded role for the trier of fact. In chapter six Dunn sets forth the principles governing calculations of damages that the attorney is likely to encounter and evaluates the possibility of recovery for impairment of capital. The last two chapters provide practical guidelines for pleading and proving lost profits damages.

In keeping with its avowed purpose as a resource tool, *Recovery of Damages for Lost Profits* contains a number of features that should prove useful to the practitioner. Chief among these are extensive citations, analysis, and discussion of rules as enunciated by various courts, and representative expressions of these rules, with descriptions of the leading cases. The work also discusses the relevant provisions of the Uniform Commercial Code, the Restatement of Contracts, and the Restatement of Torts, and then illustrates how courts in representative jurisdictions apply these bodies of law. Most sections within each chapter conclude with a summary, a discussion of practical application, and an analysis of emerging trends. The final two chapters provide examples of charts for the presentation of damages, complaints for both contract and tort damages, and sample interrogatories and jury instructions for both plaintiff and defendant. A provision is made for annual supplementation, a feature that should further augment the value of Dunn's work as a research and practice source book.

RIGHT AND WRONG. By Charles Fried. Cambridge and London: Harvard University Press, 1978. Pp. viii, 194. \$15.00.

Ethics scholars have generally viewed the concepts of "right" and "wrong" in one of three ways. First is the view taken by some Judaeo-Christian thinkers that "right" and "wrong" are moral absolutes. At the other extreme is consequential analysis, often attributed to the Utilitarians, Jeremy Bentham and John Stuart Mill. Under this view, no act is intrinsically right or wrong; an act is right or wrong only insofar as it produces good or bad consequences. Between the absolutist and consequentialist thinkers lies the Kantian position espoused by Professor Charles Fried in his latest book, *Right and Wrong*.

"Right" and "wrong," in Professor Fried's view, are "categorical norms" that, although absolute in the majority of cases, are flexible enough to yield to consequential analysis in difficult fact situations. The norm "do no harm," for example, is broad enough to absolutely forbid acts of direct or intentional harm but does not extend to situations in which the forbidden result occurs inadvertently or because one has failed to seize an opportunity to prevent that result. Contrary to the consequentialists, however, Professor Fried believes the goodness of the ultimate consequences does not guarantee the rightness of the actions which produced them. Among the competing consequentialist schools of thought attacked in *Right and Wrong* are Utilitarianism, represented by Bentham and Mill, and the "economic analysis of rights" theory advanced by Ronald Coase, Harold Demsetz and Richard Posner.

Professor Fried begins *Right and Wrong* with an analysis of "wrongs." He focuses on two specific acts that are categorically prohibited: the direct and intentional harming of innocent people, and lying. These acts are wrong, he explains, because they deny to the victim the status of a free person capable of rational choice. This emphasis on individuality is central to Professor Fried's analysis. Intentionally causing physical harm to an innocent person is wrong because the actor thereby exploits his victim's body. Similarly, lying is wrong because the liar exploits his victim's mind. Professor Fried's analysis does not apply, however, when the "victim" is himself acting wrongly.

Professor Fried next analyzes "rights." Although he defines "rights" as moral entities the violation of which is always wrong, he argues that it cannot be assumed that every wrong creates a right in those whom the wrong injures. Professor Fried distinguishes between a "positive right"—a claim to goods, services, or well being—and a "negative right"—a right that something not be done

or that some particular imposition be withheld. He concludes that although there are numerous "negative rights," there is only one "primary positive right" one possesses against others—a right to a fair share of the community's scarce resources. Professor Fried argues that this basic right gives rise to a qualified duty on the part of all within a given community to contribute monetarily to the welfare of others.

The final step in Professor Fried's analysis focuses on "roles." Although his theory suggests that certain moral precepts are absolute, Professor Fried insists that his view is not inflexible but rather leaves individuals discretion in shaping their lives. The Kantian emphasis on respect for individual personality, he explains, means that a person is authorized to give a measure of preference to persons standing close to him (his family and friends, for example) over the abstract interests of humanity in general, even when such preference may cause harm to others. Arguing that professional roles are analogous to friendship and family membership, Professor Fried concludes that if a lawyer in a reasonably just society gives good and faithful counsel to a client, regardless of the harm this advice may cause the client's adversary, he fulfills his role and that role itself is a good one. It follows that a good lawyer is a good person, and the fact that he chooses his clients from those who can pay the most or whose cases involve travel and excitement should not vitiate that conclusion.