Vanderbilt Law Review

Volume 31
Issue 6 *Issue 6 - November 1978*

Article 7

11-1978

Recent Publications

Journal Staff

RECENT PUBLICATIONS

BAR ADMISSION RULES AND STUDENT PRACTICE RULES. Edited by Fannie J. Klein with contributions by Ms. Klein, Steven H. Leleiko, and Jane H. Mavity. Prepared by the Institute of Judicial Administration for the Council on Legal Education for Professional Responsibility. Cambridge, Mass.: Ballinger Publishing Co., 1978. Pp. 1225. $100.00.

In this single volume, the Council on Legal Education for Professional Responsibility provides the first comprehensive collection of state and federal bar admission and law student practice rules. Prior to this publication, the Council had published only law student practice rules. The inclusion in this volume of bar admission rules as well represents an attempt to address public concern over the quality of advocacy by focusing on the entire process of becoming qualified to practice law, including both law school training and bar admission. The compilation includes the text of state statutes and state and federal rules permitting the student practice of law and governing admission of attorneys to practice. The volume contains convenient charts summarizing these statutes and rules. It also includes representative cases on bar admission issues and bibliographies relating to bar admission and student practice.

In addition, Jane H. Mavity compares and analyzes the varying bar admission rules, concluding that the lack of agreement among the states about the standards of legal education necessary for admission to the bar undermines the reliability of the admission process and damages both the profession and the public interest. Finally, Steven H. Leleiko, after surveying the student practice rules, argues that clinical education is the foundation upon which legal institutions can structure responsible legal education by preparing lawyers to meet the actual needs of society. In publishing both student practice rules and bar admission rules in one volume, the Council intended to highlight the need for uniform national bar admission standards that would require clinical legal training prior to admission. At the very least, the Council has succeeded in providing a comprehensive and useful reference book.

DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES. By Stephen Wasby, Anthony D'Amato, and Rosemary Metrailer. Carbondale and Edwardsville, Ill.: Southern Illinois University Press, 1977. Pp. xx, 489. $19.85.

In 1954, the United States Supreme Court in *Brown v. Board of Education (Brown I)* held that "separate" education for blacks and whites in public elementary and secondary schools was not "equal" education under the equal protection clause of the fourteenth amendment to the United States Constitution. A year later, in *Brown v. Board of Education (Brown II),* the Court held that the schools must desegregate "with all deliberate speed." In 1969, however, the Court in *Alexander v. Holmes County* held that there had to be an end to "all deliberate speed" and that desegregation had to come "at once." Using the *Brown* and *Alexander* decisions as the endpoints of their analysis, and combining the analytical tools of the legal historian and the political scientist, the authors of *Desegregation* investigate the Court's strategies in handling race relations cases during the Warren era.

Although the authors focus primarily on the *Brown* cases, they emphasize that *Desegregation* is not simply another book about the school cases. After a discussion of pre-*Brown* race relations decisions beginning with *The Civil Rights Cases* of 1883, and after a lengthy discussion of the *Brown* litigation from its inception at the district court level, the authors proceed topically to explore the Court's rulings in other areas of race relations. Proceeding chronologically within each topic, the authors examine the Court's housing, voting, transportation, public facilities, public accommodations, and protest decisions.

The book, subtitled "An Exploration of Supreme Court Strategies," focuses primarily on the strategies used by the Court in seeking and achieving a particular doctrinal result. Emphasis is placed on "external" strategy, defined as the Court's "strategy vis-à-vis other actors in the political system" such as state legislatures and lower federal courts, as opposed to the "internal" strategy of obtaining a consensus among the nine Justices. The authors' basic premise is that, operating in a complex political environment, the Court cannot avoid politics in the broadest sense. The authors argue that to be effective the Court must undertake the difficult task of relating to its "external" environment. According to the authors, the Justices have at least a rough idea of what they want to do and where they are going.

The authors demonstrate the various strategies available to the Court by examining judicial techniques such as case selection, the

choice of language and reasoning in written opinions, the methods by which the Supreme Court defers to lower court rulings and delays reaching certain areas of law until the proper case arises, the use of summary dispositions and per curiam rulings, and "the general judicial preference for incremental actions." Applying their multifaceted analysis to the Warren Court desegregation decisions, the authors conclude that the Court often played down the racial element of many cases in an effort both to still "the racial fears of the racially fearful" and to prevent lower courts from limiting Supreme Court desegregation opinions to exclusively racial fact situations.

The authors also examine the role of oral argument in developing the contents of the Court's final written opinions and the role of judicial questioning during oral argument as a strategic device by which one Justice attempts to influence his brethren. "If a Justice hammers on a particularly difficult point," the authors point out, "he may be intending to persuade his colleagues that they will have to deal with that point and resolve it if they want to decide the case in a certain direction. Or a question to counsel can in reality be an argument, not thought of or pressed by counsel but which the Justice, knowing his colleagues, has decided to bring out in the open."

The authors do not address the desegregation problems currently faced by the Burger Court, such as the permissible extent of busing, the merger of central city school districts with surrounding suburban districts, and de facto segregation resulting from neighborhood housing patterns. They note, however, that "these complexities seem of a different order from the issues of the Warren Court period when the Justices were staking out the basic ground rules regarding constitutional protection against racial discrimination." *Desegregation,* therefore, is viewed by the authors primarily as "an overview of an era."

ETHICS IN THE PRACTICE OF LAW. By Geoffrey C. Hazard, Jr. New Haven: Yale University Press, 1978. Pp. xviii, 159. $10.00.

Ethics, a concept that ranges from the technical to the moral, is an integral part of the foundation that guides the day-to-day activities of lawyers. In this regard, the American Bar Association set forth ethical guidelines for the legal profession with the adoption in 1970 of the Code of Professional Responsibility. Nevertheless, in any attempt to prescribe general rules of professional conduct, specific situations often create ethical problems that force the conscientious practitioner to sail an uncertain course between Scylla and Charybdis. Moreover, the recent Watergate debacle questioned whether legal ethics were chimerical, or merely elusive. In this book,

Geoffrey Hazard offers a succinct overview of the ethical problems and crises facing the contemporary lawyer.

Hazard's first two chapters examine the Code of Professional Responsibility and highlight that the Code's rules of professional conduct deal with essentially three problems: confidentiality, conflict of interest, and prohibited assistance. He recognizes that the Code's general guidelines fall short in many important areas; consequently, Hazard spends the remaining chapters discussing these areas. Hazard analyzes the ethical dilemma posed by unpopular clients, fees, conflict of interests, and Louis Brandeis' "lawyer for the situation" concept. He also treats the ethical problems inherent in the adversary system, the "revolving door" (lawyers moving in and out of government service), and the situation in which a client declines his attorney's advice. Indeed, Hazard notes that even the determination of who the client is might pose ethical problems. Throughout the book, Hazard uses examples of corporate and governmental agency attorneys to support his ideas.

The implementation of a broad-based standard of ethics for the legal profession, or for any profession, is an arduous task because of the diverse beliefs among the members of the profession and the multitude of situations that necessitate decisions. The system of ethics for a profession must recognize and conciliate these various elements. The instant book, through careful analysis and discussion, has made a significant contribution to the understanding of these interests.

THE LAW OF CORPORATIONS: WHAT CORPORATE LAWYERS DO. By Jan G. Deutsch and Joseph J. Bianco. Mineola, N.Y.: The Foundation Press, 1976. Pp. xxix, 988. $19.50.

Abandoning hornbook categorization and seeking to present legal doctrines in the context of entrepreneurial conduct, the authors organize this casebook based upon six roles played by the corporate lawyer: reader of cases, litigator, draftsman, political technician, economic analyst, and counsel. Deutsch and Bianco disclaim any attempt to produce a comprehensive reference tool for existing law; instead they focus upon the emerging trends in fluid areas of corporate law. Although most of the well-known case law is presented, the authors omit the traditional analysis of Delaware statutory law and create selected statutory provisions and explanatory legislative materials for the hypothetical state of Arcadia. Comparatively few informative and conventional casebook notes are included; instead, probing questions constantly interrelate each case with cases and concepts presented earlier in the volume and with

the entrepreneurial motivations and goals being regulated. Major principles and developing trends of corporate law are presented, but this book's emphasis is upon developing a multifaceted mode of analysis from the perspective of a practicing corporate lawyer.

PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS. By Milton Heumann. Chicago: The University of Chicago Press, 1978. Pp. viii, 220. $15.00.

In theory the basic tenet of American criminal justice is that an accused may be convicted only by a jury of his peers after a trial in which his defense attorney and the prosecutor vigorously debate his guilt. The reality of the criminal justice system, however, flies in the face of this traditional maxim. For more than seventy-five years the criminal courts in America have not tried the great bulk of their cases. Plea bargaining, the process by which the defendant in a criminal case relinquishes his right to a trial in exchange for a reduction in charge and/or sentence, has largely replaced trial by jury. Hence, in reality the trial court has become a plea bargaining court. This profound transition raises many questions about the day-to-day nature of criminal justice administration.

In his recent work, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys,* Professor Milton Heumann examines the adaptation of new prosecutors, defense attorneys, and judges to the plea bargaining court. Firmly grounding the research for his formative analysis on a representative sample of circuit and superior courts in the state of Connecticut, Professor Heumann not only examines how new attorneys and judges adjust to the plea bargaining procedure, but also explores the nature of this adaptation process and its substantive impact on the criminal justice system.

In establishing the framework for his seminal effort, the author first challenges the belief that plea bargaining is an expedient developed to manage heavy case loads in the criminal courts. Drawing upon an impressive collection of analytical data, Professor Heumann effectively challenges the theory that plea bargaining is a function of crowded court dockets and firmly establishes that plea bargaining is integrally and inextricably bound to the trial court. Then, after defining "newcomers" as individuals with less than one year's experience in the criminal justice system, the author divides his study into three sections. First, he explores the adaptation of new defense attorneys to the plea bargaining process. Tracing the developmental stages of defense counsel from the naivete of the recent law school graduate to the outlook of the seasoned public

defender, Heumann probes the newcomer's gradual adaptation to the subtleties of plea bargaining. In tracing the maturation of the counsel's own plea bargaining skills, the author carefully analyzes the impact of the criminal defendant's factual culpability coupled with the absence of contestable legal and factual issues on the development of the new defense attorney.

Turning to the defense's counterpart, the prosecutor, Heumann examines the prosecutor's initial firmness and resistence to plea bargaining. Utilizing a very compelling "mellowing hypothesis," the author then describes the emergence of the prosecutor as the central figure in the local criminal court, a figure who comes to presume that a plea bargain will be sought in most cases and that he has the responsibility and power to negotiate cases.

Finally, Heumann probes the adaptation of criminal court judges to the plea bargaining process. Once again Heumann identifies the unrealistic and amorphous expectations of a newcomer to the criminal justice system and identifies the judge's significance in the plea bargaining process as the potential power to upset negotiated dispositions. Hence, Heumann claims that the efforts of prosecutors and defense attorneys are to a great extent defined by their perceptions of what judges will allow. Thus, the fact that judges rarely overturn negotiated settlements offers convincing evidence of the success of both the prosecutors and defense attorneys in fully adapting to the plea bargaining process.

Heumann's analysis and observations offer significant insights into the nature of plea bargaining and its impact on the criminal courts. Although some readers may disagree with Professor Heumann's conclusions, this volume demonstrates masterful use of quantitative data in unraveling the mysteries of the plea bargaining process.

POLITICS AND THE PROFESSORS: THE GREAT SOCIETY IN PERSPECTIVE. By Henry J. Aaron. Washington, D.C.: The Brookings Institution, 1978. Pp. 185.

According to the "common view," in the early 1960's the public supported enthusiastically governmental action to combat poverty, improve education, expand health care, reduce unemployment, and control inflation. The strength of this movement emerged from the enactment of the War on Poverty, Great Society programs, and a broad consensus identifying social and economic problems and their solutions. Political and scholarly trends, however, shifted dramatically in the early 1970's. Americans doubted the ability of government to solve domestic problems, a new presidential administration

modified existing programs, and researchers questioned the previous liberal legislation.

Henry J. Aaron, the Assistant Secretary for Planning and Evaluation of the Department of Health, Education, and Welfare and a former senior fellow in the Brookings Economic Studies program, examines the foundations of the initial commitment to social reform programs and the subsequent disillusionment, focusing upon the contributions of social science scholars. The author concentrates on the federal government's intervention in the areas of poverty and discrimination, education and training, and unemployment and inflation.

The examination of these three concerns evidences strikingly parallel changes in attitudes toward public expenditures and governmental programs. In the area of poverty and discrimination, oversimplified characterizations of certain sectors of the population gave way to a more complex analysis that undermined existing programs. The former belief that education assured economic success has been replaced by doubt that a predictable relationship exists between education and income potential. The earlier goals of significantly reducing unemployment and providing job training programs while controlling inflation have been seriously challenged by several alternative approaches. Thus, Aaron finds that all three areas were characterized by readily accepted generalizations that served as the basis for massive social reform in the 1960's. These generalizations were superseded in the 1970's by a complex, realistic appraisal of the dynamics of public policy.

Aaron also finds that during this period scholarly findings paralleled public policy developments in the areas of poverty, unemployment, and education. The author notes that research reflected current political opinions and programs as much as it influenced them. Additionally, research had only a limited impact when it influenced attitudes toward complex social issues at all.

Aaron attributes the development of the "common view" to external events, rather than to scholarly findings or the inadequacy of the programs. The Second World War and the depression precipitated the public's eagerness for aggressive federal intervention in social problems. Momentum for social reform increased following the Supreme Court's recognition of the civil rights issue and the assassination of President Kennedy coupled with President Johnson's electoral landslide. Similarly, three major occurrences hastened the people's subsequent restrictive attitude toward such undertakings. First, Americans lost faith in the benefit of government action following the Vietnam War and Watergate scandal. Second,

the "formal" battle of the civil rights movement had been won in the courts and legislatures. Third, the previous consensus of social scientists and the public on the parameters of social welfare problems and their solutions collapsed.

In conclusion, Aaron predicts that the current adverse reaction to the Great Society era may be temporary. He foresees an increase in the federal budget and in the public's desire for governmental action. According to Aaron, social science scholars will play an integral role in the formulation of future social and economic policy.

PUBLIC POLICY AND PRIVATE HIGHER EDUCATION. Edited by David W. Breneman and Chester E. Finn, Jr., with the assistance of Susan C. Nelson. Washington, D.C.: The Brookings Institution, 1978. Pp. 450. $16.95.

A collection of essays, introduced and concluded with summarizing chapters by the editors, *Public Policy and Private Higher Education* deals with the role of private higher education in the 1980's and focuses upon the determinative effect of public policy in shaping this role. The editors make a primary assumption based upon population trends, social attitudes, and increased costs that the demand for higher education, which has boomed since the 1950's, will abate in the 1980's. This drop in demand will require a severe retrenchment in higher education, and the editors assert that current government policy, which heavily subsidizes the costs to students attending public institutions, if allowed to continue, will cause this retrenchment to be concentrated in the private sector. The editors state that the preferable basis for determining which institutions survive this retrenchment is in a market of fair competition among institutions in which the performance of each school and its success in attracting students determines its fate. Public subsidy, however, is the determinative factor. A competitive system does not exist under the present policy because of the disproportionate public expenditure for students attending public institutions. To create fair competition among schools, the editors assert that public policy makers are confronted with a fundamental choice: to make private colleges and universities more like public ones, or to make public schools more like their private counterparts.

The editors have compiled essays that consider various facets of the problems facing private higher education. The first chapter is a broad overview outlining the relevant factual information and the present methods of support for higher education. It assesses the need for review and reform in public policy. The second chapter, by Susan C. Nelson, and the third chapter, by Michael McPherson,

provide basic economic information about the financial support of higher education and the demand for it. Nelson's essay compares the support of the private and public sectors and examines the change in this support over the years. McPherson studies the demand for higher education and documents the substantial effect that the tuition gap between private and public institutions has on student demand. Three chapters consider governmental education policy. Lawrence Gladieux and Thomas Wolanin investigate the political environment in Washington, assess its receptiveness to the reform of education, and predict the political feasibility of various policy options. Robert Hartman describes the present federal role in subsidizing higher education and proposes an alternative program that would place private and public schools on an equal footing by shifting all institutional aid into subsidies for individual students. Tax policy at both the state and federal level is the subject of Emil M. Sunley's essay, which focuses on the deduction for charitable contributions as well as the proposals for a tuition tax credit. Robert Berdahl examines the relationship between public and private educational interests, and using California, Ohio, and New York as case studies, suggests methods for avoiding and dealing with the conflict that arises between the two sectors. Colin C. Blaydon proposes reform of financing policies at the state level to allow private and public institutions to compete more fairly by adjusting the differences in tuition rates. Public policy and its effect on institutions of higher learning is viewed from the campus perspective by David G. Brown and Thomas E. Wenzlau, who predict the institutional response to some of the policy alternatives discussed in the other essays.

The final chapter outlines the editors' view of the most desirable public policy reform. They advocate the creation of federal matching grant programs to provide incentives to the states to transfer at least an increased portion of public subsidies from direct public institutional support to student aid programs. Tuition costs at public institutions would rise to a level with which private schools could compete, and the resulting increased aid to students would broaden students' choices of institutions while providing public support to those schools who successfully compete for students in the educational marketplace.

THE PUBLIC USE OF PRIVATE INTEREST. By Charles L. Schultze. Washington, D.C.: The Brookings Institution, 1977. Pp. vii, 93. $7.95 cloth, $2.95 paper.

Schultze's book is a short yet effective critical analysis of the

American tendency to respond to social problems by legislative fiat and cumbersome regulatory schemes that are inefficient and often impossible to enforce. The author's thesis is that although there is a growing need for collective intervention into business and individual behavior, governmental intrusion can be minimized by creating market-like incentives so that private interests coincide with public goals. Mr. Schultze illustrates the inadequacies of present governmental programs by showing, for example, how EPA regulations actually discourage environmental cleanup and how subsidizing mass transit systems must ultimately fail to reduce permanently traffic congestion. The market solutions making undesirable behavior such as polluting or driving to work more expensive are often deemed politically unacceptable. Concluding that there are no easy solutions, the author urges that market incentives be given serious consideration as alternatives to traditional command and control methods.