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BOOK NOTES

ELEMENTS OF JUDICIAL STRATEGY. By Walter F. Murphy. Chicago: University of Chicago Press, 1964. Pp. 249. $7.50.

In this book, Mr. Murphy has attempted to fashion, or rather has laid the groundwork for the fashioning of, a new tool with which to study the Supreme Court and its decisions. This tool is capability analysis, a concept concerned with two questions: (1) Given a policy-oriented Justice with certain defined, strategic goals, what range of choice is actually open to him? and (2) What modes are available for the expression of those choices? Realizing that the range of choice will often dictate the mode of expression and that the converse is also true, Mr. Murphy has wisely not attempted to separate his discussions of the two questions, but has treated them together under five broad headings: the traditional framework of judicial power, marshalling the Court, managing the judicial bureaucracy, political checks, and ethics and strategy.

In his discussion of the traditional power framework within which the Supreme Court operates the author covers old ground, dealing with such matters as the jurisdictional limitations upon the Court, its law court function of making case by case determinations, and its self-imposed restraints as to when and how it will hear and determine a controversy.

The second broad heading, entitled "Marshalling the Court," forms probably the most fascinating chapter in the book. The author is here concerned with the issue most vital to any policy-oriented Justice: How can he win and hold for his side at least four other votes in cases that directly affect his policy goals? Mr. Murphy is quick to recognize that the Justice's professional skills—his thoroughness of research, his logical analysis, and his felicity of expression—are the qualities that count most in persuading the other members of the Court to accept his views. But professional ability is not the only means by which a Justice may gain votes; charm, graciousness, and skill in negotiation and conciliation also play their part. The points made in this chapter, as with the points made elsewhere, are illustrated by examples drawn from several sources, but primarily from the letters and papers of Chief Justice Taft and Mr. Justice Murphy. One of the more interesting instances of the workings of interpersonal relations on the Court is the account of the habit of several Justices, particularly Mr. Justice Frankfurter, of writing on the back of opinion drafts being circulated for approval such comments as "Well done,"

"Beautifully presented," or "It stands with Marshall's best." A mature Supreme Court Justice, especially one accustomed to the calculated flattery of politics, is likely to take such comments in perspective. Nevertheless, a Justice must to some extent base his self-esteem on his professional reputation, and compliments from his brethren which bolster that reputation not only enhance the self-esteem of the Justice, but also enhance that Justice's opinion of the wisdom and good judgment of the writer of the comment.

A sub-part of this chapter is devoted to a discussion of the unique position of the Chief Justice. Of the several advantages flowing from this position, two of the most important are the power to assign opinions and the prerogative of voting last in conference. A situation in which a Chief Justice may use both of these advantages to protect his policy goals occurs when he sees from the way the vote is going that his views are in the minority; thereupon he votes with the majority in order to retain the opinion-assigning power so that he can assign the opinion either to himself or to another Justice with views similar to his own, thereby ensuring that his policy will suffer as little damage as possible. Another advantage is that as Chief Justice he is the official leader of the Court and can, if he so desires, by the force of his personality and intellect, exercise a great deal of control over the conferences.

The third broad heading deals with the problems involved in managing the judicial bureaucracy; that is, the implementation of a policy in the federal courts system and, to a lesser degree, in the state courts. A Justice cannot rest contented merely because he has seen his ideas prevail in the decision of a particular case, for he may witness the ultimate defeat of his policy at the hands of recalcitrant lower courts. If a district court or court of appeals is bent on emasculating or at least blunting a doctrine announced by the Supreme Court, there are several courses open to it. It may distinguish a case on its facts, it may employ procedural devices aimed at delay or avoidance, or, if its opposition to the Court is strongly enough felt, it may risk outright reversal. Thus, the task of the Court does not end with the laying down of a rule; the lower courts must be persuaded of the rightness of that rule. Here again a clear, well-reasoned opinion will do much in advancing a Justice's policy goals.

The chapters discussing political checks on the Court are the weakest in the book. Few novel ideas are presented here. Most enlightened readers are now aware that Supreme Court decisions cannot long run counter to a prevailing economic or social policy as expressed by the popular will in election results. Nor is it surprising to learn that the Court may read its own ideas into a statute by means of statutory

interpretation, or that the Court may provoke congressional action by a literal application of a statute or by a call for legislative action in an opinion that states there is no judicial solution to the problem. It is, however, a bit surprising to learn that Chief Justice Taft and Mr. Justice Brandeis attempted to advance their strategic goals through extra-judicial action; Chief Justice Taft by actually lobbying for or against certain bills, and Mr. Justice Brandeis by influencing many Cabinet and sub-Cabinet appointments during the early part of the New Deal. These chapters are also weakened by over-reliance upon examples involving Chief Justice Taft, whose political background and activities were unusual, to say the least.

The final discussion of the limitations on judicial strategy is concerned with ethical limitations. The ethical framework—as seen by Mr. Murphy—within which a Justice must operate in formulating and carrying out his strategic goals consists of the duties and responsibilities imposed by the Constitution, relevant statutes, and the oath of office. Decisions concerning the propriety of attempting to use political lobbying to achieve policy goals and the propriety of inter-Court compromise and compromise with one of the other branches of Government must all be made within this ethical framework..

Although this book was written by a political scientist and possibly for political scientists, it can certainly be of use to lawyers, who are perforce students of the Supreme Court. For the lawyer it provides a point of view from which to analyze and study the workings of the Court. Lawyers often seem uncomfortable when presented with discussions of concepts drawn from political science and economics such as "probability theory," "zero-sum games," and "capability analysis," but they should not be. These concepts, if carefully studied and properly used, can be of much assistance in understanding the political and economic milieu in which the lawyer operates as well as in understanding the possible roles and choices available to our policy-making institutions of government. The book then is helpful in discovering what a Justice can do and is thereby of assistance in the study of what he has done or of what he will do. By giving lawyers an additional insight into the checks on the Court and the opportunities available to it, Mr. Murphy has contributed to a better understanding of the operations of the Court and has given lawyers several new factors to consider when couching arguments before the Court or when evaluating its past work.

The weaknesses of the book are mainly two. First, as is true of much of the literature of political science and sociology, the author spends a great deal of time arranging facts and putting labels on actions so as to bring existing material and scholarship within the framework of the

concept or terminology that he is presently advancing. This "labelling the obvious" has been pointed out before, and lawyers, when reading discussions of how a Justice can go about getting votes for his side, are apt to respond with a "So what?" It is well to keep in mind, however, that although much of the material adduced to support the concept of capability analysis is not new, the concept itself is, at least as applied to the Supreme Court, and there is something to be learned from it, even though at times familiar paths must be trod. A second weakness, one readily acknowledged by Mr. Murphy, is that after all the theorizing is done about how a Justice *can* operate in advancing his policy goals, much of the valuable evidence concerning how he actually *did* operate must come from letters and private papers. When these are available, they are often incomplete or misleading; but they are often unavailable, at least until several years after the death of the Justice involved.

In spite of its weaknesses, the book does make a contribution to Supreme Court scholarship, and it presents several ideas and concepts which, though presently in an elementary stage of development, will have to be considered and dealt with in future evaluations of the Supreme Court.

LEGAL INTERVIEWING AND COUNSELING. By Harrop A. Freeman. St. Paul: West Publishing Co., 1964. Pp. XXI, 246.

This book, which is a new type of casebook, raises interesting questions in regard to its form as well as its substance. By using actual cases of consultations from the records of various law firms, Professor Freeman has created a non-appellate-court casebook designed for teaching law students the art of dealing with and advising their clients.

In his preface, Dean Griswold expresses great interest in the book because it marks a departure from the typical casebook. The overwhelming success of the case method of legal education has largely restricted the student to the consideration of cases decided in appellate courts. Even outside such areas as contracts and estate planning—where the very litigation of a case often suggests that there has been some failure on the part of the lawyer or of the law—there persists a nagging conviction that appellate cases are somehow atypical and that, by studying appellate cases alone, the student acquires a distorted view of the overall role and problems of a lawyer. Certainly, litigated cases are not adequate vehicles for dealing with the situations which confront the lawyer in office consultations.

Dean Griswold suggests in the preface that the book may prove as important a pioneering effort as Dean Langdell's *Cases on Contracts*. Although this is a bold prediction, the book may be significant not only for the originality of its form but also as a measure of the growing awareness of legal educators of the shortcomings of the traditional case method. The creation of this book reflects the belief that a legal education should impart something more than the narrow technical virtuosity which is the object of the conventional casebook. The book's contributors are themselves evidence of the desirability of combining a legal education with broad interests and with expertise in other fields. For example, these contributors include Dr. Arthur J. Brodbeck, who is a law school graduate as well as a psychologist; Bishop James A. Pike, former professor of law; Dr. David Riesman, professor of social science as well as a former practicing lawyer and professor of law; and Dr. David H. Wilson, practicing lawyer and psychiatrist. Although the suggestion of the need for knowledge in other areas may raise the vexed question of whether law schools should attempt to give their students a liberal education, the legitimacy of the casebook itself need not depend on the answer to this question. Since the book maintains its legal orientation throughout, and since it is designed to prepare the students to face specific types of problems which they will encounter in practice, it clearly stays within the accepted area of legal education.

In organizing his book, Professor Freeman places, after the statement of most of the cases, comments by some of the contributors. These comments are often helpful in understanding the cases and are good starting points for a discussion, since the contributors state their opinions freely and specifically and do not hesitate to disagree with the lawyer's handling of the situation. Although it is one of the least complex cases, "the Case of the Barricaded Road" is typical of the book's emphasis on the need for sensitivity and breadth of understanding on the part of the lawyer. The legal setting is simple; the client owned a small weekend cabin, access to which had been blocked by an adjoining landowner's barricading the road across his land. The lawyer was certain that he could establish the client's right to use this road in a lawsuit or that the client could successfully resort to self-help by removing the barricade himself. The client, however, a rather timid individual who was already under treatment for a nervous condition, was appalled at the idea of any unpleasant confrontation with the landowner and seemed to prefer abandoning the cabin to establishing his right to use the road. The lawyer, an overbearing and intolerant person, proceeded to denounce his client for spinelessness but finally agreed to try to negotiate an easement. The ease-

ment was ultimately purchased for 250 dollars, and the client's nerves were spared considerable depreciation, but the lawyer left no doubt as to his opinion of his client for failing to enforce his rights. The comments point out both the lawyer's success as a negotiator and his regrettable failure as a sympathetic counselor. He refused to consider the personal needs of a client whose character and sense of values differed from his own and, by indulging in frequent scoldings, managed to destroy part of his client's small fund of self-respect. Such cases show that the casebook may be of value to the practicing lawyer as well as to the law student. Like most of the cases, it suggests the danger of considering a client's problems purely in legal terms. Other cases, however, present the opposite danger of the lawyer's delving too deeply into psychiatry and other areas in which he lacks expertise. Considered as a whole, the casebook should encourage the lawyer to broaden his awareness of a client's problems and, in appropriate cases, to consult experts in other fields.

Although the cases themselves comprise the bulk of the volume, there are several introductory chapters. The most helpful of these is an introduction to the art of interviewing, which suggests rules for organizing and conducting an interview and makes the important point that a good interview, no less than a good brief, must be logically and effectively organized. An interview should proceed from a recognition of the client's problems and desires to a search for information and a clarification and correction of the information offered and, finally, to an analysis of the situation. Counseling, which is the final stage of the meeting, follows the lawyer's analysis. This chapter also suggests problems that arise in specific areas such as the interviewing of witnesses and even the arranging of the lawyer's office. Another chapter furnishes an introduction to psychology, tracing major streams of psychological theory and discussing some of the basic concepts in that field. Although the rest of the book seems to be appropriate material for the law student, it is doubtful that including such a bare introduction to a most difficult science accomplishes any useful purpose. This chapter is not necessary to the understanding of the cases and comments in the rest of the book and its effect is to equip the student with a terminology which he is able to understand in only the most superficial manner. The other chapters, however, are both germane to the subject and meaningful even to those who lack psychological expertise.

A final question in evaluating the book is whether it could succeed as the basis of an actual law school course. The teaching of such a course would require considerable imagination and skill in discussion, and certain obvious dangers are present. Perhaps the greatest problem

for the instructor would be the difficulty of keeping the discussion of these cases from getting too far afield. Here the very strength of the casebook contributes to the problem, since the book's success in vividly presenting human relations and conflicts opens avenues of discussion which are closed to students considering the relatively bloodless records of appellate cases. With skillful instruction, however, an effective study of the cases is possible, and the contributors' comments should prove most helpful in stimulating a profitable discussion. Another difficulty arises from the fact that the book is so brief that no single area of counseling can be thoroughly covered. The cases are divided into sections on family problems, criminal problems, financial problems, and psychotic-neurotic problems with no more than ten cases in any section. Obviously, the material cannot begin to suggest the range of problems involved in counseling in any of these areas. The student, therefore, would have to realize that the course's value does not lie in the exhaustive treatment of any given subject. The course, however, could be of substantial value to the student by giving him a better perspective on the total function of the lawyer and an increased awareness of the types of problems which will confront him in practice. Third year men should be especially receptive to such a course, since they are normally acutely aware of their impending departure from the law school and have begun to feel a need for help in fields outside strictly legal matters. The casebook could also be a valuable aid to the teaching of legal ethics, since most of the cases involve some attempt on the part of the lawyer to influence the personal life of his client. This is a crucial responsibility which the office lawyer must bear alone, and the book provides a unique opportunity to consider problems in this area.