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Book Reviews

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BOOK REVIEWS

THE LAW PRACTICE OF ALEXANDER HAMILTON. By Julius Goebel, Ed. and Associate Editors: New York and London: Columbia University Press, 1964. Pp. XXV, 898.

"Without numbers, he is an host within himself." Thus wrote Jefferson of his great rival and essential complement among the founders of the nation. And so begins the first chapter, "The Many Hamiltons and the One," that appeared in another book on Hamilton the same year as this one.[1]

"The Many Hamiltons" that readily come to mind are his varied incarnations in public life. His work as a lawyer has been almost forgotten, but no longer is it so. The present book, the first of a two volume work, is a biography of his law practice. It shows his contributions to the growth of the law and his professional capacities.

The law and the judicial scene in the late 1780's, including practice and procedure, provide the starting point. Then three sets of Hamilton's cases are portrayed. One set comprises the controversies of Massachusetts and Connecticut with New York over parts of New York's territory, with the New England states relying on early grants of territory running "from sea to sea." Another set was the War Cases over confiscation of the property of Tories. They are a reminder that the war of 1775-1783 was a civil war as well as a war for independence.

The case most interesting today involved the continuing problem of freedom of the press. The editor of a rural newspaper who had published a scurrilous attack on President Jefferson was prosecuted and convicted for criminal libel. Hamilton appeared as his counsel in an argument for a new trial and urged that "truth with good motives for justifiable ends" was a good defense.[2] Though he lost the skirmish before an equally divided court he won the battle and the war.[3] His client was never punished and his views were written into the statutes and the Constitutions of many states, as Mr. Justice Brennan of the Supreme Court of the United States pointed out at this term in a case involving alleged criminal libel by a prosecuting attorney of a whole bench of judges.[4]

1. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 3 (1965).
2. GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 840 (1964).
3. *Id.* at 844-48.
4. "The 'good motives' restriction incorporated in many state constitutions and statutes to reflect Alexander Hamilton's unsuccessfully urged formula in People v. Croswell, 3 Johns. Cas. 337, 352 (N.Y. Sup. Ct. 1804), liberalized the common-law rule denying any defense for truth." Garrison v. Louisiana, 379 U.S. 64 (1964).

Hamilton's thoroughness as a lawyer appears throughout the book. When a young man he drafted his own practice manual. He was most careful in preparation. His arguments were directed to basic policies and not to case matching. It had to be so, for there were only English reports when he began his practice. It would have been so, one may hazard, even if there had been an abundance of reports. There were routine cases in his practice to be sure, but there were many novel problems of the relations of state with state, and state with nation in the new federal union, as well as problems of nation with nation. Hamilton's mind was affirmative in character and was directed to fundamentals at the beginning of his country, which he envisaged as one of the great nations of the world.

Hamilton, the lawyer, was more fortunate in his wife than he could have guessed. It was through her devotion that many of the fragile papers of the lone practitioner were preserved.[5] He is similarly fortunate in the learned biographers of his practice. On the flyleaf of the book they set themselves down as editors. They have, indeed, searched out all the records available from county clerks' offices to the National Archives, and most of the book is made up of documents given with meticulous care so the reader may judge for himself what manner of lawyer Hamilton was. They have done much more. From the first chapter, "The Law and the Judicial Procedure" through each set of cases they have given their own background discussions of the social, political and legal setting. These discussions are notable for their liveliness and readability as well as the knowledge and insight which they give into the law and practice of the times.

An historian of an earlier era could say history is past politics. A legal historian today would borrow and broaden the saying to make it read—Law is present politics, economics, sociology, ethics and practicalities modified by inertia, selfishness and hopes.[6] The practicing lawyer would add still other elements. The practice of law calls for the protection and advancement of the interests of clients under an adversary system of law and practice which constantly tends to become more technical as it seeks definiteness and certainty.

Hamilton knew full well the importance of technicalities and how to make use of them. Witness the second and third paragraphs of his Practice Manual:[7]

> If the person resides in a different County your first Process must be a

5. GOEBEL, *op. cit. supra* note 2, at 2.

6. See GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS (1946); HURST, LAW AND ECONOMICS GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1954).

7. GOEBEL, *op. cit. supra* note 2, at 55.

> Capias which is a Writ compounded of the Capias of Common Pleas and the Bill of Middlesex of the Kings Bench.
> If the Person is not found in the County in which your first Writ issues in the first Case you must sue out a Latitat in the second a Testatum Capias.

Yet, Hamilton was master and not subject of the technicalities of practice. His arguments for clients often reflected the larger views of public affairs.[8] In the public mind his place is that of the arch conservative who favored even monarchy. In another view he was the very opposite of the conservative. He was the future-directed man who sought order and strength in the new national government as essentials to the security and development of his country. Who can now doubt that the views on powers of government pressed by Hamilton have prevailed over those of Jefferson?

Yet powers are not ends in themselves; they are instruments to other things. Here Jefferson's ideals have their great place. This generation, no less than the one after 1783, is one of conflict between order and liberty, stability and change. It is Hamiltonian in powers and methods of government, Jeffersonian in its ideals in a society that Jefferson would have abhorred.[9] In our times, too, there is need for lawyers who will lift up their eyes from books and clients and give public guidance. In the Foreword to this book Judge Proskauer cites Hamilton as an examplar of what de Tocqueville urged on American lawyers:[10]

> I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.

ELLIOTT E. CHEATHAM*

8. See *id.* at 282, 586, for matters discussed in court cases and also in the Federalist Papers.

9. See HAND, SOURCES OF TOLERANCE IN THE SPIRIT OF LIBERTY, 66 (Dillard ed. 1952).

10. GOEBEL, *op. cit. supra* note 2, at vii.

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LAWYERS IN POLITICS: A STUDY IN PROFESSIONAL CONVERGENCE. By Heinz Eulau and John D. Sprague. Indianapolis: Bobbs-Merrill, 1964. Pp. 164. $1.95.

It is commonly agreed that the United States is a "law-minded society" and that lawyers have traditionally exercised an unusually strong influence in our political life. Less than one per cent of the total population of the country has a virtual monopoly on judicial offices and provides more than one-half the legislators and executives at all levels of government. Students of American political history, from de Tocqueville to the modern sociologists, have been fascinated by this phenomenon of the lawyer in politics. They have attempted to explain why lawyers have such an affinity for politics and what the consequences of their dominance may be.

Generally, these observations have left a residue of untested impressions, popular beliefs, and political folklore. The subject, then, is one in which a serious empirical analysis is particularly welcome, and it is this kind of study that Professors Eulau and Sprague have attempted to provide.

The result, while valuable, is neither as complete nor as free from shortcomings as it might have been. In view of its scope, the book would have been more aptly entitled "Lawyers in Legislatures," for there are few references to data that concern the other important species of politicians. Most of the data is derived from materials collected for studies that did not have the present problem in mind.[1] Most of the tables in the book are derived from a study undertaken in 1957 by the State Legislative Research Project.[2]

Any attempt at a rigorous behavioral investigation runs the risk of its comprehension being reduced by specialized jargon. The present work is not an exception, and the lay reader may find his interest deterred by passages such as this one:

> This study's concern is not in examining the conflict potential inherent in the lawyer's roles as he confronts his obligations to clients, colleagues, and the public at large, or in the politician's roles as he faces his constituents, his peers, or the larger community. Nor is the way in which role conflict is avoided or reduced our focus. But if a cluster of roles involves a variety of expectations and attendant obligations, either the division of labor

1. EULAU & SPRAGUE, A STUDY IN PROFESSIONAL CONVERGENCE vii (1964). In particular the authors acknowledge their reliance on unrelated previous work by Professors David Derge of Indiana University and Joseph A. Schlesinger of Michigan State University.

2. This was a study of the legislatures of New Jersey, Ohio, Tennessee, and California, sponsored by the Social Science Research Council and conducted by several prominent social scientists including one of the authors of the present book.

> tends to make for the segmentalization of the cluster, so that its component roles may be taken by different persons; or the actor himself may develop such great versatility in adapting to different expectations that he can mobilize whatever component of the multi-functional central role he is expected to take in a variety of circumstances.[3]

For a work which aims at systematic analysis, there are occasional minor lapses. Among these is a tendency to overgeneralize the significance of data collected in only a few states. In addition, the authors at some points inject information, the relevance of which is questionable. For example, in discussing the party partisanship of lawyers and non-lawyers they state that "in Tennessee, with its weak party and strong factional system, fewer legislators than in New Jersey and Ohio are partisan, but lawyers are again somewhat more partisan than nonlawyers."[4] The reader is left to wonder whether the authors mean to state a causal relationship between a weak party system and the degree of partisanship, or whether the remark is a mere descriptive phrase.

A large portion of the book is a classification and summary of earlier beliefs concerning the phenomenon of the lawyer in politics. The authors discuss and dispose of the four major apprehensions commonly held by those who are hostile to the lawyer's prominence in political life. They are that lawyers are over-represented (at best a tautology), that the lawyer is engaged in a conspiracy to promote his own interests (there is no evidence that lawyers vote as a bloc), that lawyers are too "conservative" (not really true, even if we could define the word) and that legal training is inadequate preparation for policy making (even if it were valid, lawyers in public service may be exceptions to any such criticism).

The book discusses the various professional roles that a lawyer is called upon to perform and how these may relate to his performance as a legislator. It analyzes the various motives, such as the desire for indirect advertising, which may or may not propel lawyers into a political career. One cannot help but reflect that these passages might have been more illuminating had the authors devoted more attention to the historical evolution of the legal profession in America. Also there are too few allusions to the impact of social and economic change on the practice of law.

The book also considers the various institutional explanations of the affinity between law and politics as vocations. These include de Tocqueville's class theory, Max Weber's "independent position of the lawyer within a capitalist economy," and Joseph Schlesinger's

3. EULAU & SPRAGUE, *op. cit. supra* note 1, at 88.
4. *Id.* at 98.

observation that the lawyer's monopoly of law enforcement offices gives him an advantage in access to other political offices. The general conclusion of the book is that each of these suggestions has a certain plausibility but that none of them is in itself a satisfactory explanation.

It would be unfair to suggest, however, that the book is no more than a compendium of former comments and common beliefs. There are a number of potentially fruitful hypotheses which obviously could serve as a basis for further inquiry. One of the most valuable insights in the book is the exploitation of an incidental remark of Lord Bryce that perhaps lawyers do not come to politics but that incipient politicians are drawn to the practice of law.

The most interesting and valuable part of the book is the last chapter, in which the authors attempt to construct a hypothesis on "the convergence of professions." They accept the common sociological assumption that a person's occupation is of crucial importance in determining his total perspective. However, all the evidence available to them indicates that lawyer-legislators do not behave much differently from nonlawyer-legislators. Yet, the large numbers of lawyers in politics would seem to indicate a genuine professional affinity. What is called for, then, is a theory which can reconcile these inconsistent observations.

> [T]he notion of convergence posits the isomorphism of the two professions: Although they are distinct and structurally independent of each other as professions, law and politics come to exhibit similar forms—a convergence which, it is postulated, would have occurred even if law and politics did not in reality intersect with one another as professions.[5]

These forms develop in response to the needs demanded of both professions by society. The similarity will become more marked with the passage of time, particularly as society grows more complex and in need of the co-ordinating skills required of both professions. Both professions tend to be integrated into the structure of political authority, and both are marked by three convergent characteristics: professional independence, a code of ethics, and a controlling norm of public service. That the authors may not have proved some of their points (*e.g.*, that politics is in fact a profession) does not detract substantially from the merits of the hypothesis.

What is needed is a study, or series of studies, directed squarely at the problem of lawyers in politics which will test the hypothesis that the authors have conceived. The available data is clearly insufficient to support very much generalization, but this book does extract all that can be gleaned from it, and points the way for what could be

5. *Id.* at 125.

very promising avenues of research. The political ubiquity of lawyers is a distinctive characteristic of American culture and it deserves further elucidation.

JOSEPH B. BOARD, JR.*

OCCUPATIONAL DISABILITY AND PUBLIC POLICY, Edited by Earl F. Cheit and Margaret S. Gordon. New York: John Wiley and Sons, Inc., 1963. Pp. xii, 446.

In their introduction the editors state that this volume of essays[1] was compiled in the hope that it might stimulate discussion and evaluation of public policy toward occupational disability. They point to several recent conferences and meetings and express the hope that these efforts reflect a new interest in taking the necessary "giant step forward" in basic reforms.

These conferences have been held and reports duly published and circulated but progress is not readily discernible.[2] The editors noted that, in its basic operating statistics, workmen's compensation, the fundamental program for occupational disability, stood in 1962 almost precisely where it did in 1950. Very little has happened since 1962 to alter this conclusion.[3]

Periodically, legislators meet and amend workmen's compensation statutes to provide for increases in benefits and certain other improvements, but the lack of imagination that has gone into restructuring this program is unparalleled. Larson in his chapter, "Compensation Reform in the United States," maintains that progress has come because of statutory construction by the state courts, rather than by

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1. CHEIT & GORDON, OCCUPATIONAL DISABILITY AND PUBLIC POLICY (1963).

2. The proceedings of one conference held on June 11-13, 1962 has been reported in a widely distributed volume entitled, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, VOCATIONAL REHABILITATION ADMINISTRATION, REHABILITATING THE DISABLED WORKER —A PLATFORM FOR ACTION (1963).

A conference held at the University of Pennsylvania on October 17-18, 1962 and sponsored by the A.M.I.A. is reported in AMERICAN MUT. INS. ALLIANCE, PROCEEDINGS, CONFERENCE ON REHABILITATION CONCEPTS (1962).

A national conference held on May 7-8, 1964, sponsored by the Texas Employers' Insurance Association in Dallas, Texas is reported in PROCEEDINGS OF TEXAS EMPLOYERS' INS. ASS'N REHABILITATION SYMPOSIUM (1964).

3. See, *e.g.*, *Workmen's Compensation Payments and Costs, 1963*, 28 SOC. SECURITY BULL. 40 (1964); *Workmen's Compensation Payments and Costs, 1962*, 27 SOC. SECURITY BULL. 13 (1963).

innovations of the legislature.[4] "In fact, sometimes the court, in its accumulated frustration and impatience with an outrageously obsolete statutory provision, will undertake a piece of statutory demolition which makes us applaud as humanitarians, but wince as lawyers."[5]

What is wrong with workmen's compensation? Why should there be these criticisms of the earliest of our social insurance programs? Larson makes the point that much has changed in the world since the basic framework of the statutes were laid down in 1911. Among these changes are the advent of social insurance programs covering interruptions of income due to unemployment, old age, and disability.

The existence of these income maintenance programs brings problems of coordination to the fore and there has been little inclination to deal constructively with these issues. Annual meetings of the International Association of Accident Boards and Commissions are emphatic in their resolutions calling for the social security administration to keep its hands off any temporary disability programs on the theory that this area has been preempted by the state workmen's compensation programs.[6] Agitation for this measure has led to the introduction of bills in Congress calling for a restoration of the provisions formerly in the federal social security law, compelling the social security administration to deduct workmen's compensation payments. On balance, Larson feels that the solution should be the other way

4. CHEIT & GORDON, *op. cit. supra* note 1, at 11-46.

5. CHEIT & GORDON, *op. cit. supra* note 1, at 13. Larson cites the Montana case of Hines v. Industrial Accident Board, 358 P.2d 447 (160), with the comment that, in this case, the Supreme Court of Montana somehow managed to hold that the contraction of polio was covered by the Montana statute which expressly excludes contraction of disease from the definition of injury. As Larson puts it, "After all when you are a supreme court, there is nothing to stop you from following the advice of umpire Guthrie: 'call 'em quick and walk away'." *Ibid.*

6. The most recent resolution was passed at the annual meeting of the association of administrators of state programs held in Baltimore, Maryland, September 2, 1964. This resolution read in part: "The IAIABC urges the United States Congress to recognize and affirm that the fundamental principle of the workmen's compensation system is the basic and exclusive program for compensating work-connected injuries and diseases, and that the intrusion of Social Security into the workmen's compensation field through a 1958 change in the Social Security law is not in the interests of the public, and

WHEREAS, there is now pending before the United States Congress legislation which if enacted, would amend the Social Security Act to eliminate the duplication of Social Security benefits be reduced by amounts received under state workmen's compensation laws, now

THEREFORE BE IT RESOLVED, that the International Association of Industrial Accident Boards and Commissions, representing workmen's compensation systems throughout the United States, strongly urges the United States Congress to enact legislation to eliminate duplicating Social Security benefits to industrially disabled employees who receive workmen's compensation benefits and we urge that Congress thereby affirm the principle that the state workmen's compensation system is the basic system for compensating the industrially disabled . . . ."

around and that social security receipts should be deducted from workmen's compensation payments, a solution vigorously resisted by the compensation administrators.

It is not only the advent of other social insurance programs which challenges workmen's compensation. Larson points to changes in the common law since 1911. Employers' liability, or at least the restoration of the right to sue on the basis of negligence, is a different alternative now from what it was when workmen's compensation was passed. Awards have become more liberal, and pointing to the example of the Federal Employers Liability Act, Larson contends that a series of Supreme Court cases has virtually converted this into a non-fault statute, vastly expanding the role of the jury and narrowly constricting the powers of the trial judge to direct a verdict for the defendant because of the inadequacy of the evidence of negligence. Larson also notes that England has adopted a system which allows suits in the event of negligence and that recovered amounts are in addition to the compensation payment.

Benjamin Marcus, prominent plaintiffs' attorney, in his paper, "Advocating the Rights of the Injured," persuasively argues for allowing an injured worker who can prove that his injury was caused by employer negligence to have the right to a judgment restoring the full amount of his loss, *less* whatever he may be entitled to under the compensation system.[7] Marcus argues that if the employer negligently damages another's property he is required to restore the full amount of loss. Why should his responsibility be less for negligent injury to a human being? If the employer negligently injures a third person, he is required to restore the full loss. Why then should a negligently injured person be discriminated against merely because the wrongdoer happened to be his own employer?

The framers of the original statute thought they had an answer to this question, but we must agree with Marcus and Larson that third-party involvement is becoming increasingly common. Highway accidents almost always carry with them third-party problems. Multi-employer construction projects and the increased traffic of employees in plants making deliveries, repairs, installations, *et cetera*, invite those suits. Also, in recent years there have been a spate of cases attempting to circumvent the immunity of the employer by alleging a breach of an independent duty running from the employer to the third party. Many jurisdictions allow third party actions against company employees.[8]

Marcus also cites a New Hampshire case which has gone so far

7. CHEIT & GORDON, *op. cit. supra* note 1, at 77-90.

8. See, *e.g.*, Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962); Hockett v. Chapman, 366 P.2d 850 (1961) Ransom v. Haner, 362 P.2d 282 (1961).

as to permit a tort action against the employer's compensation insurance carrier for failing to discover defects in a compressed air tank after the carrier had undertaken to conduct monthly inspections of the plant.[9]

The organized plaintiffs' bar has been pressing for the cumulative tort remedy and, as Marcus puts it, for renegotiation of the original agreement in which the workers' tort rights were supposedly bargained away in order to obtain workmen's compensation. It may well be true, as Larson claims, that what keeps employers awake at nights in England is, not the cost of workmen's compensation, but worry about the real cost of supplementary damage suits. The threat of these suits argues for facing the problems of workmen's compensation and for making the necessary compensation reforms.

It may well be that we will have to face the possibility of tort liability as a concurrent remedy. However, one wishes that there were better data available to evaluate the effects of this change. Jerome Pollack, who is represented in this volume by a paper dealing with disability insurance under social security, has argued elsewhere that allowing damage suits would probably be at the expense of workmen's compensation, and may perpetuate the evils under both systems.[10]

Before one becomes too enthusiastic about the possibility of cumulative tort remedy, whatever evidence is available on the recoveries under the Federal Employers Liability Act ought to be examined. Cheit's contribution, "Can Injured Workers Recover?" cites the result of his investigations into the actual awards under the FELA and the Jones Act.[11]

Cheit recognizes, as he does in his basic volume *Injury and Recovery and the Course of Employment*,[12] that comparative evaluation of employers' liability statistics is complicated by the paucity of records of the day-to-day individually bargained settlements. It is also hard to determine the number of cases that would come under workmen's compensation if railway employees were covered, but would not be under employer's liability because no negligence exists that could be claimed. Also, data on legal fees and delays are not easily obtained or evaluated. As important as any of these other difficulties is the fact that we have no uniform concept of permanent disability under workmen's compensation. Each of the fifty-four jurisdictions has defi-

9. Smith v. American Employers' Ins. Co., 102 N.H. 565, 163 A.2d 564 (1960). See also a discussion of later cases in 1 ABC Newsletter 13 (1964).

10. *A Policy Decision for Workmen's Compensation*, 7 IND. & LAB. REL. REV. 51 (1953).

11. CHEIT & GORDON, *op. cit. supra* note 1, at 47-76.

12. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT (1961).

nitions peculiar to its own laws.

In spite of these difficulties, however, Cheit attempts to compare permanent and total disability cases under the FELA with a similar sample of cases under workmen's compensation in California. His data indicate that about eighteen per cent of FELA cases received awards exceeding 40,000 dollars. None of the California cases did. However only eight per cent of the compensation cases received less than 9,600 dollars while forty-three per cent of FELA cases fell below that amount. The median compensation payment was twenty-five per cent higher than the median FELA award! And these are the serious disability cases which attract the most favorable attention for the FELA.

This controversy exposes one of the great difficulties in workmen's compensation. We lack comprehensive data about the program itself, and we have even less data about what happens under actual recoveries in alternative programs.

But the advent of social insurance and changes in the common law are not the only environmental changes which have occurred since the advent of workmen's compensation. Rehabilitation as a concept has matured from its early emphasis on physical restoration to a whole system of guidance, training, placement and restoration of the worker to the job, or to an independent living status in a manner consistent with his residual abilities. Increasingly, it has become anachronistic to deal with a system which pays money benefits when restoration of the workers to the job might be the objective.

The catalogue of the difficulties continue. Each of the jurisdictions has laws a bit different than the others. Consequently, there are problems involved in conflicts of laws, problems involving dependents overseas, travel overseas, *et cetera.* Our new knowledge about mental and nervous injury has caught many of the states unprepared. Similarly, the atomic energy radiation problem which has occupied the attention of Congress, and most recently a Department of Labor conference, is left far from solution.[13]

The problem remains: should we throw the system out and substitute an alternative system, or should we attempt to aid the daring of the judiciary in making progress in particular areas by a thorough statutory reform. In this respect Larson's experience with the model act legislation is instructive. Those who are optimistic about the prospects for radical statutory reform ought to read care-

13. See mimeographed paper by David Johnson, *Federal-State Cooperation in Improvement of Workmen's Compensation Legislation,* submitted to the Bureau of Labor Standards, U.S. Department of Labor and U.S. Atomic Energy Commission. A conference on this topic sponsored by these agencies was held in Washington, D.C. on January 25-26, 1965.

fully the story of what happened when the Undersecretary of Labor proposed a model statute only to have the ideal misinterpreted as a move toward federalization.

More recent efforts to revive the model law concept under the aegis of the Council of State Governments have not been received with a great deal of enthusiasm.[14] In large part, the dragging of feet in getting behind this statute stems from the traumatic experience associated with the first effort when the Congressional Appropriations Committee slashed the budget of the Bureau of Labor Standards by 50,000 dollars. Although the draft of the Council of State Government's model law was not complete at the time Larson wrote his paper, substantial outlines of the act are detailed here together with Larson's explication.

Cheit, in his essay, "Can Injured Workers Recover?", also opts for continuation of the present workmen's compensation system. He rejects the idea of the damage suits as an alternative or supplemental remedy, and he believes that federal participation carries with it certain difficulties. However, he proposes certain reforms. He would change the several methods of compensating permanent disability by compensating for physical disability as such. This is on the theory, that while rating physical incapacity is difficult, rating occupational capacity is flatly impossible. In this respect, he differs from Larson's view which rejects the so-called "whole man" theory by rating disability.

Cheit would simplify the laws by providing that injuries fall into one or another group, each with a rather wide percentage range of disabilities. Thus, instead of trying to decide between the small differences of five or six percent, he would classify disabilities into class A, B, *et cetera.* In addition to his unlimited, rehabilitation-oriented, supervised medical care, each worker would receive an indemnity benefit which increases in amount according to the disability category. This would be paid periodically in conventional fashion. He would also receive an incentive assurance to help guarantee his re-employment, the duration of which would be related to his rating group.

This is the novel portion of the proposal. In effect it would provide that an employer, who does not hire a permanently disabled worker after his condition is rated stationary, becomes liable for a sum equal to the employee's cash benefits, and this liability cannot be passed on to a carrier. The documentation for these ideas is set forth more fully

14. *Workmen's Compensation and Rehabilitation Law,* reprinted from COUNCIL OF STATE GOVERNMENTS, PROGRAM OF SUGGESTED STATE LEGISLATION—1963 (1963).

in Cheit's *Injury and Recovery*.[15] This proposal does have the advantage of focusing attention on the restitution problem rather than the damage concept attached to the money award.

A fundamental concept underlying workmen's compensation in most jurisdictions is financing by means of private insurance. Only eight jurisdictions have exclusive state funds, whereas in eleven jurisdictions there are state funds that compete with private carriers. In no other social insurance program does private insurance play such a fundamental role. Criticisms have been levied against the compensation system for retaining such a large share of the premium dollar. In 1963, 63 percent of the premium dollar reached the injured worker, a ratio which also prevailed in 1960 and 1961. For private carriers alone, the ratio of direct losses paid or direct premiums written was 56 per cent, a proportion unchanged since 1960. The loss ratio calculated on basis of losses incurred is higher. According to the National Council on Compensation Insurance, losses incurred by private carriers amounted to 64 per cent of net premiums earned in 1963. This was 63 per cent in 1962 and 65 per cent in 1961.[16]

A lucid exposition of the virtues of private insurance is contained in Ashley St. Clair's contribution, "Occupational Disability—Privately Insured."[17]

St. Clair practically grew up with the workmen's compensation program; and although an ardent advocate of private insurance, he recognizes thoroughly that the carriers have obligations to the injured workers. These include the prompt payment of weekly benefits required by law, the provision of skilled medical care and, when necessary, vocational rehabilitation. St. Clair realizes that the carriers themselves cannot be expected to operate in ways adverse to their interests and that the laws in most jurisdictions need to be amended and their administration improved. St. Clair is also frank in recognizing that although there may be competition for the business of the large employer, the small employer, whose safety record leaves much to be desired, is likely to insure through an agent, and possibly with a carrier who handles workmen's compensation only as an accommodation. Such a carrier is not always ready to meet its obligations to disabled workers and to employers, and at times the lack of supervision allows carriers to ignore their obligations with impunity.

Stefan Riesenfeld is not as kind to private insurance in his contribution entitled, "Efficacy and Costs of Workmen's Compensation."[18]

15. *Supra* note 11.
16. *Workmen's Compensation Payments and Costs*—1963, 28 SOC. SECURITY BULL. 40 (1965).
17. CHEIT & GORDON, *op. cit. supra* note 1, at 91-128.
18. *Id.* at 279-313.

He criticizes rate-making procedures for excessive expense loading and failure to take incomes derived from the investment into account in the loading formula. His discussion points to the conclusion that the time has come to reorient and modernize the existing workmen's compensation systems. "In their present form they are beset with many shortcomings, inequities, and social and economic wastes."[19]

James N. Morgan, in "Adequacy and Equity of Benefits," points out that the present system is an uneasy compromise which neither shifts the social costs of work injuries forward to the consumer, nor compensates the worker or his dependents for net losses.[20] He points out that it may be necessary to deduct from benefits paid amounts available from other insurance, including social insurance, if the occasional availability of this aid is not to be used as an excuse for generally inadequate benefits under workmen's compensation.

It is well recognized that workmen's compensation is being supplemented for certain workers by corporate supplements. Harland Fox in his paper, "Corporate Supplements to Workmen's Compensation," brings together the existing data in this area.[21] Fox points out that the benefits available under the corporate system are not as generous as might be imagined. This may well be true, but what may be happening is that we are creating what Larson has referred to as two classes of workers. This is a phenomenon noticed in underdeveloped countries where only a portion of the labor force tends to be covered by any social insurance.[22] While the corporate supplements may not be impressive in the aggregate, for particular groups of employees they may be significant enough to remove the pressure for any basic reform.

Z. L. Gulledge, in his chapter entitled "Vocational Rehabilitation of Industrially Injured Workers," supplies some of the missing data in this area by setting forth the results of his California study.[23] This study attempted to develop the best means for the selection, referral and provision of vocational rehabilitation service to workers injured in industrial accidents, and to develop techniques and procedures for working directly with insurers—including the state fund, private carrier, and self-insured employers. This rather careful study has led directly to the establishment of a new system of referrals in the state of California.

No one contribution in this book ought to be neglected. Margaret

19. *Id.* at 311.
20. *Id.* at 314-33.
21. *Id.* at 334-65.
22. *Dualism, Stagnation, and Inequality: The Impact of Pension Legislation in the Chilean Labor Market,* 17 IND. & LAB. REL. REV. 380 (1964).
23. CHEIT & GORDON, *op. cit. supra* note 1, at 395-420.

S. Gordon's two chapters on "Industrial Injuries Insurance in Europe and the British Commonwealth" constitute a definitive history of these programs in these several countries before and since World War II.[24] Dr. Ernest L. Jokl's paper on the "Physiological Aspects of Rehabilitation" is a welcome attempt to portray this aspect of rehabilitation in a work designed to be read by laymen.[25] Henry Kessler's contribution on "The Impact of Workmen's Compensation on Recovery" utilizes his rich knowledge of actual cases to illustrate principles which he has discovered through long years in the field.[26] Dr. E. C. Steele's paper on "Benefit Administration" is a lucid explanation of the Canadian system, which is universally pointed to as a model for United States' jurisdictions to follow as best they can within the constitutional restraints prevailing in the United States.[27] Dr. Leon Lewis contributes a chapter on "Medical Care Under Workmen's Compensation," in which he emphasizes the need for supervision of medical care which is the one benefit available under workmen's compensation which is duplicated by no other social insurance program.[28]

"Disability Insurance Under Social Security," by Jerome Pollack, is an attempt to examine the latest addition to our Federal Social Security program.[29] Pollack analyzes the exact issues which must be considered in deciding whether an expansion of the disability insurance program is consistent with the continuation of the state workmen's compensation programs.

The instinct for survival is strong in social insurance programs. In our pluralistic system it is not easy to gain the consensus for a new program—witness the struggle for health insurance. But once a program comes into being, the tendency is to remedy its deficiencies by alterations and additions, rather than pulling the program up by its roots and starting anew. Thus, it may well be that workmen's compensation will ever be with us, and if this is the case, it behooves those who are charged with playing an essential role in the program to understand its essential purpose and function.

To lawyers in many jurisdictions, workmen's compensation is important only as a tribunal before which he appears. The very concept of the program as a social insurance is a strange one, but it is an orientation with which the legal practitioner is becoming increasingly familiar. From time to time it has been suggested that the compensation principle should be extended to such phenomena as automobile

24. *Id.* at 191-253.
25. *Id.* at 379-94.
26. *Id.* at 366-78.
27. *Id.* at 257-78.
28. *Id.* at 124-57.
29. *Id.* at 158-87.

accidents. Evaluation of such ideas requires some notion of how the program has been working in the area of occupational disability.

It is fair to say that the verdict of the contributors is not favorable. None are satisfied with the program as it is, although not all would be willing to entertain the radical remedies of federalization, absorption in social security, or negligence suits. Their analyses should be of interest to the lawyer who must be concerned with how the programs are fulfilling their social objectives. Information must buttress concern if it is to lead to action and, possibly, destined reforms. This volume should serve this end.

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