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Book Reviews

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BOOK REVIEWS

THE STATE LEGISLATIVE INSTITUTION. By Jefferson B. Fordham.[1] Philadelphia: University of Pennsylvania Press. 1959. Pp. 109.[2]

We have been urged frequently and cogently to recognize that law today emanates more from the legislative than from the judicial process.[3] But, outside a course or two in "Legislation," lawyers and law schools probably still pay insufficient attention to the process of law-making in representative bodies. Only if drawn into lobbying activities on some client's behalf or if lured into political actions extracurricular to their legal practice do most lawyers come into close contact with state legislatures. It is therefore heartening that, throughout his three lectures, Professor Fordham points to the importance of state legislative processes and institutions as sources of law. His concern, furthermore, is purportedly more broad-gauged than the practicing lawyer's concern with the content of statute law. He starts from the premise that American state legislatures can do their job rationally and effectively only if they are given an appropriate structure and power proportionate to their great responsibilities as vital lawmaking agencies.

His list of specific recommendations for thus equipping them is a long one, adding up, as he says, to a "dramatic break" with existing practices and not to mere "minor tinkering." Quantitatively speaking, most of the proposals echo the recommendations and accomplishments of the movement for reform in American congressional procedure and organization—reduction of the number of standing committees, rationalization of committee jurisdictions, regularizing of committee hearings and reports, improvement of staff and work facilities, and so on. At least as important are general recommendations for unharnessing legislative power by elimination of cramping state constitutional limitations—for example, those on the size of the state debt or on the amount and type of permissible taxation, or those constitutional declarations of policy which restrict legislative policy choice. Most striking of all is a plea for unicameralism, together with suggestions for a system of representation combining single-member geographical districts and at-large districts on both a statewide and regional basis.

Professor Fordham does not endorse every proposed reform which

1. Dean of the University of Pennsylvania Law School.
2. This book was originally delivered as *The Edward G. Donnelly Memorial Lectures* at the College of Law of West Virginia University.
3. Akzin, *The Concept of Legislation*, 21 IOWA L. REV. 713 (1936); Cohen, *Toward Realism in Legisprudence*, 59 YALE L. REV. 886 (1950).

the examples cited might call to mind. He thinks the legislative council is a "temporizing device" which can readily be dispensed with once the legislative institution is properly revamped. Municipal home rule he sees as an unwise limitation on legislative power. Popular initiative and referendum he rejects as analogous to the settlement of a case at law by popular vote. Proportional or functional representation schemes do not meet with his approval.

To anyone familiar with the history of legislative institutions in general and of American movements for legislative reform in particular these various proposals and the arguments for or against each of them will no doubt sound like skillfully rendered variations on a familiar theme. The author's intent, like that of previous familiar tracts, is to persuade; and the reader is accordingly presented with a brief drawing on previous arguments in order to state the best possible case for the author's side. But Professor Fordham deserves praise for covering this familiar ground neatly and succinctly: even though little of what he says there is altogether new, the first two-thirds of his slim volume covers most of what occupies volumes of previous disputation.

The third and final lecture takes up issues which are less familiar and probably, for the professional reader, considerably more interesting than those just described. Here the author recommends creation (in each legislature) of a "Standing Committee on Sanctions and Law Enforcement," which should assess the prospects for citizens' conformity to proposed laws and write into each law the kind of sanctions that will achieve maximum conformity to it. Especially when he specifically recognizes that legislators will hereby be forced to draw upon the knowledge of "behavioral scientists," he encourages the reader to expect a broad-gauged discussion of the character of law as a social and political force. Such a discussion has been urged and initiated before.[4] But the expectation is unfortunately never fulfilled. "Behavioral scientist," it turns out, is a limiting, not an expansive term, which denotes specifically only psychologists—and explicitly excludes psychiatrists, whose business is essentially therapy, at that. And even the "psychology" Professor Fordham has in view is a pretty archaic brand. In both conception and use it is hardly one step removed from that expounded by Jeremy Bentham in his discussion of sanctions over one hundred years ago.[5]

The most obviously disappointing feature of the discussion of sanctions, as of the preceding discussion, is its complete reliance upon the formal kind of deductive analysis used by Bentham and by many

4. Dickinson, *Legislation and the Effectiveness of Law,* 17 A.B.A.J. 645 (1931).

5. Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1948 ed.).

American political scientists and reformers. Certain premises which are crucial to the argument are simply omitted altogether from consideration. Do legislators really behave differently in a unicameral than in a bicameral legislature? How? Why? Will they indubitably base their decisions more rationally on "the facts" if these are routinely marshalled in orderly committee hearings and fully reported by committees than they do in disorganized chambers without adequate committees and committee procedures? Will the quality or content of laws be changed at all if so? How? Questions like these can legitimately be juxtaposed to every one of the author's recommendations for change. But it is unquestioningly assumed throughout that instantaneous alteration in legislators' decision-making behavior, of precisely the kind desired, will follow simply and directly as a consequence of the institutional, structural and procedural changes. Even though time and space limitations foreclosed the author from full discussion of such questions, it might at least have been suggested, by footnote or otherwise, that the problems are of critical importance to the topic at hand, and that there are some relevant studies by political scientists, social psychologists and others which say something about the assumptions.

More specifically, there should at least be some recognition of the conception of the functions and qualities of law which is implied by the method and content of the argument. The standards by which Professor Fordham here judges legislative institutions all look upon statutes as primarily tools with which judges and lawyers work. His over-riding goal is to facilitate production of statutes meeting the standards of consistency, clarity and legal feasibility. An often used argument, for example, is that some proposed change will result in making the legislative record more complete and more accessible, so that lawyers and judges may more easily determine legislative intent when they come to apply the statutes to cases.

Doubtless, facilitation of legal application, or rationality of lawyers' and judges' decisions, are worthy goals. But is not the *political* function of legislature-made law at least as important? The *process* of making the laws and not just the end-product forms of words is what develops and maintains community-wide consensus about basic principles of justice. *Because* laws are in large part the outcome of contests among parties and interests they are able to acquire the character of *authoritative* rules in the community. In the political sense, the full character and significance of any law is never wholly encapsuled in the statutory language. Whatever reformers do to the legislative process ought to be done with its high political goals and functions well in mind. Indeed, the purely legal standards of statutory nicety are justified ultimately by the assumption that they, too, serve these

higher goals of the legislative process.

It may be that the reforms suggested by Professor Fordham would contribute to reaching these goals. But he does not tell the reader whether he thinks they will or not. Though it may be unjust, it is still quite possible to infer from his book that *only* the legalistic goals and standards need be pondered in reforming legislative institutions. There is a very real danger that reforms undertaken on that basis could damage or destroy the state legislature as a viable political instrument.

JOHN C. WAHLKE*

HANDLING ACCIDENT CASES. By Albert Averbach. Rochester: The Lawyers Co-operative Publishing Co. 1958. Pp. xii, 1505.

There has been a recent spate of "how to do it" books for plaintiff's attorneys in personal injury negligence cases. Many are little more than a rehashing of techniques familiar to any practitioner who has ever set foot in a court room; of some use, perhaps, to the law student or recent graduate, but to be employed only as a crutch and cast aside as soon as one can walk alone. Others describe new and more effective methods for presenting to the court and jury the plaintiff's case in graphic and arresting form so as to impress as forcefully as possible upon the agency which will decide the case the cause and extent of the injuries involved and the necessity for adequate compensation to plaintiff for them. The present treatise, as its author's connection with NACCA and other similar organizations dedicated to "the adequate award" would indicate, belongs to the latter category.

It should be stated, however, that Mr. Averbach's approach is largely free from the almost hysterical insistence which characterizes the works of some of his fellow authors in the field that any award which a jury can be persuaded to give in a personal injury case is justified, regardless of the means used to achieve it, arising presumably from the belief that insurance companies and corporations are the natural prey of the lawyer. True, he devotes a chapter to demonstrative evidence, which, as he points out, is nothing new; and another to the computation and proof of damages, including the use of mathematical formulae in the area of pain and suffering, a practice which has been condemned in some states. But he does not advocate whipping the jury into a frenzy of emotional sympathy for the plaintiff by means of the former (which frequently results in nothing more than a mistrial or reversal), or climbing to astronomical heights by means of the latter (which tends to inspire in the average

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jury the same sense of unreality as does the national debt). Instead he suggests a more realistic approach, based upon a thorough investigation of the facts leading up to the accident and of the medical aspects of the injury which resulted from it. The end product which this produces is an evaluation of both liability and damages which can be rationally supported at every juncture, and which is therefore most persuasive both to the defendant and his attorney during settlement negotiations, and to the judge and jury at the trial. And if a verdict is obtained by these means, it is far more likely to stand up upon motion for new trial and upon appeal.

Medico-legal technique is Mr. Averbach's forte. Not only does he devote his longest chapter to it (some 180 pages replete with illustrations), but his book is accompanied by a separately bound supplement of twenty-one pages, the contents of which are strictly medical in nature, including eight transparent overlays of the human body showing its various systems from the skeletal to the muscular, with the relationship of all of the intervening organs to each and to each other. In fact this brief supplement constitutes in itself a short course in anatomy which will be of inestimable value to any practitioner in the field.

Mr. Averbach is a proponent of the medical brief. This, of course, is not for the use of the court, but exclusively for that of counsel in examining and cross-examining expert witnesses and others upon medical issues in the case. To this limited extent, its utility is obvious. The attorney who, faced with a cool and self-possessed expert witness, fumbles among his pile of medical texts and comes up with a half-digested quotation which can be refuted with a word, could save himself much embarrassment and possible disaster by briefing the medical aspects of his case in advance. Here is good advice for both plaintiffs and defendants, for each will have his own experts to deal with and each will be faced with those of the other on ground familiar to the witness but which the lawyer can make his own only by intensive preparation.

But Mr. Averbach's book is not all devoted to medical proof. There are chapters on theories of liability, pleadings, discovery procedures, settlement negotiations, opening statements, the trial, summation, and the verdict and motions following it; twenty-nine in all, ranging from the opening interview with the client to the closing statement for services and expenses after settlement or verdict, both much neglected subjects. Of particular interest is a chapter on the value of medico-legal seminars and symposiums, which have become an extremely popular form of continuing legal education. Each chapter is keyed to appropriate references in *A.L.R.* and *A.L.R.2d,* and there is also included a tabulation of all annotations in the latter series

dealing with tort procedural and negligence law.

A substantial part of the two volumes is made up of material which has been previously published but some of which is obtainable elsewhere only with considerable difficulty. The lengthy annotation from *A.L.R.2d*[1] (it should by now be apparent that Mr. Averbach's publishers also put out this series) dealing with failure on the part of a motorist to give a signal for a left turn is reprinted in full, together with the decision in *Morris v. Crumpton*[2] which it originally followed, as is the opinion in *Smith v. Ohio Oil Co.*[3] and its following annotation upon the use of skeletons and similar exhibits for purposes of demonstration at the trial.[4] Forms for many purposes are reproduced, including those for use in investigating accidents and interviewing witnesses as available from two commercial companies. Extensive bibliographies are given, including one of over 240 titles on medical subjects which the author states are "from the shelves of my personal library." There are examples of trial briefs in eight different types of cases, covering over 150 pages; and reprints of no less than twenty-seven articles (six of them by Mr. Averbach himself) occupy almost a third of the total bulk of the book. While this would seem to be somewhat of a hodge podge of material, Mr. Averbach has succeeded in relating it through the common theme of trial preparation and technique, so that the overall effect is of a unified whole rather than a mere collection of occasional pieces.

The publishers of this treatise make a statement in their foreword with which no lawyer would quarrel. They say: "It is the duty of plaintiff's counsel to see that plaintiff's case is presented as forcefully, clearly, and persuasively as possible. Defendant's counsel must protect his client from both unjustified and exorbitant claims. To function well in either capacity, the lawyer should be thoroughly grounded in the law concerned, and in the trial techniques required."

Will Mr. Averbach's book assist in achieving these laudable and desirable ends? There is reason to think that, if properly used, it will. It does not contain all the answers; it is doubtful that Mr. Averbach ever intended that it should. But it does point out many of the problems to be overcome, the pitfalls to be avoided, and the means to be utilized in doing so. And if it guides its readers down the path of thorough legal and factual preparation before and during trial, it will have performed a service to them and to the public for which its author is entitled to be congratulated.

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1. Annot., 39 A.L.R.2d 65 (1955).
2. 259 Ala. 565, 67 So. 2d 800 (1953).
3. 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956).
4. Annot., 58 A.L.R.2d 689 (1958).

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