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Book Reviews

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BOOK REVIEWS

The American Legal System. By Lewis Mayers. New York: Harper Brothers, 1955. Pp. iv, 589. $6.50.

The author of this book is professor of law not in a law school but in a college, the City College of New York. The book seems to have grown out of courses meant to constitute a part of a general college education rather than the preparation for the legal profession. It is addressed not, or not so much, to the law student or the lawyer but to the citizen who wishes to inform himself about the legal machinery of his country. The book should also be of value, however, to the member of the legal profession who for once intends to see not only the trees but the forest. It should be of help to the young college student who considers the law as a possible future career. It will be of special interest to that steadily growing number of foreign observers who are looking for an American exposition of the total structure of the administration of justice in the United States.

Until quite recently it was difficult to find a book to which one could refer such an observer or which could be used as a basis for courses on introduction to American law for foreign students, such as are offered at the University of Chicago Law School, or at such foreign universities as Frankfurt, Paris, Oslo or West Berlin. A collection of cases and materials, such as those contained in the excellent books by Pirsig or Benson and Fryer, would be of little use to a foreign student without the guidance of an American law teacher. Kinnane's text on the common law is usable for the purpose but limited to the basic elements. Torstein Eckhoff's fine introduction is sealed to all but the few who can read Norwegian. The recent French treatise by André and Suzanne Tunc has become available only this year. It is written by a pair of continental scholars for continental readers, and understandable only to those who know French. For all those who cannot make use of the European books, Professor Mayers' book will constitute the most suitable introduction. Those who can will regard it as a welcome addition, not only because its American flavor cannot be reproduced abroad but also because its subject matter is not the same as that of the books just mentioned.

This subject matter is not fully recognizable from the title, which might be understood to indicate that the book deals with the entire legal system of the United States including or, perhaps even emphasizing, the substantive law of the country and its sources. This is not the case, however. It is the sub-title which gives a more descriptive indication of the contents: "The Administration of Justice in the United

States by Judicial, Administrative, Military, and Arbitral Tribunals." Not the substantive law of the United States is the concern of the author, but the machinery by which it is administered, the tribunals and their procedure. As also indicated by the sub-title, the description is not limited to the "courts" in the commonly understood sense of the term. Professor Mayers' survey goes far beyond the traditional, though artificial, limit; it covers every kind of dispute-deciding or law-administering agency in the United States, the courts of the nation and the states on all levels from the justice of the peace to the Supreme Court of the United States, the administrative agencies, boards, commissions and tribunals, the various kinds of military courts, including military commissions, occupation courts, military government and High Commission courts, and even the private agencies of arbitration in commercial, labor and other matters. The only tribunals of which no description is given, although they are mentioned, are the consular courts. They have not fully disappeared, as the author seems to believe. These manifold agencies are described not in the sense of a presentation of the individual features of every particular administrative or other agency, but by way of a general treatment of the features by which the various kinds of deciding agencies and their procedures are characterised. Owing to the fantastic complexity of our American system the task is enormous. It is also difficult intrinsically. Every expositor of a technical subject for lay readers constantly finds himself caught upon the horns of a dilemma: on the one hand he must concentrate on the essentials and present them in a style which the layman can understand; on the other hand he must be sufficiently accurate so as not to mislead the reader or bore him with generalities. A good popularization requires not only a full technical mastery of the subject but also the gift of empathy and the skill of good, vivid writing. Professor Mayers has well approximated these ideals, even though he has in parts succumbed to the temptation of being more legalistic than the purpose of the book might justify. The very first chapters, which are concerned with the tortured topic of the distribution of powers between the nation and the state, constitute particularly arduous reading.

The next following chapters on the administration of criminal justice will reward the reader with the relief of greater liveliness and understandability. Within a short space of just a little over one hundred pages one finds a vivid description of the course of a criminal prosecution from the first investigatory steps of the police to the final stages of appellate proceedings. It is close to life and tied to that general body of knowledge which the average citizen can be expected to have. The author has also well succeeded in making understandable the much more intricate features of civil procedure in its several American variants. For the legally-trained reader the most rewarding part of the book may well be the sequence of chapters on "administrative

tribunals and their supervision by the courts," in which a vast mass of heterogeneous material is neatly arranged so as to throw into clear relief its significance, the basic problems and the manifold attempts at their solution.

Throughout his book, the author not only describes the present state of affairs and its historical background but also subjects it to sagacious criticism, often combined with suggestions for constructive improvement. He also does not fail to point out the many ways in which our administration of justice is subject to political influences, legitimate and illegitimate, and how they operate. Occasionally, comparisons are made with what is apodictically called the continental system and which appears to constitute the common, although not always fully accurate, American view of French institutions.

Although not strictly limited to a presentation of the "law" concerning the administration of justice in the United States, the book does not go very much beyond it. In contrast to Dr. R. M. Jackson's recent work on the *Machinery of Justice in England,*[1] Professor Mayers' book contains neither statistical nor much other factual data. It has a distinctly legalistic flavor, without consistently maintaining the full accuracy of a law book. But as we have already observed, the task of the author has been enormously difficult, and he has handled it with remarkable skill and competence.

MAX RHEINSTEIN*

THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT. By Robert H. Jackson. Cambridge: Harvard University Press, 1955. Pp. 92. $2.00.

Among the leaders of the New Deal, none was more aggressive than Robert H. Jackson. As Assistant General Counsel of the Treasury, he espoused the use of the taxing power to equalize income and distribute wealth, and he proudly defended a proposed estate tax on the ground that its effect on the Henry Ford fortune would be to "convert what is now a family industry into a widely owned one." He was the New Deal's most outspoken foe of big business and, as Assistant Attorney General for the Anti-Trust Division, he created a national furor by charging that the 1937 recession was deliberately contrived by a "strike of capital" against the government for the purpose of embarrassing the administration's reform program. Next to Roosevelt himself, Jackson was the most articulate advocate of the use of governmental power to bring about economic and social, as well as political, democracy; he said that he supported the New Deal with

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1. 2d ed. 1953.

"far more doubts about its adequacy than about its moderation." He was Roosevelt's choice as Democratic candidate for governor of New York in 1938, but was too radical for the state organization, which insisted on the renomination of the conservative incumbent—Herbert Lehman.

Jackson was the administration's most effective legal critic of the nullification of the New Deal program by the Supreme Court. His argument in support of the "packing" plan was acknowledged by all to be the ablest and most reasoned of any given. As Solicitor General, he contributed a major part in the clearing away of the constitutional rubbish which had accumulated over the years; his briefs and oral arguments before the Court were so brilliant that Justice Brandeis is supposed to have said that Jackson should be Solicitor General for life. His book, *The Struggle for Judicial Supremacy,* is still the most fascinating account yet written of the great constitutional struggle of the thirties; and it still affords the most candid and persuasive statement of a major thesis of the liberals of that day: that when great political, economic and social issues have been debated and resolved in political arenas by elected representatives, it is no proper function of the judiciary to thwart the democratic will by a "tortured construction" of the Constitution which equates the validity of legislation with the political, economic and social predilections of the Court.

What happens when a New Dealer, committed both to the realization of a fuller democracy and to a doctrine of judicial self-restraint, is appointed to the Supreme Court? Much of what has been written about Jackson, particularly since his death in October of 1954, has depicted him as a liberal New Dealer who became a conservative Supreme Court Justice. Critics have paired him with Justice Frankfurter in contrast with Justices Black and Douglas, both of whom, if not as intimate with Roosevelt as was Jackson, were nevertheless prominent New Dealers prior to appointment to the Court. If it is true that Jackson became a conservative while Black and Douglas remained liberals, then it is because the labels, as applied to Supreme Court Justices, no longer have the same meaning they once had. For during his tenure as a Justice, Jackson fairly consistently adhered to his philosophy of judicial self-restraint by the Supreme Court, and consciously deferred to the President and the Congress as the ultimate policy-makers, regardless of whether that policy was "liberal" or not. Justices Black and Douglas, on the other hand, have become known as "judicial activists" who do not hesitate consciously to give constitutional and statutory language that interpretation which they feel is more apt to effectuate democratic values.

To put it bluntly, Justices Black and Douglas are not loath to mold the law in accordance with their own political, economic and social predilections; this, of course, is the very judicial technique for which

the old Court was so roundly damned by the New Deal liberals. But if Jackson was consistent in his adherence to judicial self-restraint, Black and Douglas are also consistent from another point of view. If the ultimate value is the achieving of a more democratic society, then it is arguable that the judiciary, no less than the executive and the legislature, should play its part. Judicial technique then becomes a variable—judicial self-restraint when the elected representatives effectuate democratic values, supplemented by judicial activism, when the elected representatives either cannot or do not act, as the particular contribution of the Court. The difference, then, between Jackson on the one hand and Black or Douglas on the other is as to the proper scope and exercise of the judicial function in a democratic society. It smacks of dogmatism to say that either of their divergent attitudes is clearly wrong; but it is also doctrinaire, and superficial as well, to label Jackson a conservative and Black and Douglas liberals.

At the time of his death, Justice Jackson had substantially completed what were to be delivered as the Godkin lectures at Harvard, and it is these three lectures which have now been published in the book under review. The Supreme Court is discussed in each essay from a different point of view: as a unit of government, as a law court, and as a political institution.

As a unit of government, Jackson finds the Court to be "in vital respects a dependent body." The political branches nominate and confirm the Justices, they may alter the number of Justices, and it is they which must execute the Court's mandates. Further, Congress may control the Court's appellate jurisdiction, and Congress also controls the funds needed by the Court to operate. The jurisdictional limitation to cases and controversies, the fact that courts are passive instruments moved by the initiative of litigants, the procedural confinement to the record made in the lower court, and the limited scope of a judgment or decree, further circumscribe the Court's function. Finally, the working methods of the Court "tend to cultivate a highly individualistic rather than a group viewpoint." (p. 16) As a result of these jurisdictional, procedural and political shortcomings, Jackson is of the opinion that the Court is ill suited for solving many of the problems of modern society, even when they are cast in constitutional or legal form.

The most interesting part of the discussion of the Court as a law court is that dealing with diversity jurisdiction. Jackson states flatly: "In my judgment the greatest contribution Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states." (p. 37) His review of the considerations leading to this opinion is so compelling as to be virtually unanswerable. This chapter in the book also

contains a discussion of the administrative process and judicial review of the orders of administrative agencies which, although interesting (Jackson could not be otherwise) contains nothing new or unorthodox.

Most readers will probably be more interested in the discussion of the Court as a political institution. Jackson is aware of the fine line between political science and legal science and says with his customary candor, "Any decision that declares the law under which a people must live or which affects the powers of their institutions is in a very real sense political." (p. 53) The great political function which the Court is called upon to perform is to strive to maintain, in "a society in which rapid changes tend to upset all equilibrium, . . . the great system of balances upon which our free government is based." (p. 61) Jackson then discusses in turn each of these balances: between the Executive and Congress; between the central government and the states; between state and state; and between authority and liberty, or the rule of the majority and the rights of the individual.

But in discharging this function, the extent to which the Court can, or even should, contribute to the preservation of free government is, in Jackson's view, fairly limited. He assails the "cult of libertarian judicial activists" and finds their doctrine "wholly incompatible with faith in democracy." (pp. 57-58) He states his own philosophy that such an institution as the Court, functioning by the methods it does, "cannot and should not try to seize the initiative in shaping the policy of the law, either by constitutional interpretation or statutory construction." (p. 79) He warns against relying upon the judiciary to save the country from intolerance, passion, usurpation and tyranny and states his own belief that "the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions." (p. 81)

In all this Jackson is subject to the fair criticism that, in counseling against over-estimating what the Court can do to maintain and further effectuate a democratic society, he himself has under-estimated its potential and would not have it fulfill its function even to the extent possible. Because the Court cannot alone guarantee the promotion or perpetuation of democratic values, or because it is incapable of prevailing against the political forces if they are bent in other directions, it does not follow that the Court should not make its contribution when, and to the extent that, it can. A good case can be made that the judicial activists would have the Court go too far beyond the line (assuming it exists) which separates interpretation from legislation. But an equally good case can be made that the Court should not lag too far behind the line by making a fetish of judicial self-restraint and deprecating to excess the reach of the Court's influence. If Jackson is right that the great political function of the

Court is to maintain the various balances in our society, then arguably it is better that the Court should perform its function, not timorously but boldly, and with courage rather than trepidation. That Jackson himself was willing on great occasions to "seize the initiative in shaping the policy of the law" is manifested by his joining, even as he was preparing these lectures, in the unanimous opinion of the Court in the school segregation cases.

Regardless of what one thinks of the Supreme Court and its function in our system of government, he cannot read this book without profit. It is doubtless superfluous to add that, coming from the pen of Robert H. Jackson, the style is what would be expected of him who is conceded to have been the best writer on the Court. To that judgment there have been, so far as I know, no dissenting opinions filed.

WILLIAM P. MURPHY*

IT'S YOUR LAW. By Charles P. Curtis. Cambridge: Harvard University Press, 1954. Pp. 178. $3.75

This reviewer is no legal philosopher. Occasionally people who do not know him try, with the best of intentions, to get him into that role. This is one of those occasions. But he must bow out. He can only attempt the task on the basis that he is a practicing lawyer who enjoys extracurricular activities of a practical rather than a philosophical nature.

What Mr. Curtis has written will interest and instruct the lawyer who is engaged in the run of the mill rough and tumble work of the profession just as much as the lawyer who is a student of the background and foundation of law. For Mr. Curtis has presented his philosophy in such a homely fashion that the lawyer who runs and reads will understand and, understanding, will do better his day's work. It is important that the lawyer appreciate his own importance. It contributes to this appreciation if the lawyer knows that when he prepares a good partnership agreement he is doing something more than serving an immediate client, that he is adding to the sum total of material available for all those who come after him who want to enter into partnership relationships. Mr. Curtis tells us this. Under the sub-heading, "Lawyers as Legislators," he says:

> "You see the tractors laboring majestically across the field, cultivating the land. You don't see the earthworms. They are even less conscious of the magnitude of their achievement than the lawyers are of their part in legislation. The Congress in Washington and the legislatures in the state capitals pass laws. The administrative agencies turn out regulations.

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> The courts hand down judicial decisions and opinions. We forget, even the lawyers themselves forget, that it is the lawyers in their offices who make the bulk of our law." (p. 42)

Speaking of partnership articles, corporation by-laws, corporate mortgages and the like, he says, "It is impossible not to give these private authorities a legislative standing in the law." (p. 43)

It is heartening for the lawyer whose clients make him "work like a horse and live like a hermit"—to quote Lord Macmillan—to feel that his work is not entirely evanescent. For the force which drives the lawyer is not the desire to earn a fee but the pride which he can take in the quality of his work as compared with the work of other lawyers. Mr. Curtis asks: "I wonder if there is anything more exalted than the intense pleasure of doing a job as well as you can irrespective of its usefulness or even of its purpose." (p. 36) But he does not intend to imply that the lawyer's work is useless or that its purpose is other than to serve the public.

There are many places in the book where earthy advice to the lawyer comes through. One of them is in the discussion of the importance that a lawyer detach himself from his client. It is pointed out that what the client needs as much as anything else is an approach to the problem without prejudice, emotion or worry. In order that he may give this, the lawyer must not permit the difficulties and troubles of his clients to become his own. He must build a mental barrier in order to protect his detachment. Sometimes lawyers fear that in doing this they are acting selfishly and in their own interest. Mr. Curtis proves the contrary.

I do not agree with the Curtis theory of interpretation, which, as I understand it, is to give a legal instrument the meaning which the person to whom it is addressed gives it provided that he does not unduly stretch "the tether of" the words. (p. 62) I am old-fashioned enough to prefer the Vaughan Hawkins theory that words should be given the meaning which the writer gave them or would have given them if the question in issue had been brought to his attention. But many a lawyer will find the Curtis theory useful when the application of the traditional theory would shatter his case.

Mr. Curtis goes from interpretation to legal draftsmanship, which he regards as the "obverse of the coin." (p. 67) He describes what, in his opinion, lawyers actually do when they draft instruments. The lawyer does not in fact try by the use of words to be so specific as to bind for all time and under all conditions those who are affected by the writing. On the contrary, he appreciates that there must be play in every legal document and proceeds upon that theory. Mr. Curtis carries this to the extreme of saying that what we should "admire in legal draftsmanship is not precision. It is a precisely ap-

propriate degree of imprecision." (p. 76) He recognizes, however, that the draftsman must exercise sound judgment in knowing when and to what extent to leave the meaning loose and he does not suggest that his method would make good draftsmanship any easier. But the lazy lawyer, applying the Curtis theory of interpretation to what Mr. Curtis says about draftsmanship, might give it a meaning which would authorize him in being a little careless in the preparation of his documents.

The discussion of the jury is discerning and delightful. His first sentence is: "My uncle used to say that the jury served the great purpose of ridding the neighborhood of its sons of bitches." (p. 91) One who knew the uncle can almost hear him saying it, for he was a forceful and forthright Cape Codder if there ever was one. This was merely by way of introduction to the function of the jury in making exceptions, which Curtis points out they do by violating their oaths. But he says that that is better than tempting the judge to violate his oath.

The question has been raised whether we should not follow the English precedent recently established and abolish jury trial in most civil cases including particularly negligence cases. One reason advanced for not doing so in negligence cases in jurisdictions having a rule of contributory negligence is that the judge is bound by it whereas the jury applies with great liberality its own rough rule of comparative negligence. The analysis of the jury process which Mr. Curtis makes would seem to support the retention of the jury system except perhaps in those jurisdictions which have adopted the comparative negligence rule by statute. And Mr. Curtis might approve trial before a judge in those jurisdictions.

The final chapter is on courts of appeal. There we practitioners learn enough about the judicial process to feel justified in discarding the slavish adherence to tradition and precedent which, when I first wrote briefs in 1910, required the citation, summarization and distinguishing of an infinite number of cases. And that is very helpful. I must not ignore, however, what Mr. Curtis says about the Supreme Court of the United States and the willingness of the people of this country to let it be their conscience and their guide, to let it fight for the things that they ought to be strong enough to insist upon getting for themselves through their legislative representatives.

Curtis criticizes the citizenry for its shortcomings. But he recognizes that a republic, populated by human beings, must give the Legislature a certain play of emotions and, at the same time, impose some limitation. It wisely does this through a Constitution drafted with the appropriate amount of imprecision and a Supreme Court with power to restrain the Legislature despite the shifting winds of popular demand

and with a discretion to allow leeway or to work up to windward, as occasion may require.

Those who read *It's Your Law* carefully will learn not only to be better lawyers but also to make a start toward becoming philosophers.

HARRISON TWEED*

BENDER'S FEDERAL PRACTICE FORMS (Vol. 5). Edited by Louis R. Frumer. New York: Matthew-Bender & Company, 1955. Pp. xiv, 918.

The only way to learn the true value of any lawbook is to work with it. Some time ago I reviewed in these pages *Bender's Federal Practice Forms,* of which only the first four volumes were then available.[1] The remarks which I made in that review were based upon a somewhat cursory examination; but since then the books have stood upon the shelves in my office (at such times as they were not in use or had not been borrowed by one of my brother lawyers) and I have had occasion to learn their utility in daily practice. As a result I have no desire to modify or withdraw any of my earlier comments; but on the contrary were I reviewing the entire treatise at this time, I should cast my remarks in a somewhat stronger form, for experience has borne out what was then largely anticipation.

There has, however, been one substantial handicap to the complete utility of this formulary, and that has been the absence of an index. This has now been removed by the publication of the fifth and last volume of the set, which contains an alphabetical listing of topics occupying more than four hundred pages. With its help, even the most unlikely subject can be traced to its proper page and section, thus eliminating much wasted time in fruitless searching and speculation.

Nor are the contents of this final volume confined to such tables. In addition, there are the rules of the United States Supreme Court (those effective July 1, 1954), together with some eighty-six forms applicable to them, and one hundred and six forms devised in accordance with the Federal Rules of Criminal Procedure. While the latter may seem disproportionate to the more than four thousand forms listed under the Federal Rules of Criminal Procedure, it must be remembered that many of the forms are applicable to both, and only those exclusively criminal in nature have been included in this final volume. The result is a comprehensive and accurate collection of examples of every form which the average practitioner in the federal courts is likely to need

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1. Book Review, 7 VAND. L. REV. 726 (1954).

in any type of practice; and the set of five volumes, now complete, makes a welcome addition to the library of any lawyer who has occasion to go into those courts.

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