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1787: The Grand Convention, by Clinton Rossiter

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BOOK REVIEWS

THE AMERICAN JURY. By Harry Kalven, Jr. and Hans Zeisel. Boston: Little, Brown and Company. 1966. Pp. x, 559. \$15.00

The jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons? (P. 5.)

In order to evaluate such criticisms of the jury system as this one by Dean Griswold of Harvard, two basic questions must be answered. When do trial by judge and trial by jury lead to divergent results, and what are the sources and explanations of such disagreement? The answers which trial judges have actually given to these two questions have been compiled into one of the most thorough works on the jury system, *The American Jury* by University of Chicago law professors, Harry Kalven, Jr. and Hans Zeisel.

The American Jury, the result of extensive research of criminal jury trials under a Ford Foundation grant, is based upon 3,576 trial questionnaires filled out by 55 trial judges throughout the United States. The trial judges were asked how the jury decided a case, how they would have decided the same case in the absence of a jury, and the reasons for their disagreements with the jury. The trial judge was chosen as the best authority to assess reasons for such disagreements since the judge will perceive his own juror-impulses although he may not yield to them.

The authors state that the purpose of the book is not to determine whether the jury is a good institution, but to provide the statistics to enable the reader to reach his own conclusion concerning the merits of the jury system. This survey reveals that in fifteen of every twenty criminal trials the judge and jury are in complete agreement. In about four the judge and jury would have reached different verdicts and in about one of every twenty cases there is a hung jury. In almost every case in which the judge and jury disagree on guilt the jury acquitted where the judge would have convicted. Kalven and Zeisel believe that the institution of the jury allows a common sense reaction to the equities of a case which the institution of the judge does not always permit. This is supported by their finding that in only 9 per cent of the cases the judge is critical of the jury's performance even though they gave a different verdict than he would have given in 19 per cent of the cases.

The survey reveals that disagreements which do exist between judge and jury are primarily caused by one or more of five basic factors: issues of evidence, jury sentiments toward the law, jury sentiments toward the defendant, facts known only by the judge, and disparity of counsel.

Does the jury understand the evidence? The authors contend that the jury does understand the evidence, since there is a high percentage of agreement between judge and jury, and since the judges answering the questionnaires never advance the inability of the jury to understand the evidence as a reason for disagreement. One of the basic theses of this book is "that the jury responds to the discipline of the evidence, and when it does not, conceals from itself its own responses to sentiment, under the guise of resolving issues of evidential doubt."

The second most frequent factor in the disagreement between judge and jury is the jury's sentiment toward the law, which implies criticism by the jury of either the law or the legal result. The jury enjoys the modern role of a moderating influence against undue prosecutions for gambling, game and liquor violations, and drunk driving. In such cases the jury at times finds the penalty so harsh in light of the offense that it acquits the defendant rather than subject him to the penalty. The statistics also reveal some evidence that the jury is lenient in cases where the defense is drunkenness. The authors further conclude that the jury's broad tendency to view the victim, rather than the state as the other party to the case, accounts for the disagreements with the legally proper result in criminal cases involving contributory fault or provocation.

When the jury's sentiment about the defendant himself is a factor in the verdict, the defendant has a characteristic which marks him as sympathetic in the eyes of the jury. One judge commented on the acquittal of a defendant from the charge of indecent exposure, "He was a crippled polio victim. He cried on the stand and obtained the jury's sympathy."

The disagreements due to facts known only to the judge are attributed to the judge's knowledge of the defendant's prior record and the failure of the jury to learn of the record since the defendant did not testify. This is a factor in one-fourth of the cases in disagreement.

Surprisingly enough one of the least frequent of the five principal causes of the judge-jury disagreement is disparity of counsel. The chapter entitled "The Impact of the Lawyer" provides unique information on the quality of legal counsel in criminal trials today. In three-fourths of all criminal trials no problem of an imbalance of

counsel was found. In the other cases there is a superior defense in about the same percentage of trials as there is a superior prosecution. This chapter also provides unique information concerning counsel for indigents in such charts as "Economic Status of Defendant and Imbalance of Counsel" and "Economic Status, Race, and Imbalance of Counsel."

The authors have compiled over 150 other extremely valuable statistical charts. Defense lawyers will be particularly interested in such statistical charts as "Jury Waiver and Jury Lenience for Major Crimes," "Sympathy Index of Defendant by Sex, Race and Age," and "The Judge's Background and His Acquittal Rate."

This reviewer highly recommends this book to all members of the legal profession. *The American Jury* is undoubtedly the leading treatise on the use of jury in criminal trials.

W. GILBERT FAULK, JR.

A SOCIAL HISTORY OF ENGLISH LAW. By Alan Harding. Baltimore: Penguin Books, Inc. 1966. Pp. 530. \$1.65.

Mr. Harding's work should appeal to any reader interested in obtaining a perspective of the law as history. Conveniently, though with some congestion, the author has compressed twelve centuries of English sociolegal history into this pocket-size edition, indexed with enough particularity to accommodate the casual reader, and yet reinforced with an elaborate bibliography.

Despite the author's pedagogic remarks to law students and mildly saline commentary on the English Bar, which may impress the reader as stratagems of marketing, this scholarly work on legal history should cause the student or lawyer to consider once again the relationship of law and history.

When law is viewed as an expression of social needs, it is understood as a description of the society which produced it. Mr. Harding's view, however, is that law seldom functions as an adequate contemporaneous expression of social needs. The lawyer, too narrowly educated, and the court, too engrossed in precedent, are not sufficiently aware of the sociological background of law. If the law is to change, as the author believes it should, the historical processes of the development of law must be understood.

The first of the book's three-part division explores the Anglo-Saxon background of the early common law. The concepts of "feud" and "peace," generic names for feudal land tenures and Office of Justice of

the Peace, are analyzed as the more important constituents in the development of English Law as a system of ideas until the seventh century.

In Part Two, the author compares the procedure of the middle ages with the "new" procedure which was emerging through the appearance of written pleadings, and gives particular emphasis to the development of equity jurisdiction in the fifteenth century. In addition, this part includes several colorful chapters on the legal system as carried on by the earliest judges and lay attorneys.

Part Two also includes a chapter entitled *Law In The Making*, which, if read at the outset, alerts the reader to motifs in Harding's earlier chapters which emerge conspicuously in Part Three. The influence of procedure on the formulation of principles of substantive law is diligently plotted by reference to the nature and limitations of the forms of action as they evolved by fluke, necessity, and shifts in relative importance. The relation of statute law to common law is scrutinized, not so much by way of their differences, but as to their interdependence, and the beginnings of modern legislative practice are traced to the influences of the Roman idea of legislation. Harding's thesis is that the influence of Roman Law, the character of feudal society, and imperatives of Christianity combined to form a medieval *natural law* which, once divested of its divine origin, became the rationalistic *fundamental law* upon which the English Constitution is based.

Part Three develops the history of English Law from the seventeenth century parliamentary destruction of a sizeable part of the legal system, which, the author believes condemned English Law to years of incompleteness and improvisation, to the present day. In making his way to a concluding chapter about law reform in the nineteenth century, Harding details the growth of common law through empire and commerce. He points out that England did not so much give a body of law to her colonies, as she did an English way of making law and ordering it through a system of courts.

The lawyer or student who reads this work cannot fail to find it instructive. Yet he will find it a work that often requires him to draw his own conclusions in passages where the author is inattentive to his thesis. For those lawyers and students who may tend to venerate the law too much, an acquaintance with the historical approach is of particular merit since it, "introduces the element of irreverence which keeps the law alive, for it shows by what absurd shifts and acci-

dents much of the law has been arrived at; that a small portion of it may be essential, but most is contingent."

ROBERT H. GRAY, JR.

CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL. Donald J. Newman. Boston, Toronto: Little, Brown and Company. 1966. 243 pp., \$8.50.

Nine out of every ten defendants who are convicted of crimes plead guilty. Although the trial of not guilty pleas has long been a focal point for detailed examination, the much greater frequency of adjudication without trial shows there is another important area which has been overlooked, especially in the light of the recent developments in criminal law.

In *Conviction: The Determination of Guilt or Innocence Without Trial*, criminologist Donald J. Newman uses data gathered in the American Bar Foundation's Survey of Criminal Justice and Administration to examine the elements in the guilty plea process: the propriety of plea bargaining, the discretionary role of the judge in sentencing or even acquitting in spite of the plea, and the role of the defense counsel. He examines each feature by itself and in its relation to the process as a whole. The author points out, though, that the inquiry is not intended to produce a final answer, but only to present the situations, raise questions, and call attention to an area of growing importance.

This study reveals that while procedures vary extensively from one jurisdiction to another, the practice itself is based on a common aim—expediency. The avoidance of the time and expense of trials is important to the economical and efficient operation of criminal courts; a steady flow of guilty pleas serves this end. Since this process, though, may impair the interests of the accused, courts have begun to consider more carefully the factual bases on which guilty pleas are entered. But Newman does not discuss this development in detail.

One important element, previously given relatively little attention, is the role of the defense counsel. Since an attorney is frequently unaware of how he can serve his client who does not wish or need a trial, the author presents a concise analysis of the possible contributions of defense counsel: the assurance of consistent and equitable treatment, accuracy throughout the proceeding, sound representation during plea bargaining, advice as to the consequences of a guilty plea, and the keeping of records for possible future use. Newman points out

forcefully that if the role of defense counsel is considered important in the trial only, the guilty pleas process, the accused, and justice itself will suffer.

Although the investigation is not claimed to be complete, the study's value is somewhat restricted from the standpoints of representation and time. Data was collected in only three states, Kansas, Michigan, and Wisconsin, and the research was begun in 1956-57, before the most recent expansion and re-evaluation of individual rights under criminal procedure. The latter fault is somewhat ameliorated, however, by subsequent documentation which undertakes to update the research.

Despite these limitations, the study is of positive value. Although he offers no remedies, the author has succeeded in describing situations and raising questions. By calling attention to an important, but largely neglected area of law, Mr. Newman has shown that the process of nontrial adjudication is much more complex and significant than has been commonly thought.

CARROLL S. KLINGELHOFER, III

FROM ESCOBEDO TO MIRANDA: THE ANATOMY OF A SUPREME COURT DECISION. By Richard J. Medalie. Washington, D.C.: Lerner Law Book Co. 1966. Pp. xix, 339. \$7.50.

Since 1936 the United States Supreme Court has handed down a number of decisions that have altered the long established law governing certain phases of the criminal law process, especially in-custody police interrogation. These decisions have generated a great deal of interest and research in the whole criminal law process. Consequently, in 1965 the Institute of Criminal Law and Procedure was created at Georgetown University Law Center, pursuant to a Ford Foundation grant, to study each step in the criminal law system from police investigation practices to appellate and other post-conviction procedures. In *From Escobedo To Miranda: The Anatomy of a Supreme Court Decision*, Richard Medalie, the Deputy Director of the Institute, examines one phase of the criminal law process. He illustrates the operation of the appellate process by which the United States Supreme Court makes an important decision by examining *Miranda v. Arizona*, the most far-reaching and controversial case on in-custody police interrogation yet decided.

The book begins with the Court's opinion in *Escobedo v. Illinois*, since it delineated the background principles of law from which the attorneys in the post-*Escobedo* cases prepared their briefs. Following

the *Escobedo* opinion, the author includes portions of the briefs and transcripts of oral arguments presented to the Court in the post-*Escobedo* cases and in *Miranda*. The book closes with *Johnson v. New Jersey*, which deals with the question of whether *Miranda* should be applied retroactively, and the decisions and orders in the 145 cases then pending before the Court in which *Escobedo* and *Miranda* issues had been raised.

The substance of the work concentrates on showing the influence of briefs and oral arguments on a Supreme Court decision. From the more than 700 pages of briefs and 280 pages of transcripts of oral arguments presented to the Court in *Miranda* and its companion cases, the author has selected certain portions which involve issues presented in *Escobedo* and arranged these excerpts so that the reader can trace the development of these issues from *Escobedo* through the briefs and oral arguments to the *Miranda* opinion. This arrangement allows the reader to compare the Supreme Court's decision on a specific issue in *Miranda* with the arguments advanced by counsel on that issue.

Realizing that the arguments before the Court in *Miranda* were made in the light of the *Escobedo* decision, the reader will see how counsel for the various parties attempt to develop them on an *Escobedo* basis. Some of the attorneys relied only on the *Escobedo* rules while others expanded these rules into broader principles of law. Counsel for Petitioner in *Westover v. United States*, for example, used the latter approach in his argument as to when the adversary or accusatorial stage begins:

"[I]t seems only fundamental fairness that, . . . , the accused be accorded a measure of protection at least moderately commensurate with the force of his adversaries' position. It is, after all, that point of *custody* which deprives the accused of his most effective defense against self-incrimination—the freedom simply to *walk away*." (Emphasis added.)

Counsel for Respondent in *Vignera v. New York* advanced a more restrictive and formalized view:

The accusatory stage is when the police have a *prima facie* case, and it has become their duty, a magistrate or commissioner being available, to bring him to that functionary for arraignment. This is a true accusatory stage.

The following language from the *Miranda* opinion by Chief Justice Warren shows the Court's more receptive attitude toward broad concepts of justice rather than narrow but definite rules of law:

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action *in any way*. It is at this point that our adversary system of criminal proceedings commences

The author also includes certain portions of the *amicus curiae* briefs filed in the post-*Escobedo* cases to show the important part they may play in Supreme Court decision-making. This is of added interest because the Court patterned its thinking, to a great extent, on the broad, conceptualistic arguments presented in the *amicus* brief of the American Civil Liberties Union.

Other important issues examined in the book are the matter of compulsion under the fifth amendment, the time when the suspect's constitutional rights accrue, and the nature and value of a warning. The reader can see the varied approaches taken by the different attorneys to these and other problems in the selected portions of the briefs and oral arguments, and at the same time he may observe the Justices' reactions to these arguments as each member of the Court questioned counsel on specific points.

From Escobedo To Miranda: The Anatomy of a Supreme Court Decision is an interesting study of the appellate process in an adversary system of justice. The materials assembled in the book provide the reader with important insights into Supreme Court decisions as "the products of an appellate process dependent on the adversary presentation of printed briefs and oral arguments"

ALTON PHILLIPS

STATE LEGISLATURES IN AMERICAN POLITICS. Edited by Alexander Heard. Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1966. Pp. vi, 182. \$1.95.

Terms such as "governmental power" and "legislative action" usually invoke thoughts of federal power and federal action. This was not always so. At one time state legislatures were the repositories of great power and the initiators of substantial legislation, not compromisers with or followers of a federal leader. However, comprehensive social legislation, national defense, an ever-expanding population, and the centralizing demands of modern technology have made the national government increasingly active in ever-widening fields. *State Legis-*

latures in American Politics deals with one result of the increased activity of the federal government—the diminution of the influence of the state legislatures. While the future role of state legislatures in the federal system is still uncertain, these legislatures will never regain their former preeminence. With proper reform state legislatures can contribute effectively and importantly as forums for political and social expression and innovation despite the limitations imposed by the complexity of modern social conditions and the growth of the federal government.

The primary objective of this collection of essays is to provide a perspective on the problems which confront state legislatures by examining “the context in which state legislatures operate and in which proposals for altering their behavior must be evaluated.” The objective is not to provide easy or ready-made solutions to an extraordinarily complex problem. It is a tribute to author-editor Alexander Heard and the five contributing political scientists that the book succeeds as well as it does. The reasons for the diminution of the influence of state legislatures are complex, but that complexity has been deciphered and made intelligible, not by restricting the scope of the book to one particular state or by treating the subject on an excessively broad basis, but by having each writer explore a separate but related part of state legislative impotence. Although this approach necessarily involves some duplication, the cumulative effect of these separate essays is an excellent presentation of state legislatures: outdated, ill-equipped, understaffed, and desperately in need of help. The forces which influence the individual legislator: bad working conditions, increased demands of voters, socio-economic influences, and his own apparent inability to cope successfully with these problems emphasize the need for action, the need for better working conditions, and the need for more efficient, creative legislators. This book, while not an express call to arms, speaks, nonetheless, with the equally compelling voice of a factual treatment of the current status of state legislatures.

Attorneys should be especially interested in the third chapter, “The Political Setting,” in which Professor Malcolm Jewell discusses the background and effects of malapportionment and the expanding concept of judicial intervention. Unfortunately in an essay this short, Jewell does not have an opportunity to discuss in depth the concept of judicial intervention and its potential effects upon state legislatures. The treatment is shallow, especially the discussion of various Supreme Court decisions: *Baker v. Carr*, *Forston v. Dorsey*, *Gomillion v. Lightfoot*, and *Reynolds v. Sims*. Jewell indicates that judicial inter-

vention in malapportionment is still very much in the preliminary stages and seems to welcome the beneficial effect it will have upon state legislatures.

The changes in state legislatures which will occur as a result of reapportionment are now largely outside the control of these bodies. State legislatures will reflect more accurately the wishes of the majority, and as metropolitan interests are given an increasingly powerful voice in state government, the control of interparty and intraparty relations may shift and provide a more competitive and efficient means of expression. However, the ultimate effect of reapportionment on state legislatures is now impossible to predict since too little is known about the ways in which interest groups influence policies in metropolitan and suburban areas. The need for research in this area is apparent and the writer properly calls for it. It is unfortunate, however, that in cursory treatment of judicial intervention, the writer should spend an inordinate amount of time discussing, without expressly accepting or rejecting, the idea that judicial action in the field of malapportionment is simply another aspect of civil rights with a voting emphasis.

State Legislatures in American Politics suggests, but is much too general to provide, express answers to state legislative problems. It is a book which is impressive for its comprehensiveness, its communication of the political environment, and its evocation of the need for action. It is a book which is free of prejudice but which presents the definite point of view that state legislatures can be a valuable and important asset to our political well being. By letting the facts speak for themselves, the writers emphasize the need for reform of legislative machinery and the need for vigorous, well trained legislators. The future of state legislatures depends to a large extent on how well equipped the legislatures are to handle the increased demands of modern society. The legislatures, according to Heard, should be saved if only as a "forum where new needs are expressed and innovation advocated." If state legislatures continue to operate as presently, such a forum will disappear. For attorneys with any interest in or awareness of state politics, this book should be a valuable and informative introduction to the work which must be undertaken to revitalize state legislatures, if they are to fulfill their societal role.

JOHN PECK

1787: THE GRAND CONVENTION. By Clinton Rossiter. New York: The Macmillan Company. 1966. Pp. 443. \$7.95.

The failure of the Articles of Confederation to provide an effective government to solve the many political and economic problems which beset America after the Revolution, necessitated the calling of a convention in Philadelphia to create a new charter for the several states. Beginning at the point when the assembly convened, historian Clinton Rossiter recounts the familiar, objective facts about the Grand Convention. In typical textbook fashion he sets forth the assembly's day-by-day, step-by-step procedure, tells of its repeated accomplishments, and praises the finished product. Taken alone, such a lengthy record of events could be uninteresting to any reader who is not a history enthusiast, but *1787: The Grand Convention* has more to offer than a historical review. Rossiter gives insight into the current significance of the Convention and of the Constitution, as well as telling some interesting facts about the Framers and their masterpiece.

Throughout the book the author repeatedly emphasizes two aspects of the Convention which are significant today: firstly, the Convention itself is a "case-study" in the exercise of democratic (or, to be precise, pre-democratic) politics, and, secondly, the Convention is a "case-study" in the process of nation-building.

As the prime example of the ability of the democratic process to solve political problems, the author cites the Convention of 1787. At the time when this nation was in need of a new, better, or at least revitalized, system of government, its leaders were able, through the process of disciplined bargaining, to produce a blueprint for such a government in the form of a Constitution. In piecing together a set of operational rules of government and at the same time compromising their outstanding and sharply divergent political differences, the men of the Convention demonstrated that "the highest political wisdom in a constitutional democracy lies in the assembly rather than in the individual lawmaker." Rossiter suggests that the modern critics of democracy who doubt its ability to govern its citizens efficiently or meet changing social conditions would do well to look to our past and see that the process of democracy has worked effectively.

As a "case-study" in the process of nation-building, the author contends that the resolve of the fifty-five delegates in 1787 to transform ideas into institutions and to set a political course toward becoming a self-sustaining nation is mirrored today in the nationalism of those countries which Sukarno calls the New Emerging Forces. According

to Rossiter, because the post-1787 United States was the first of the New Emerging Forces, the decision-making process so successfully employed by the Philadelphia Framers should find in the future increasing political support among those countries which are striking out for self-assertion, world recognition, and independent government.

In light of the existence in 1787 of civilizations which began their drive for self-assertion centuries earlier, it is hard to conceive how the United States could accurately be called the first of the New Emerging Forces. Nationalism was certainly an active force on other continents prior to 1787. The reader is tempted to inquire why Mr. Rossiter did not consider the Roman Empire, Greece, or even Spain as the first of the Emerging Forces.

Rossiter's implication that emerging countries today should copy the procedure and political organization of the Convention because it was so successful in arriving at effective, enduring solutions to our national problems is also suspect. The fact that the democracy which resulted from the Grand Convention was readily accepted by and has worked well for the United States, logically does no more than justify its usage for a particular group of Anglo-Saxons with a particular background, from a particular geographical area, and with a particular technology. To generalize more than this and to say, for example, that the constitutional democracy adopted by the United States of 1787 would work equally well in the Ghana of 1967, is, at best, to indulge in a technical, logical fallacy.

Despite these imperfections in some of his theses, Rossiter presents in his book much noteworthy material which makes it worthwhile reading. One quite interesting aspect of the Constitution brought forth by the author is that it is a fascinating anomaly of both certainty and uncertainty. While it attempted to settle forever the three great legacies of 1776, independence, republicanism, and union, the Constitution left to other men and to other times such critical matters as the institution of slavery and the technique of judicial review.

The inability of the Convention to deal imaginatively with slavery resulted in an omission from the document which was so fateful that a Civil War far bloodier than the Revolution of 1776 was required in order to supply the missing terms. The Framers could not directly confront the question of slavery because to have done so would have threatened the very existence of a national union. To embody in the Constitution any threat to slavery would have invited almost certain rejection of the instrument. Likewise, any approval or encouragement of this "nefarious institution" would have meant rejection.

The technique of judicial review was not firmly established until sixteen years after the signing of the Constitution. Rossiter feels that this power of review is so essential to our constitutional rights that not until John Marshall had finished reading his opinion in *Marbury v. Madison* in 1803 did the Grand Convention in truth adjourn. According to this view, the holding of that landmark case should have been integrated with the original provisions of the Constitution.

Although the author's esteem for the Framers as individuals and as a group, and for their Constitution, is boundless and unending, he points out that those "Americans who think of the Convention as an assembly of demigods, like those individuals who expect heroes to live happily ever after, would do well not to look too closely at the lives of the Framers in the years that followed the Great Happening of 1787." Of the fifty-five representatives at the Convention, ten became bankrupt or were caught in dire financial straits, six suffered painfully through various chronic illnesses, two were killed in duels, one was poisoned by a greedy heir, one vanished mysteriously, one became an infamous drunkard, one went insane, and two even dabbled in treason.

Even though Mr. Rossiter's book is heavy with historical detail in some areas and over generalized in some of his conclusions, it is, nevertheless, a rewarding study which presents a complete and interesting account of one of the most important events in the last two centuries.

GEORGE A. RAGLAND

BASIC PROTECTION FOR THE TRAFFIC VICTIM. By Robert E. Keeton and Jeffrey O'Connell. Boston: Little, Brown and Company. 1965. Pp. xv, 591. \$13.50.

Of all the reforms proposed in the field of tort liability, few have received as much attention as the various proposed systems for dealing with automobile accident claims. The adequacy of the present system of recovery is being analyzed and questioned for a very basic reason. There are 1,750,000 persons injured annually in traffic accidents, but only a small percentage of them is receiving any compensation whatever, and an even smaller percentage is receiving adequate compensation.

The volume of material on this subject has increased at a rapid rate. Comprehensive studies have been published, but perhaps none has treated the subject as comprehensively as *Basic Protection for the*

Traffic Victim—A Blueprint for Reforming Automobile Insurance, by Robert E. Keeton, Professor of Law at Harvard Law School, and Jeffrey O'Connell, Professor of Law at the College of Law of the University of Illinois. Their detailed analysis appraises the effectiveness of current methods of compensation, explores possible improvements and finally develops a detailed proposal for reform, cogently reinforced with arguments supporting the constitutionality of the proposal. Superb scholarship and thorough research have led the authors to the conclusion that the present system, even in the most progressive states where compulsory insurance is the law, provides "too little, too late, unfairly allocated, at wasteful cost and through means that promote dishonesty." They stress that under the present systems the least seriously injured are more than amply compensated, while the severely injured are inadequately compensated. The authors support this contention by reference to most of the empirical studies on the subject which have been published over the past thirty years.

Their proposal for changing the automobile claims system is a basic protection plan which is in the nature of an extension of medical payments coverage. Keeton's and O'Connell's proposal for compulsory insurance would reimburse proved economic losses within specified limits *regardless of fault*. The tort remedy would then be available for claims involving property damage, the first \$100, and amounts above \$10,000 in damages for bodily injury. Recovery would only supplement available collateral benefits, and in the absence of optional additional coverage, the basic protection plan would not cover damages for pain and suffering. Loss of income is scheduled at a maximum rate of \$750 per month, and the payments under the proposal are on a month-to-month basis as losses accrue and not in one lump sum. The authors then set forth the text of a model act to carry out their plan, subject to modification regarding benefit schedules and premiums.

Most of the automobile compensation reforms proposed over the past three decades have been based generally on Workmen's Compensation principles. The Keeton-O'Connell plan is different from those proposals in that: 1. It preserves the common law tort remedy for injuries exceeding \$10,000. 2. There is no fixed schedule of benefits for specific injuries. 3. It operates through the courts rather than a special administrative board. As with other proposed plans, the Keeton-O'Connell plan was prompted by the inadequacies of the present system, such as uncompensated injuries, the inadequacy of the fault system, the unsatisfactory nature of lump sum verdicts and the evils of delayed justice due to congested court calendars. The basic

protection plan offers remedies for all these inadequacies except for court congestion which should be a major concern for any new plan. Under the present system of tort liability, the traditional burdens of proving or disproving negligence have acted as an incentive for litigants to reach equitable out-of-court settlements instead of risking recovery on an uncertain jury verdict. Such out-of-court settlements seem essential in mitigating court congestion. However the Keeton-O'Connell proposal may unwittingly increase court congestion and delay. Because attorneys' fees are paid by the insurer under the basic protection plan, the attorney and his client have little to lose by availing themselves of a tort remedy and seeking a recovery over and above the coverage of the basic plan knowing that even if unsuccessful, there would still be coverage under the basic protection plan. Since there is no risk of losing basic protection, it would be economically advantageous in many instances for an attorney and his client to sue. The incentive to reach an out-of-court settlement is thereby replaced by the incentive to sue. Two flaws are therefore quite evident. Traditional common law tort suits, retained by the proposal, will continue to crowd the court calendar, and the courts will be required to administer the plan. These two problems, which should have taken top priority in remedial reference, could increase rather than diminish court congestion.

In addition to this procedural defect, the Keeton-O'Connell plan may also be politically unrealistic and unattainable since it incorporates several features which may serve to alienate the very groups whose approval is necessary to make the proposal law.

1. The basic protection plan is compulsory. (To date only Massachusetts, New York, and North Carolina have adopted compulsory automobile insurance.)

2. The method of charging legal fees is drastically altered, since contingent fees are abolished.

3. A substantial proportion of bodily injury claims are removed from the present system.

4. The one payment system is replaced by a monthly payment system.

5. The principle of interest on overdue payments is introduced.

6. Collateral sources must be exhausted before basic protection benefits can be received.

For any proposal to seriously vie for consideration as a statute, certain basic criteria must be adhered to. The kind of plan that would be

acceptable to the state legislatures, the bar associations, the insurance industry, and the public at large must be considered, and, most importantly, a successful reform must recognize certain political realities by accommodating the traditional elements of the older system it attempts to supplant. The Keeton-O'Connell proposal probably involves too dramatic a change to gain acceptance. However, this fact does not lessen the importance of the authors' work. While their proposal does not, in any realistic sense, present a "blueprint", it could, nevertheless, prove a very useful guide for any system which does emerge to fill gaps in the present system. Every serious student of the law owes a duty to himself and to society to keep in touch with this important and changing area of law, and the Keeton-O'Connell proposal offers an excellent opportunity to do so.

KEARONS JAMES WHALEN, III

THE LITIGATION PROCESS IN TORT LAW. By Leon Green.
New York: The Bobbs-Merrill Company. 1965. Pp. viii, 507. \$4.95.

The intricacies of tort law have baffled generations of judges, lawyers, and students alike, despite countless words attempting to explain and crystallize tort doctrines. In *The Litigation Process in Tort Law*, Professor Leon Green, well known for his pragmatic approach to negligence law, offers his analysis of tort law by reproducing in one volume a series of articles which he has written over a number of years.

Green directs his analysis to the person, whether beginning student or not, who is susceptible to new approaches. The old tort analyses fall short of portraying the tort litigation process as it actually functions. The shift from a doctrinal to a more pragmatic approach clears away the veil of judicial obscurity and opens the way to the understanding that is necessary to challenge successfully and to broaden the scope of the law to meet the ever-changing needs of society.

This comprehensive study begins with a panoramic view of the tort law system and the several important factors which give it shape and momentum. Green states that the broadest purpose of tort law is to furnish people with a system of compensation for certain legally recognized injuries. Although this system is usually assumed to be shaped and limited by the application of tort doctrines and principles, Green asserts that these are mere tools which the courts use in justifying predetermined results. He believes the factors which really determine the limits of protection are: the administrative factor, the

ethical-moral factor, the economic factor, the prophylactic factor, and the justice factor. The influence of any particular factor depends upon the circumstances of the case but all of these factors must be considered and balanced if any rule is to have a lasting effect. Instead of expressing the determinative role of these factors in an opinion, however, Green points out that the courts seem to think themselves bound to translate the factors into historic legal concepts. Green criticizes that approach as only clouding issues, confusing juries, and preventing a pragmatic analysis of the limits of the law itself.

Having discussed the important factors which he believes shape the tort law process, Green then critically analyzes the litigation process in relation to negligence law, and asserts that confusion and injustices in the judicial process arise from the failure of the courts to develop an understandable and "reliable" formula for the analysis of negligence cases.

Green points out that in medieval tort law a person who injured another was held liable regardless of fault. This strict liability approach, reflecting the deep moral content of the age, was explained in terms of simple causation doctrines: a person paid for the injuries he caused. As industrial activity increased, however, a conflict developed between this policy of strict liability and new policy considerations which recognized certain economic factors and favored industrial growth. To escape the doctrinal limitations of the classic causation concept and to encourage industrialization, the courts created defenses such as contributory negligence and assumption of the risk, and grafted the theory of proximate cause onto causation. These doctrines crystallized before negligence law emerged as a separate field of tort law.

Green next turns his attention to the proper use of judge-jury system in modern society, the system being highly elastic and "individualistic." The judge, in deciding issues of law, must evaluate factors which will further the administration of law and justice, while the jury's role is somewhat more circumscribed. Theoretically it only determines issues of fact and applies the law to the facts it has found. Since judges and juries are subject to persuasive social values, however, judgments are ultimately the expression of the social values the judge and jury think controlling, and as long as these values remain variable, decisions on apparently identical situations can be different.

However, there are a number of cases, such as those involving employer-employee relations in which the determinative factors of social values have crystallized to an extent which enables placing liability

in a uniform fashion. The final determination of the issues can be adequately accomplished outside the judicial system, for example, through workmen compensation commissions.

In other areas, legislatures and the courts have codified the rules of conduct and uniformly placed liability when it has been felt that the stage of experimentation is past and the end result desirable. Violations of safety statutes such as pure food acts and laws prohibiting the sale of fire arms to minors have been interpreted as *per se* negligence by the courts. Jury participation in such cases is increasingly diminished, although the judicial process still plays an important role. But Green suggests that liability for automobile accidents has now become so firmly entrenched that administrative agencies should preempt judicial inquiry and administer relief according to damages claimed. Green feels that this approach could be extended to other areas of negligence law to clear the backlog of cases and, of even more importance, to give the judge-jury system more time to act in new fields of tort liability where it operates most efficiently.

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