

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1982

Book Review. Law in the Balance: Legal Services in the Eighties by Philip A. Thomas (ed.)

Bryant G. Garth

Indiana University School of Law - Bloomington

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [European Law Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Garth, Bryant G., "Book Review. Law in the Balance: Legal Services in the Eighties by Philip A. Thomas (ed.)" (1982). *Articles by Maurer Faculty*. Paper 1133.

<http://www.repository.law.indiana.edu/facpub/1133>

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

links Carson demonstrates how a combination of macro-sociological forces help to explain the inadequacy of safety legislation offshore.

Many of the limitations of the study are recognised by Carson himself. He does not claim that the type of analysis he employs has any applicability beyond the field of North Sea oil and at most that "the history of offshore safety encapsulates a series of contemporary sociological issues in a particularly acute and fascinating form." (p. 302). By approaching the subject through concrete analysis rather than at a high level of abstraction he sidesteps the issue of economic determinism and avoids taking a position in the debate which surrounds the nature of the contemporary State. He acknowledges too, the unresolved difficulties of moving from a high level of abstraction down to the 'lower levels' involved in research projects such as his own.

Sociologists who prefer their subject-matter neatly pre-packaged and labelled and those who, like Grace and Wilkinson, argue that the sociology of law must commit itself to a single theoretical perspective, will find this study disappointing.[1] Carson does not adhere to any clearly articulated theory, nor does he locate his analysis within any one sociological perspective. Arguably, where there is more than one valid sociological issue which needs to be explored, and none of the existing approaches are capable of investigating all such issues, then the weaknesses of the one perspective methodology can be avoided by the use of different approaches to deal with different issues, without lapsing into mere eclecticism.[2] Consistent with this view, Carson's analysis is informed at different points by an emphasis on economic and political constraints and by the interpretative sociology familiar from his earlier historical work.

This is a good empirical study, linked to wider theoretical concerns which, though modest in its claims, makes a valuable contribution to the literature on the emergence and implementation of legislations.

NEIL GUNNINGHAM*

*Law Faculty, Australian National University

NOTES AND REFERENCES

- [1] C. Grace and P. Wilkinson *Social Inquiry and Legal Phenomena* (1978).
- [2] D. Nelken "Sociology of Law v. Socio-legal Studies: A False Divide", Paper delivered to *Conference on Critical Legal Scholarship*, Kent University, March 1981.

Law in the Balance: Legal Services in the Eighties by PHILIP A. THOMAS (ed.) (Oxford: Martin Robertson 1981, 245 pp., £18.50 hard, £6.50 soft.)

The Royal Commission on Legal Services[1] failed to fulfill the expectations of most individuals concerned with reforming legal aid and the legal profession. Many, if not most reformist observers, expected a lay-dominated, relatively unbiased commission to reject certain English idiosyncrasies like the divided profession and the conveyancing monopoly, to see the compelling logic for a subsidized expansion of the law centre movement, and to recommend the creation of new institutional structures to make the profession more accountable to the public interest. When the Commission's Final Report failed to take up the call for throughgoing reform, the reaction predictably was very harsh, suggesting that the Royal Commission somehow had made a terrible mistake.[2]

One virtue of the essays in *Law in the Balance: Legal Services in the Eighties*, edited by Philip Thomas, is that they avoid the temptation to heap still more abuse on the Report. While the subject matter of the essays is ostensibly the findings of the Report, and the essays were

presented in earlier form at a Conference on the Royal Commission on Legal Services (held in Cardiff in March 1980 and co-sponsored by the British Journal of Law and Society and the Faculty of Law, University College), they go much beyond easy criticism. The Report has been used as a source for fresh insights into the debate on legal services and the legal profession. *Law in the Balance* contains nine essays, including general discussions of the profession by Richard Abel and Philip Lewis, and particular studies on law centres, legal aid policy, advertising, accountability, education, and research. There is also a useful comparison with the Report of the Royal Commission for Scotland.

As Philip Thomas emphasizes in the introduction (p. 2) and Philip Lewis explains at some length in his contribution (pp. 60–83), the Commission's approach to the legal profession must be taken seriously. It reflects a coherent view, built on certain assumptions about what a profession is and how it must operate. The Commission adopted the traditional professional paradigm as its *sine qua non* and then used that paradigm to examine a number of perceived issues in professional services. As Lewis observes, "the Commission started with a profession and looked to improve it." (p. 72) From this point of view, the only real error was probably with respect to law centres. The Commission refused to understand that the traditional paradigm could assimilate law centres and the kind of "innovative" legal services that they provide. It ignored, or perhaps could not see, the proximity between law centres' "political" activities and, for example, those of a number of corporate law firms.[3] The conclusions about law centres may therefore not even be persuasive to otherwise conservative members of the legal profession. The Commission for the most part, however, did what critics and other observers have often failed to do — asked how tampering with the profession in the name of the public interest could be reconciled with the traditional idea of an independent, self-regulating, monopolistic, high status and non-commercial but well-paid legal profession. Such a perspective may have led the Commission to defend its view of the conveyancing monopoly because of its importance to the income of solicitors. But generally the Commission's approach was based on a principled view of the profession; its first priority was to maintain the profession as traditionally envisioned.

The Report thus forces us to take seriously the idea of a legal profession: what it means today, and what it will mean in the future. The profession is under attack in England and elsewhere, and we do need to understand how the profession is resisting or embracing change in response to that attack. The power of the essays in this book is that they move us beyond the simple professional defense by the Commission, and, I think, show the inevitable failure of that defense to resolve the problems that confront it. While some of the essays are closely tied to the English situation, the themes that emerge are of enormous significance both in Britain and abroad. In the remainder of this review I would like to discuss several of these themes and how they are approached in the book.

Richard Abel's essay, "The politics of the market for legal services", (pp. 6–59) begins the book and provides a radical perspective that, I think, will have to be confronted henceforth by anyone interested in understanding the legal profession. Building on Larson's history and theory of professionalism,[8] Abel argues that the Commission's Report can best be understood as part of the legal profession's necessary effort to gain and preserve "control of the market for legal services." (p. 6). With the post World War II loss of control over the supply of lawyers and legal services, the market for legal services has been characterized by "overproduction," and the profession as a result has turned increasingly to the strategy of "demand creation." Examples include especially state subsidization of legal aid but also such innovations as legal advertising. The new strategy in turn requires new efforts to legitimize the profession: "the profession must now show why everyone *needs* legal services and why the state should help to satisfy those needs." (p. 34) New efforts, however, even if partially successful, raise new problems, and Abel does not expect the profession to be able to contain such problems as the "heightened level of competition," increased heterogeneity in the legal profession, and pressures for public control ("he who pays the piper calls the tune and is entitled to do so"). (pp. 24 and 42). Concluding a careful analysis that can only be outlined in rough form here, Abel

suggests that “[t]he latter half of the twentieth century may witness the demise of the professions.” (p. 44).

It is not possible to prove or disprove Abel's interpretation of the legal profession in post World War II Britain (or the United States), but there may be some disagreement about which are the leading factors in the profession's recent attention to questions of demand stimulation. First, the profession in its conduct and public pronouncements has not always been the prime mover in expanding legal aid. The government has had its own reasons, some of which are discussed below, to subsidize legal services for those who might otherwise be unable to afford them.[5] Second, it is not clear if the tremendous expansion in numbers of practitioners happened just because of a change in educational opportunities (loss of supply control) or also because of a perception among would-be-lawyers that the new role of the state and economy in the post-war period had enhanced the demand for lawyers. Third, marketing innovations such as advertising and price competition have to a great extent been imposed on the profession from outside forces, including the rise of the consumer movement generally in the Western World. It is hard to know how much they relate to the profession's need to stimulate demand.

But Abel's central points survive quibbling about ultimate causes. Leaders of the legal profession (and the Royal Commission's pro-professional Report in particular) are trying to adapt the profession and its markets to the current situation in a way that can preserve as much as possible the traditional professional structure, including a monopoly on legal services (at least profitable ones), high collective status, high incomes, and self-regulation. And that is not easy.

As Phil Fennell points out, the legal profession has always been characterized by “market” and “anti-market,” “entrepreneurial” and “anti-entrepreneurial,” elements (pp. 144–160). Recently there has been increasing pressure to promote access to legal services through enhanced competition among lawyers and between lawyers and others. Presumably, this reflects what Larson terms “the equalizing and democratizing effects of the market.”[6] And one task of the Royal Commission was to confront that tendency. It did so by suggesting very limited advertising by individual solicitors or firms under the control of the Law Society plus broader advertising campaigns by the Law Society itself. Price competition through advertising would remain prohibited. “All who get legal services,” the Commission emphasized, “should get the same standard of service,”[7] opting here as elsewhere in the Report to preserve its ideal of professionalism.

In contrast, the Scottish Royal Commission on Legal Services, as explained in the essay by Ian Willock, explicitly adopted a “consumer perspective” on these issues (pp. 84–106). As a result, the Scottish Report favoured marketing devices to enhance the accessibility of legal services, including advertising and price competition and an end to the conveyancing monopoly. But the Scottish Commission also stopped short of a system of open competition. Certainly competition was not to be permitted in the level of the services provided: the legal profession must maintain “rigorous standards of professional care and conduct.” (p. 104) Thus, as Willock points out, “the Commission seems to have been uncertain whether to espouse a professional ethic of service and moderation or a commercial ethic of competition.” (p. 104)

The same uncertainty, it can be noted, is found in the United States, where Supreme Court decisions in favor of accessibility have forced advertising and price competition on the legal profession.[8] Likewise, the logic of consumerism and the market has led increasingly to an emphasis of the notion of “client autonomy,” meaning that it is the client who, on the basis of “informed consent”, is to make the important decisions in the lawyer-client relationship.[9] The question that Willock asks about Scotland and Martin Partington raises in his essay about England and Wales thus surfaces as well in the United States: how far will the profession go in favor of consumer choice and competition? How far can it go without losing its identifying features? Can one draw the line, and if so, where? Closer to the balance recommended by the English Commission or the Scottish?

The momentum in the United States for product differentiation between types of services in

legal clinics, small personalized law firms, legal specialists, and high-powered corporate lawyers, is strong, especially if informed clients choose among particular types. It may lead further away from the traditional anti-entrepreneurial elements in the profession.

The profession in both Britain and the United States appears to be making a counterattack on the market, based on the issue of professional competence. That issue was given prominent concern in the Scottish and English Reports and has been defined as "the issue" for the eighties in the United States by the current President of the American Bar Association.[10] Virtually all the contributors to this book criticize the profession's long unwillingness to police the quality of its own members. And it is apparent that the issue of competence today represents an effort of the profession to reassert the ideal of an elite, well-paid, highly-respected, homogeneous, self-regulated, and monopolistic profession. While there is not space here to develop this topic,[11] a single professionally defined, high standard of competence helps cut back on competition, price-cutting, and diversity in the profession. Also, if the profession loses (and is seen to lose) its ability to impose restrictions on quality against the desires of informed consumers, there may be little left indeed of the traditional ideal of professionalism.

The future of legal services will be dramatically affected if the decline in the traditional ideal of professionalism continues. It will also be influenced greatly by the increasing state involvement in the delivery of legal services.[12] Indeed, a declining image of professionalism may lead to more state regulation. In addition, we should recognize that, while legal aid employs lawyers, the state also has its own interests in extending the law through expanding legal services. Several authors in this book, including Partington, Willock, and Colin Campbell, point out that welfare state governments have taken measures to facilitate the enforcement of new rights created by the state. As Campbell states, "Some legislators, or policy makers, *are* concerned that laws should bring about results." (p. 231) Part of the inadequacy of the Royal Commission's treatment of law centres was its failure to realize that the more activist strategies of law centres can be means of enforcing accepted legislative policy. The notion of "proactive" strategies, as discussed by Mike Stephens, is built in part on the need to "strengthen the capacity of clients to realize their rights." (p. 109)

There is another dimension to state-supported proactivity, however, pointed out here by Partington and Willock. Lawyers spread legality, meaning both legal rights and legal obligations. Partington in particular suggests that the latter function may emerge as the more important one in an era of economic scarcity. Lawyers may be co-opted wittingly or unwittingly to serve the state in cutting back legal rights:

Unless they are careful, therefore, lawyers will, far from being able to assist the deprived — the group who are said to be the primary concern of the Commission — have to perform the task of informing the poor that they cannot get various additional benefits. (p 139).

In the United States the Reagan administration has not developed much of an interest in using lawyers to cool off clients demands, but perhaps that is because of Reagan's longstanding and perhaps shortsighted opposition to the pro-rights activities undertaken by Legal Services Corporation lawyers.[13] It is well to remember, however, that any expansion of state-funded lawyers will derive from state policies that may as easily encompass the contraction of rights as the expansion and implementation of rights. In practice state lawyers may be essential to the diffusion of rights, but of course they serve other goals as well. That is why the Legal Services Corporation has survived thus far in the United States.

This review has highlighted some of the major issues about the legal profession raised in this important set of essays and in the Report that inspired them. As these essays demonstrate, the Royal Commission's Report may be valuable to the extent that it provides "the raw material which researchers need to provide superior understanding of lawyers and their role in society." (p. 216) At the very least, the Report provided and defended an ideal model of professionalism that can be the basis of serious research and thought about just what is happening with law and the legal profession today. All of the essays in this book, including the useful ones not yet

mentioned here by William Twining and Harry Arthurs, respectively, on legal education and accountability of the profession, go beyond particular reforms to confront the larger issues about the role and functions of the legal profession and legal services. Of course, this book too is limited by its focus primarily on the concerns that emerged in the Royal Commission Report. There is thus more in this book about the legal profession than about the role of law or the processing of disputes through the assistance of lawyers or others who may or may not invoke the law.[14] But the important achievement is to transcend the Royal Commission's ideal of the legal profession and begin to understand just what a profession is and how it is changing. The essays in this book suggest that the legal profession, despite the efforts of the Royal Commission, is moving far from its traditional ideal.

BRYANT GARTH*

*School of Law, University of Indiana, Bloomington.

NOTES AND REFERENCES

- [1] *Report of The Royal Commission on Legal Services*, (1978; Cmnd. 7648; Sir Henry Benson).
- [2] According to Thomas (p. 1), "Certainly there were those who felt that the case for reform of legal services was total and that its achievement would be promoted and possibly fulfilled by the establishment of a Commission." In a review I prepared of the Commission Report, I may have been guilty of expecting too much of the Royal Commission. See B. Garth, "The Benson Report: A reactionary view of Community Law Centres" (1980) 5 *Legal Service Bulletin* 147. Since my review there discussed law centres, I will not spend time repeating points here.
- [3] According to Campbell (p. 66) "Lawyers in private practice do all sorts of things and some have close parallels with test case and group action and certainly some represent, albeit in a different environment, the diagnostic, catalytic and combustible work that is involved in law centre community work."
- [4] M. S. Larson, *The Rise of Professionalism: A Sociological Analysis* (1977).
- [5] For a more general discussion see B. Garth, *Neighbourhood Law Firms for the Poor: A comparative Study of Recent Development in Legal Aid and the Legal Profession* (1980).
- [6] Larson, *op. cit.*, p. 213.
- [7] *Report, op. cit.*, para. 5.5.
- [8] See *Goldfarb v Virginia* 421 U.S. 733 (1975) (which prohibits minimum fee scales); *Bates v Arizona* 433 U.S. 350 (1977) (allowing advertising); and *In re R.M.J.* United States L.W. (January 25 1982) (advertising)
- [9] Spiegel, "Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession" (1979) 128 *U. Pa. Law Rev.* 41; Martin, "Informed Consent and the Practice of Law" (1980) 48 *George Washington Law Rev.* 307. Also *The A.B.A. Model Rules of Professional Conduct* (1981) draft rules 1.2 and 1.4.
- [10] D. R. Brink, reported in (1981) 67 *Am. Bar Assn. JI.* 264.
- [11] These ideas are explored in a preliminary way in a draft of a paper entitled "The Bar and the Issue of Competence" on which I am currently working.
- [12] This may be in the form of regulation of actual delivery of legal services. For an up to date review of the current plight of the Legal Services Corporation in the United States, see Drew, "A Reporter at Large: Legal Services" *New Yorker* 1 March 1982, 97-113.
- [13] *Ibid.*

- [14] Both Lewis (pp. 69–70) and Partington (pp. 131–2) emphasizes the failure of the Report to focus on these concerns. For an excellent approach to these problems as they relate to the profession, see S. Macaulay, “Lawyers and Consumer Protection Laws” (1979) 14 *Law and Society Rev.* 115.

The New Social Contract by IAN MACNEIL (London: Yale University Press 1981, xiii + 164 pp., £10.50 hard.)

Contact Law in Perspective by J. TILLOTSON (London: Butterworth 1981, 174 pp + index. £5.95 soft.)

Ian McNeil has for some years been developing and modifying a theory concerning the present state of contract law. The present book is the latest summary of his ideas. His main thesis is that the classical model of contract as single exchange of commodities between strangers is inappropriate and deficient in explaining modern contractual relations. He proposes instead that contract can only be understood by a recognition that every contractual transaction involves social relations over and above the mere exchange of commodities. By analysing and defining the nature of these social relations involved in such transactions, he suggests a definition which centres on a distinction between “relational contracts” encompassing the real social norms and “discrete contracts” which are the fictional underpinning of the classical theory.

MacNeil argues that the paradigm of classic contract law is an isolated economic exchange of commodities. This is a discrete transaction between strangers which presupposes no existing relationship between the parties nor creates any relationships other than those specified by the contract itself. This “discrete contract” is for MacNeil a fiction and an abstract creation of legal scholars. Every contract, he argues, involves social relations over and above the exchange itself. To understand these relational contracts we need to explore the nature of the social relations involved and created by the social actors who contract with each other. Much of the book revolves around two basic arguments. First, there is a dichotomy between discrete and relational contracts which reflects a gap between legal theory and social reality. Secondly that contracts are symbols of wider social relations and as we live in a contractual society, to talk about relational contracts involves discussing social relations as a whole. Contractual relations are a microcosm of society as a whole. So, “law scholars . . . must become something else — anthropologists, sociologist, economists, political theorists and philosophers — to do reasonable justice to the issue raised by contractual relations.” (p. 70)

MacNeil begins in Chapter 1 by attacking the limitations of the classical nineteenth century theory of contract as an abstract discrete exchange of promises. He emphasises the unreality of the definitions contained in legal textbooks which concentrate on the legal remedies rather than the social reality of exchange. Further, he attacks the exclusiveness of promises as a criterion for defining obligation in contract theory. This, he argues, ignores the other norms such as custom, status and hierarchy that may govern the social relations created by the contract. This leads him to his ideal-type definition of discrete contracts as opposed to relational contracts. For MacNeil, the discrete contract is archetypally an isolated economic transaction between two strangers who exchange defined and measurable commodities. The relation does not involve a change in personal status, and is designed to allow the individual to maximize their economic advantage. The transaction is typically short and specific within defined limits and with every contingency specifically agreed in advance. The exchange of commodities requires only a transfer of the goods without any further intercourse or co-operation, and the obligations are enforced by an external agency. This model of discrete contract is then contrasted with both primitive, pre-industrial societies and with modern, complex and long-lasting contractual relations typically of a large business enterprise.

MacNeil pursues his argument in a difficult and confusing Chapter 2. After much re-reading, this chapter is best understood as furthering the argument about the deficiencies of classical