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Book Reviews

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BOOK REVIEWS

PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS. By Walter J. Blum and Harry Kalven, Jr.[1]
Boston: Little, Brown and Company, 1965, Pp. vii, 88. $2.50.

The sponsors of various suggested plans for compensating the victims of automobile accidents have been inclined to predicate their proposals on the premise that the automobile accident is a social hazard, an inevitable result and a by-product of motor-minded American progress.[2] Such sponsors apparently see nothing unrealistic in the idea of special generosity to this particular class while ignoring those who suffer misfortunes from other causes.

These views are challenged by the authors of this well-organized little book. They note that "the problem is bigger than that which the proponents started out to solve," and they make the point that "the welfare universe is not limited to victims of auto accidents but includes victims of all other kinds of human misfortune. We can think of no ground for singling out the misfortune of auto accident victims for special welfare treatment."[3]

An interesting feature of this book is that it explores what might be called the "social security approach" to the problem of compensating the automobile accident victim. Overly simplified, this approach would contemplate (a) elimination of the "fault criterion," and (b) a "wide scheme of accident insurance" that "would require use of the taxing mechanism to collect premiums, producing what can be viewed as an extension of social security."[4]

The title of this book is derived from the circumstance that a teacher of private law and a teacher of public law combine their perspectives "on a topic that seems to need the attention and skills of both."[5] Because they relate the problem of automobile accident compensation to social security and the welfare approach to relief of misfortune, these writers recognize that "private law cannot borrow goals from public law fields without accepting the obligation to make a proper public law analysis."[6]

This is not to say that Professors Blum and Kalven endorse social security as a solution to the problem of compensating the automobile accident victim. On the contrary, they assert that "the social security approach to the problem of the auto accident victim has some destructive disadvantages."[7] In this respect, they point out that this approach:

(1) Would seem to run the greatest risk of lessening deterrence, if "economic considerations have a bearing on accident causing behavior";

(2) Has "the disadvantage of supplanting the private insurance industry

1 Professors of Law, University of Chicago Law School.
2 Marx, *Compensation Insurance for Automobile Accident Victims: The Case For Compulsory Automobile Compensation Insurance,* 15 OHIO ST. L. J. 134, 137 (1954).
3 Text at 83.
4 *Ibid.*
5 Text at 8.
6 Text at 85.
7 *Ibid.*

in a major sector of its activities, and replacing it with taxation and government administration of welfare benefits";

(3) Would "add to the power of the government and weaken what now is an important private pool of power"; and

(4) Calls for "one more — and perhaps an irreversible — reduction in the area of individual autonomy."[8]

Various persons have advocated different proposals looking toward substantial changes in our legal system's treatment of automobile accident claims. Among those that have been advanced and which are mentioned in this book are: (1) The Columbia auto plan of 1932;[9] (2) Green's "loss insurance";[10] (3) Ehrenzweig's "full aid" plan;[11] (4) The Clarence Morris proposal;[12] (5) The Conard report;[13] (6) The Marx reforms;[14] (7) The California study;[15] and (8) The Keeton-O'Connell plan.[16] Blum and Kalven assert that the main question involved in the consideration of any such plan is whether there may be "a single choice" between (1) the common-law adversary system "in which not all victims recover, and where inevitably there is delay in paying claims," and (2) an auto compensation plan under which "every victim would get something, including prompt payment of medical and emergency expenses."[17] This is a result of the premise that "the heedless, callous person causing injury would be paid on the identical formula as the innocent victim."[18] As Blum and Kalven state, "This is too stark a contrast because of possible variations both on the common law side and among auto compensation plans."[19]

Perhaps no other book on the contemporary scene has so clearly spelled out the elements of the problem that Blum and Kalven discuss. What they see in the suggested auto compensation plans may perhaps be outlined as follows:

Alternative I. Placing the cost of additional coverage on motorists. This would involve:

A. Redistributing losses among victims by placing the additional cost on some victims; or

B. Placing the cost on society as a whole rather than on some identifiable group; or

C. Financing the additional coverage out of the economies of administration expected to be derived from moving to a "plan."[20]

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8 *Ibid.*

9 1932 REPORT OF COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (Columbia reports).

10 GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958).

11 EHRENZWEIG, "FULL AID" INSURANCE (1954); Ehrenzweig, *Towards an Automobile Compensation Plan*, 3 FEDERATION OF INS. COUNSEL Q., 5 (1961).

12 Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

13 CONARD & MORGAN, THE ECONOMICS OF INJURY LITIGATION (1960).

14 Marx, *supra* note 2.

15 Weigel, *Preliminary Report of Plans for Inquiry into the Wisdom of a California Automobile Accident Commission*, 34 CAL. ST. B.J. 393 (1959).

16 KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1966).

17 Text at 4.

18 Knepper, *The Automobile in Court*, 17 WASH. & LEE L. REV. 213, 222 (1960).

19 Text at 4.

20 Text at 31.

Alternative II. Requiring potential victims to insure themselves against injury regardless of third party fault. Objections to this would include that:

A. No one should be compelled to pay premiums to insure against losses caused by the fault of another.
B. Everyone may buy auto accident insurance, but why should the state intervene and compel him to do so?
C. The administrative cost of selling separate insurance policies covering auto accidents to the entire population would be prohibitive.[21]

Blum and Kalven also note that three other points are usually urged by sponsors of such plans, namely that:

(1) The bluntest version of the discussion of vicarious liability doctrines is that a loss should be placed on the party with the "deepest pocket";[22]

(2) Because motorists, the argument runs, are a class wealthier than victims as a class, the motorists should pay for accident losses;[23] and

(3) The settlement ratio is already extremely high — approaching ninety-seven percent for all claims[24] — so that we already have a liability-without-fault program in effect.

Thus, in facing up to the various aspects of the plans and proposals which emanate from countless sources — from ivory towers to legislative halls — Blum and Kalven do a realistic job of spelling out what must be considered in trying to decide whether a new and different auto-victim-compensating program can be developed in today's society.

Furthermore, they repudiate the idea that we should "Sue for Safety," observing that "the law has not taken very seriously the possibility of deterring with tort sanction."[25] They recognize that "the driver's own personal safety is almost certain to be involved in any accident and that financial liability on the driver is not likely to add materially to this natural sanction."[26]

These writers do not "rush to applaud" the idea of "killing off lawyers."[27] Noting that even in the case of a compensation plan, a claimant will be financially better off with legal representation, they point out that:

> Everything in our experience strongly indicates that the lawyer frequently is an economically valuable component of the negotiating process in the simple sense that the results are different when he participates. For a compensation plan to work as intended, the adversary balance contributed by the lawyer will often be needed.[28]

It is submitted that as today's society views the problem of compensating

21 Text at 40-41.
22 Text at 55.
23 *Ibid.*
24 Text at 47.
25 Text at 62.
26 Text at 63.
27 Text at 48.
28 *Ibid.*

the victims of automobile accidents, it should differentiate between (1) the responsibility of that society to alleviate the distresses of its members, and (2) the duty of an individual to compensate his neighbor for damages suffered by accident. The first is the corporate responsibility of the state, based on the socio-economic concept of our American way of life. The second is derived from the fundamental religious belief that each of us is responsible to his God for his own conduct — hence, in respect to his neighbor, he is responsible only for that which results from his fault. This analysis and this resulting concept of liability-for-fault are fundamental to the common law that serves as the basis of our jurisprudence. Blum and Kalven recognize these principles, as they state that the "whole concept of fault" is closely tied to views on personal responsibility — "and hence to values that have deep cultural and religious roots."[29]

This book encompasses much information in few pages. Whether one agrees with the views of these writers is unimportant. What is significant is that whoever studies this text will have a better and clearer understanding of one of the most serious problems in today's economy.

*William E. Knepper**

THE PRESS IN THE JURY BOX. By Howard Felsher[1] and Michael Rosen.[2] New York: The Macmillan Company, 1966. Pp. 239. $5.95.

This informative publication spotlights the titanic collision between the first amendment right of freedom of the press and the sixth amendment right of fair trial. A parade of sensationalistic cases documents the authors' position — the all-powerful press must be curbed by legislative sanction from preventing the "newsworthy" accused from receiving his constitutional right to a fair trial.

The prologue succinctly states the case against the press:

> Nowhere are newspapers so thorough as they are in reporting crimes. The bloodier the crime, the more specific the report. . . . A narcotics murder is worth a half-dozen hit-and-run deaths to an editor with a sense of reader interest. Rape is a headline; rape plus perversion plus throat-cutting is the approach of the millennium.
>
> When a suspect in a sensational case is finally picked up and booked, editors may well lay in an extra supply of ink. Every detail of the crime is re-created, every scar on the suspect's face is lengthened and colored; the arresting officers are besieged for quotes (and usually give them), investigating officers are asked what evidence they have (and usually give it), school records are examined, employers questioned, and families badgered. The crudest behavior is piously justified by editorial affirmations of the public's right to know.
>
> In crime reporting, the press prints every fact it can find, and some facts it imagines. We read the stories and prejudge the defendant before he has been near the courtroom.

29 Text at 8.

* Member, Ohio Bar.

1 Howard Felsher, a television writer-producer especially active in public affairs programs and documentaries, wrote the book.

2 Michael Rosen, an attorney, is responsible for the research.

> At some point during the time we were borrowing our judicial system from the English, we closed our eyes and missed the guarantee of the rights of the accused with regard to the press. The English long ago recognized that the press, if it would have a conscience at all, would have it only if imposed by law.[3]

This book is written for the general audience rather than for the attorney.[4] If the authors' purpose is only to "provoke constructive comment" by giving the public an awareness that modern press coverage has a "negative bearing on our judicial system,"[5] then they have achieved their purpose well. If, however, it is the authors' objective to recruit advocates for their thesis, *The Press in the Jury Box* lacks the requisite impact to apostolize, for it fails to establish the rapport necessary to evoke from its reader lasting emotional feeling.

Be forewarned that the authors have no pretensions of effecting an analytic, dispassionate study. This is an angry assault on the press. The approach is reportorial rather than legalistic. For one familiar with the topic, it is at best light reading giving little or no insight into the jurisprudential considerations that any balancing of such basic constitutional rights necessitates. It is likewise of no value for research since it is devoid of citation, although the book is in essence a collation of cases where the rights of the accused have been trammelled.

This exposé — Felsher is a script writer, not a novelist — moves quickly. It is, however, virtually impossible to make dull reading of such sordid fare as the *Lindbergh* kidnapping, the *Rosenberg* spy trial, or the *Sheppard* case. The first chapter effectively sets the stage by shocking the reader into a realization of the omnipotence of the communications media. "God should have been a newspaperman. Then He would really be the focus of worship. . . . All the world prays to the power of the press. This power is based on fear and the demonstrated ability of the press to mold the minds of men."[6] The succeeding chapters headline horrible examples of newspaper excesses to illustrate how, under the banner of "the public's right to know," the circulation-impelled press is driven unrelentingly in the quest for sensationalistic fare for the table of the insatiable public.[7]

Since the Supreme Court has granted certiorari and the *Sheppard* case is once again in the public eye, it has been selected as an example to illustrate the effect of news "coverage" on the judicial process. In the chapter aptly

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3 Text at 30-31.

4 Of greater interest to the practicing attorney is the monograph FAIR TRIAL VS. A FREE PRESS (Center for the Study of Democratic Institutions, 1965). It consists of the papers offered at a 1965 symposium by Zelman Cowen, Dean of the University of Melbourne Law School; Alfred Friendly, Managing Editor of the *Washington Post;* Gene Blake, *Los Angeles Times* Staff Writer; Donald H. McGannon, President of Westinghouse Broadcasting Company, Inc., and W. H. Parker, Chief of Police of Los Angeles. Most sides of the question are presented in this interesting, succinct and readable thirty-six page paper. It may be procured without cost from the Center for the Study of Democratic Institutions, Box 4068, Santa Barbara, California.

5 Text at 7-8.

6 Text at 15.

7 While the newspapers are the focus of this attack, it is worth mentioning that the other communications media, especially television, have the potential for even greater infringements. The authors explore this in their chapter, "The Zealousness Transplant: Newspapers to TV."

titled "The Editor as Judge," the authors review the *Sam Sheppard* case, labelling it the "perfect example of dereliction of our nation's editors."[8] The murder of Marilyn Sheppard had attracted national attention. Dr. Sam related the story of a bushy-haired intruder who bludgeoned his pregnant wife. Because of the dearth of evidence indicating the presence of an outside suspect, suspicion soon centered on Dr. Sheppard himself. After several subtle editorials demanding that the police question Sheppard, three weeks after the murder *Cleveland Press* editor Louis Selzer dropped all pretense and "got down to the business of being his own judge and jury."[9] The July 30th headline read, "Why Isn't Sam Sheppard in Jail?" — the following edition, "Quit Stalling — Bring Him In." Sheppard was indicted. "To this day no one can know how deeply the grand jury was influenced by the campaign against Sheppard waged by the Cleveland Press."[10] But the *Press* was not satisfied with precipitating an indictment; it would settle only for a conviction. The newspapers previewed the evidence. Hearsay and other inadmissible evidence were brought to the attention of the public. James S. Bell of the Supreme Court of Ohio paints a vivid picture of the atmosphere then prevailing:

> Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. Special seating facilities for reporters and columnists representing local papers and all major news services were installed in the courtroom. Special rooms in the Criminal Courts building were equipped for broadcasters and telecasters. In this atmosphere of a "Roman Holiday" for the news media, Sam Sheppard stood trial for his life.[11]

Needless to say, Sheppard was convicted; but after ten years in prison he won an appeal based on the refusal to grant a change of venue. The real question is: since virtually every newspaper in America had featured the *Sheppard* case, was it possible for him to obtain a fair trial anywhere? Perhaps the Supreme Court will answer that question.

Of special interest is the final chapter which presents available remedies and attempts an evaluation. The authors conclude that only a legislative enactment which embodies the English system of almost complete restraint from pre-verdict news coverage of criminal cases will be effectual. The alternatives, especially that of a more rigid enforcement of *Canon 20*,[12] should be of particular interest to all members of the legal profession.

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8 Text at 68.
9 Text at 73.
10 Text at 76.
11 Text at 33-34.
12 CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION, CANON TWENTY:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances

The press excuses or at least attempts to justify its behavior on the theory that most of what it prints comes from police and attorney "leaks." The chapter, "The Unpluggable Dike: Leaks to the Press," relates the indiscretions of policemen and prosecutors in supplying the much needed quote for a scoop. Even Chief Justice Warren was guilty of using the intentional press leak in his younger days to obtain an indictment.[13] In an attempt to dry up the sources of these leaks, the Supreme Court of New Jersey has banned potentially prejudicial statements by prosecutors, policemen, and defense lawyers to news media before and during criminal trials.[14] The court's pronouncement singled out for censure statements about "alleged confessions or inculpatory admissions" by the accused, assertions that the case was "open and shut," and references to prior police records. Sanctions can be imposed on offending lawyers by the court and on police offenders by police disciplinary authorities.[15] While such a solution is not as completely effectual as that of the authors', it has the advantage of not directly interfering with the freedom of the press.

Since there seems to be universal acceptance of the oft-quoted H. L. Mencken remark that "journalistic codes of ethics are all moonshine," the alternative of a newsman's code[16]—a statement of principles "to educate a lot of newspaper people . . . to get them to take voluntarily the necessary steps to see that freedom of the press does not interfere with fair trials"[17]—cannot be seriously considered. Other possible solutions, including the exercise of the court's contempt power[18] and the accused's recourse to a libel suit, are fraught with problems.[19]

Concededly, legislative enactment is the only way of insuring that the communications media do not "poison the fountain of justice before it begins to flow."[20] But, do we want to afford less than the full measure of the first amendment guarantee? While this reviewer is in complete agreement with the authors that there can be no compromise with the accused's right to a fair trial, there is a possible alternative which the authors have not considered. Judge J. Skelly Wright[21] advocates the dismissing of those cases where pretrial pub-

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of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

13 Text at 89-92. An excerpt from *Earl Warren: A Great American Story* by Irving Stone relates how District Attorney Warren, feeling the necessity for public support, released each day's proceedings of the grand jury to the press. When condemned for this practice, Warren quoted the California statute—"members of the Grand Jury may not disclose evidence"—but argued that the statute did not prohibit the district attorney from doing so.

14 State v. Van Duyne, 43 N.J. 368, 204 A.2d 841, 852 (1964), *cert. denied*, 380 U.S. 987 (1965).

15 FAIR TRIAL VS. A FREE PRESS, *op. cit. supra* note 4, at 2.

16 See, *e.g.*, Massachusetts Guide for Bar and News Media, *id.* at 34-36.

17 *Id.* at 26.

18 The Supreme Court decisions in Wood v. Georgia, 370 U.S. 375 (1962), Craig v. Harney, 331 U.S. 367 (1947), Pennekamp v. Florida, 328 U.S. 331 (1946), and Bridges v. California, 314 U.S. 252 (1941), appear to have insulated the press from judicial contempt.

19 Among other problems, truth is an absolute defense and much of prejudicial pretrial publicity is concededly true. Also, the cost of such litigation is usually prohibitive.

20 Rex v. Parke, [1903] 2 K.B. 432. It is not absolutely clear that such a legislative enactment would not run afoul of the first amendment. It appears, however, that the cases cited in note 17 *supra* do not foreclose the possibility of a criminal contempt statute.

21 Judge, United States Court of Appeals for the District of Columbia Circuit.

licity has so infected the public that no judicial safeguard[22] can be employed to effectively afford the defendant a fair trial.[23] This alternative is premised on a recognition of the valuable right in a free press even in criminal matters. "If the press has access to police headquarters and other sources of information concerning police work, the probability that that work will be conducted with respect for the rights of the accused and the public is increased immeasurably."[24]

Returning once again to the *Sheppard* case, unquestionably the editor of the *Cleveland Press* went too far. But, are not such extreme actions sometimes warranted in those cases where money and influence are often used to "hush up" crimes and judicial malfeasance? Wouldn't it have also been a miscarriage of justice if Sam Sheppard could have escaped indictment merely because he was from one of the leading families?

Nevertheless, it cannot be denied that the press must be taught responsibility. Perhaps good example and drying up of sources will be the answer.[25] Then again, maybe we cannot control the excesses of the press with anything less than a legislative mandate, but before such drastic action is taken, an objective look at all the consequences must be made. This reviewer feels that the emotional approach of the authors pales in the light of the rational and practical urgings of J. Skelly Wright:

> It is my belief that full recognition of the news media's rights under the First Amendment would prevent a fair trial before an impartial jury as required by the Sixth Amendment in only a precious few cases, and that the dismissal of those few cases as non-triable would be a small price to pay for the great benefits we all receive — the public generally and persons accused of crime in particular — from the disclosures made in the press with respect to the goings-on in police stations, district attorneys' offices, and courthouses throughout the country.[26]

*Richard D. Catenacci**

22 Change of venue; change of venire; continuance; severance; voir dire examination; challenges; sequestration; and instructions to the jury.

23 Address delivered at the annual meeting of the Bar Association of the Seventh Federal Circuit, Chicago, Illinois, May 11, 1965, reported in 38 F.R.D. 435 (1966).

24 38 F.R.D. 435 (1966).

25 Edward Bennett Williams stated: "If lawyers would meticulously abide by this rule [Canon 20], most of the difficulties would be overcome." WILLIAMS, ONE MAN'S FREEDOM 218.

26 38 F.R.D. 435 (1966).

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