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Book Reviews

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DISPASSIONATE JUSTICE. By *Glendon Schubert.*† Indianapolis: Bobbs-Merrill Company, Inc., 1969. Pp. 342. $9.50.

Soon after opening this book, you get the notion that the author was being cute when he chose the title. Its message is very clear: neither Supreme Court Justice Robert H. Jackson nor his opinions were free of the passionate process.

The work, subtitled "A Synthesis of the Judicial Opinions of Robert H. Jackson," is a study by a reknowned political scientist, currently serving as York Professor at York University, Toronto. It has all the virtues and all the faults of such an inquiry, for the author has sought to read political and philosophical connotations into all of Jackson's actions. Not content with this, he turns a wide brush on the entire court and paints the whole bench, with all its changes during the Jackson tenure, with brash, bold philosophical colors, colors which are always distinct and identifiable, incapable of being blurred.

In the author's view, no decision ever made by Justice Jackson—indeed, no decision by the Court itself—was the product of impartial judicial evaluation of precedent or the briefs and argument presented by counsel. Instead, these decisions and opinions were merely the product of the environment which preceded and remained with the Justice on the bench.

In Jackson's case, these factors included his early life as a small town lawyer in upstate Jamestown, New York; his self-education (no college and only one year in law school); his success as that county-seat lawyer and his admiration of and respect for the managerial class who had hired him as their lawyer; his great experience as General Counsel for the Internal Revenue Service; Assistant Attorney General in charge of the Tax Division; Solicitor General and Attorney General, which experience curiously instilled in him a distrust and dislike of big government; his political affiliation with Presidents Roosevelt and Truman; and his personal pique at Justice Black who, the author says, put the kibosh in Washington on Jackson's hope to be appointed Chief Justice by President Truman, while Jackson was "over there" in

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Nurnberg performing as America's chief prosecutor at the war crimes tribunal. "Among his personal virtues were sociability, candor, eloquence and wit; his vices were pride, jealously, and . . . ambition."

Armed with impressions assimilated from a thorough study of his subject's life and times, Professor Schubert then proceeds to examine three hundred opinions of Justice Jackson and sets forth excerpts of fifty-three of them in this "synthesis" to prove his point. He tells us: "I believe this collection is representative of Jackson's style, of his best judicial writing, and the scope and content of his thinking." Maybe it is, and maybe it isn't. I don't know. I haven't read all three hundred of them.

But the validity of the conclusion that this particular collection represents the "scope and content of [Jackson's] thinking" is subject to some question when the author freely admits that two-thirds of his anthology focus on personal, rather than property, rights, whereas "in the universe of the more than three hundred opinions from which our sample was drawn, almost precisely the opposite ratio obtains." Furthermore, most of the anthology is gleaned from dissenting or concurring opinions for the ostensible reason that here is where the true measure of a judge is revealed. To a political scientist this may be a truism; to a lawyer, this is nonsense. Justice Jackson himself once cogently observed:

> There has been much undiscriminating eulogy of dissenting opinions. It is said they clarify issues. Often they do the exact opposite. The technique of the dissenter is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess. So the poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant.

Although I am not prepared to embrace the author's conclusions that his selections mirror the true Jackson legal philosophy, I do feel that the value of this book—and it has great value—stems from its insight into certain of the interests and rhetoric of the Justice. This aside, it is a scholarly thesis, written in crisp and fresh style, setting forth the ideology of a divided court in transition, moving from the divisions of one era into those of the next. It is a commentary, if not a pontification, on this transitional period with Robert H. Jackson as its anti-hero, straddling the period between the Nine Old Men and the Warren Court.

The book does have its faults. There is too much Schubert and not enough Jackson. The introductory commentary to the selections in many instances reveals, if not a lack of confidence in our judicial processes, certainly a lack of understanding of the day-by-day business of lawyering and judging. The constant imputing of petty motives to Supreme Court justices, the continual references to the personal dislikes of Jackson vis-a-vis Justice Black and Murphy and others, the repetition of the central theme that Supreme Court decisions emanate from a cauldron of emotional personalities rather than from the calm evolutionary process of precedent and reason—all of this—is at best a revelation of jurisprudential cynicism. At worst, it is academically simplistic.

But the book is worth reading. There is an easy pace to it. The Jackson selections are delightful to read, a refreshing change from the ponderous tomes afflicted with "footnote-itis" which seems to obfuscate most appellate opinions today—my own included. The work is a scholar's extensive research into the life and writings of Jackson, and the result is a distillation of that scholar's passionate viewpoints on his subject.

Accepted for what it is, as a sort of political science fiction, it is valuable. It carries the theme that it was the personality of Jackson, framed by his background and experience, which dictated the form and phrase of his decisions, and not Jackson, the lawyer. The theme runs through the book: it was no body of traditional law, no lofty language of our constitution, but only deep-seated feelings, engrafted by his personal experiences on and off the bench, that made Jackson a supporter of freedom to believe, so long as the exercise of this freedom did not trammel another's quiet right to exercise this same freedom; that made him uphold the doctrines of separation of religion and state; that made him respect the privileges of property ownership; that made him hostile to big government; and that would have made him feel at home in the Warren Court's treatment of search and seizure cases.

This emphasis on emotion, rather than reason, on personality rather than rationality, may be complimentary to some. But to a judge, especially to a justice of the United States Supreme Court, it is biting criticism as scathing in effect as it is elegant and sophisticated in presentation.

One last observation: Bobbs-Merrill did the author no favor in its

choice of type size for the opinions. Wear your reading glasses for this ordeal, and when it comes to quotes within the opinions, just dig out your magnifying glass, because this size type was designed by the same character who inscribed the proverbial prayer on the grain of rice.

*Ruggero J. Aldisert**

THE TROUBLE WITH LAWYERS. By *Murray Teigh Bloom*.† New York: Simon & Schuster, 1968. Pp. 351. $6.50.

To begin with, this book is mis-titled. And I can't suggest a better title without first identifying the specifics of how the present one is a misnomer.

First, Mr. Bloom is not a lawyer. He is a journalist of the muck-raking variety who over the years has written on such diverse topics as women's diets,[1] pupils and teachers,[2] and the high cost of living.[3] His perspective is then necessarily that of a layman.

He is not writing about all lawyers, nor about all aspects of law practice or lawyers' work. He writes only of those attorneys who deal with the "middle class", defined by him to be these people with incomes upward of about $6,000 but less than real wealth. And within this slice of the profession he really only decries those who have caused trouble—conceding that the rest are generally honest, upright and decent. Ignored (for better or worse) is the quality of legal services provided to the poor, the truly rich, and the myriad of incorporeal clients.[4]

Bloom's approach is neither systematic nor scientific. By his admission, the book is "unbalanced". Since he neglects to identify sources for most of the parade of scandals, it is hardly an authoritative book—unless as Bloom suggests one is willing to take the author's professional reputation as proof enough. Already some of his alleged incidents have been challenged,[5] and if the strain of exaggeration and half-statement

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† Mr. Bloom is a professional writer.

1. Bloom, *How Other Women Diet*, 129 REDBOOK, Oct., 1967, at 70.
2. Bloom, *Good Pupils, Poor Teachers*, 128 REDBOOK, Feb., 1967, at 72.
3. Bloom, *How Seven Families Beat the High Cost of Living*, 94 McCALLS, June, 1967, at 66.
4. *Compare:* Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK (1967).
5. Boardman, *Book Review*, 1969 WIS. L. REV. 671; Fuller, *Book Review*, 55 A.B.A.J. 68 (1969).

thereby shown run throughout the book, it is hardly the kind of indictment a prosecutor would comfortably want to take to court.

Nor does Mr. Bloom pretend to be dispassionate. He states and restates, and restates again, his thesis that lawyers are overpaid, underworked, prone to greed, and highly motivated only when the sanctity and financial security of the legal profession itself is under attack.

One reviewer has suggested the book could more accurately be called *The Occasional Trouble with Approximately Fifteen Percent of All Lawyers.*[6] This doesn't go far enough. I would prefer something like *Unrelated Essays, Based on Accumulated Gossip, About Scandalous or Money-Making Behavior by Certain Lawyers (And Some Non-Lawyers).* With these parameters drawn, I can now tell you about the book.

The volume consists of sixteen chapters of vituperative accounts of lawyer greed or misconduct. Particular attention is given to divorce cases (in which, says Bloom, lawyers become "partners" with the divorcees by exacting a percentage of the property as a fee) and probate proceedings, where Bloom suggests it is seldom an estate is settled without graft-like appointments of guardians by the court and a system of fees again based on percentages of the estate rather than time spent on the case.

The author attacks the contingent fee system, the bar's lethargic acceptance of Client Security funds and lax discipline by the bar of unscrupulous and unethical conduct by lawyers. Interspersed with these chapters of general discontent are others focusing on particularly outrageous instances: these chapters bear such reflective titles as "How to Get Kicked Out of the Middle Class by a Law", "Loser of the Year", and "The Swinger and His Indians". The first of these described the truly pathetic tale of Clarence Jackson of Phoenix, Arizona, whose business was absolutely destroyed—legally—by a lawyer for Sears, Roebuck who managed to liquidate Jackson's business to satisfy a $625 judgment.

The second of the chapters mentioned recounts the near catastrophe of a struggling government employee who lost his home to satisfy a judgment of less than $600. But here the culprit was not a lawyer. The foreclosure sale without reservation of an equity of redemption was permitted under a recently revised New York law, and the individual

6. Waltz, *Book Review*, WASHINGTON POST BOOK WORLD, March 2, 1969, at 20.

who foreclosed for the creditor and purchased at the sale was the non-lawyer president of a local realty company. These distinctions bother Bloom not one bit: he concludes that chapter: "Who's gonna pass a law saying lawyers can't make a fast buck when they see the chance."[7]

The penultimate chapter is a rosary of "I hate lawyers" chants. Apparently cumulative repetition of dislike, to Bloom, proves his point. But the reader is left wishing the list of speakers (mostly journalists like Bloom) could be expanded beyond Pamela Mason speaking on the *Merv Griffin Show.*

Almost anticlimactic is the final chapter, "What Can We Do?" Reviewer Lestor Mazor[8] has caught the irony of Bloom's suggestions for more publicity and exposure of lawyer misconduct: "If the lawyer's disease is legalism, journalists seem to suffer from its analogue, publicism." For after some three-hundred fifty pages of journalistic rock-turning, all Bloom can recommend is more of the same.

The book has not gotten a good press, but that of course is expectable when, as far as I can tell, all the reviewers have been lawyers. As literature it has been called "tiresome",[9] "somewhat tedious",[10] and "shallow",[11] and it is true that it is not a difficult book to put down. The parade of lawyer-committed atrocities goes on and on, and the promise is always that the next one will be worse than the last. For the lawyer reader, there is the growing frustration from chapter to chapter that the incidents couldn't all have happened so horribly. Throughout, Bloom's discourse suffers from the distortion factor commonly involved when a story passes from person to person by word of mouth.

Sooner or later, though, in discussing a book such as this, one has to ask whether there is as much as a grain of corn in the dunghill.[12] Of course there is. Whatever weaknesses of research or literary style mark the book, no one can reasonably doubt that in greater or less degree Bloom has in fact identified weaknesses in the law as it is practiced on his middle class target group. Lawyers will tend to agree with Dean Drinan of Boston College that the legal profession "needs every re-

7. Indeed, the only hero in the story is Legal Aid Attorney Robert Akeson who managed, in the course of litigation, to achieve a reasonable settlement which restored his client to his home.
8. Mazor, *Book Review*, 1969 UTAH L. REV. 429, 431.
9. Waltz, *supra* note 6, at 20.
10. Drinan, *Book Review*, AMERICA, Feb. 1, 1969, at 144.
11. Weiss, *Book Review*, NEW YORK TIMES BOOK REVIEW, Feb. 16, 1969, at 20.
12. Apologies to Jeremy Bentham.

former and prophet it can acquire," but "is not likely to accept Mr. Bloom's credentials as a reformer or as a prophet."[13]

Unfortunately, lawyer-readers will underestimate the reception Bloom's book will likely have among the public. That it will produce any immediate outrage is unlikely, but the subtler effects can be as dangerous to an unwitting profession. For the layman is prone to believe accusations such as Bloom's, and is likely to believe them in the exaggerated, distorted form in which Bloom presents them. The layman simply cannot dismember the accusations as several lawyer-reviewers have; the layman probably will not even muster a healthy suspicion that Bloom has overstated his case. Yet it is this public, ultimately, which will dictate when, and in what form, there shall be extraneous regulation of the profession.

Bloom acknowldeges through the book that certain remedial steps are in progress: Clients Security funds are being established; disciplinary procedures are being re-examined (the 1969 ABA Convention saw the adoption of a totally new Code of Professional Responsibility, displacing the older Canons of Ethics); the proliferation of group legal services for Bloom's "middle class". All these thoughtful attempts to protect clients and uplift the quality of lawyers' services share a common origin—they all emanated from the profession itself. In this, the law may be far outstripping its sister professions where outside regulation frequently is imposed after a genuine outcry over abuses left uncorrected within the profession.

Professor Mazor at Utah read Bloom's book and quickly identified the gut issue.

> The trouble with the American Legal profession is much more substantial and more difficult to overcome than Bloom's finger-waving would lead one to believe. As a number of recent studies (which receive scant attention from Bloom) attest, the major problems—the availability of legal services, the quality of those services, the economics of law practice, the education of lawyers—are directly related to the horse-and-buggy features of the organization.[14]

Horse-and-buggy, precisely. How unbelievably mired in the past is the legal profession, both in the manner in which it teaches its neophytes, and in the way it operates law offices. Christopher Columbus Langdell, certainly a sick man while alive, still dictates the curricula and teaching

13. Drinan, *supra* note 10, at 144.
14. Mazor, *supra* note 8, at 431.

method in most law schools. More seriously, courses in Legal Ethics, or Professional Responsibility, still concentrate on teaching law students how to keep non-lawyers from practicing law. These same courses can only suffer as law schools all-elective curricula, for students will certainly opt for "bar review" courses over good-conduct lectures. Why can't these courses remain mandatory, and why can't they focus primarily on the affirmative duties of the bench and bar to serve both client and community fairly and well, with help from whatever non-professionals can appropriately render assistance?

Any why can't the practicing bar appreciate the message of people like H. Lee Turner, chairman of the ABA's Special Committee on the Availability of Legal Services.[15] Mr. Turner, a practitioner from Great Bend, Kansas, has developed an extensive sub-professional staff in his office—a technique he calls "systems management". Careful training of this staff, and the delegation to it of large amounts of the work normally done by attorneys, permits Mr. Turner and his partner to handle many times the normal caseload for a two-man firm. If this model could be emulated, the sheer volume of clients could reduce fees and make large chunks of lawyer time available for indigent clients, continuing legal education, or other professional activity.

The trouble, of course, is that no matter how carefully and thoroughly lawyers draft up their analyses of what is wrong with their profession, and no matter how reasoned and feasible their proposals for change, their writings never become best sellers (as Bloom's book might, or as Dacey's did). The communication gap between the profession and the public continues, and indeed a similar gap exists within the profession, between most of the bar and those few with enlightened views of the future. Perhaps one of the prices we pay for these communication breakdowns is the success, from time to time, of a book like Bloom's.

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15. The work of Mr. Turner's committee is reported in 10 LAW OFFICE ECONOMICS & MANAGEMENT 7 (1969).

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LABOR AND THE LEGAL PROCESS. By *Harry H. Wellington.*† New Haven and London, Yale University Press, 1968. Pp. vii, 383. $10.00.

The field of contemporary labor relations, particularly in the area of collective bargaining, is not only controversial but presents a threat to the survival of existing labor-management institutions unless accommodations are forthcoming. This is the prognosis set forth by the author, who proceeds to address himself to two of the problems involved: major strikes and the inflationary effects of bargaining settlements on national economic policy. Three other problems of major importance which he identifies but which do not pose such a threat are union participation and management prerogatives in the negotiation and administration of the collective agreement, the role of the individual in the collective structure, and the activity of unions in the political process.

Although the book does not attempt to cover the field of labor law in its presentation, it does, in interesting and panoramic fashion, disclose a compendium on the development of that body of law with emphasis on the important problems facing policy makers today. Primarily, the author depicts in detail the history and the troublesome areas inherent in collective bargaining as affected by the legal process and the relationship of such bargaining to the concomitant political, economic, and social forces in our society. This rather prodigious undertaking is handled with ease, and the theories expounded reveal a thorough and knowledgeable insight into labor history.

An interesting example, revealed almost instantly in the first chapter which covers "Legal Theory and Collective Bargaining,"[1] sets the tone or premise for this work. It also serves to reflect the flavor and the technique employed by the author throughout the book. At the turn of the century, striking employees were tried for criminal conspiracy and, in some instances, convicted. Such cases also turned up after the Civil War and found favor with the courts in the 1880's. Actually, striking journeymen in those days conditioned their return to work upon the dismissal of all who had "scabbed" which, in essence, was an intent to establish a union shop.[2] Thus, it appeared in the criminal

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1. H. WELLINGTON, LABOR AND THE LEGAL PROCESS, CHAPTER 1 (1968) [Hereinafter cited as WELLINGTON].

2. WELLINGTON at 8.

conspiracy cases that, although the indictments contained a count alleging that the workers had combined to raise wages, it seemed that the condition for the elimination of "scabs" was the heart of the illegality. It is, therefore, remarkable that, in the celebrated 1842 case of *Commonwealth* v. *Hunt*,[3] the court found legal a strike to cause the discharge of a "scab." The author analyzes the court's decision not only in this case but also in other cases during this period of time:

> It is the courts' rhetoric, however, that remains important. First, the fears expressed by the judges that workers would band together reveal values that are implicated in many contemporary labor problems. Second, the expressed fears encountered a compensating rhetoric reflecting a compensating set of values that pressed for recognition. And third, it has been the province of the legal system and its several branches to mediate among these underlying values, values shaped by history and presented by economic and political power.
>
> The target of judicial rhetoric in the conspiracy cases was employee group action. If the societies of workers were to have their way, what would happen to the employer's freedom to dissent, the locus of political power in the community, and the economic well-being of the people? By and large, the judges could see only disaster.
>
> A Connecticut court pictured an official of a workers' society lecturing an employer in the following improbable way:
>
> It is true we have no interest in your business, we have no capital invested therein, we are in no wise responsible for its losses or failures, we are not directly benefited by its success, and we do not participate in its profits; yet we have a right to control its management and compel you to submit to our dictation.[4]

The author then continues:

> The rhetoric of the courts in the conspiracy cases is intriguing because the problems rehearsed are so plainly the ancestors of our own. Reviewing them is rather like passing through a gallery in a great English house where one sees in the portraits on the wall the face and figure in different dress of the man selling souvenirs by the door. The linkage between the Nineteenth Century labor problems and those today is in the underlying values appealed to by the courts; values not easily put aside, although surely no longer held in their pristine form.[5]

3. 45 Mass. (4 Met.) 111 (1842).
4. State v. Gilden, 55 Conn. 46, 72, 8 A. 890, 894 (1887) *cited in* WELLINGTON at 9.
5. WELLINGTON at 11.

Subsequently, the author discusses the courts' concern for the employer, their regard for the dissenting worker, and their rhetoric "addressed to the political and economic consequences of worker groups. . . ."[6] He then proceeds with his "Theories of Judicial Abstention,"[7] "Legislative Action,"[8] and "Legal Theory and the Contemporary Statutory Structure."[9]

The basic approach, as outlined, helps the reader to a more comprehensive understanding of subsequent chapters in which the author addresses himself to management rights and union participation in collective bargaining, the role of the employer in the collective structure, and union power relating to politics and the economy. Of considerable interest is the attention devoted to an analysis of the inflationary effects of collective bargaining settlements and of the ad hoc intervention by the Johnson administration to achieve a settlement when the International Association of Machinists struck five major airlines in 1966. The author reasons that such intervention is caused by the pressure of public opinion, also perhaps by the inadequacy of statutory solutions, and has the advantage of greater flexibility, but does impose "demands upon labor and management officials which they may justly believe are inconsistent with their legal and institutional obligations to union or corporation."[10]

Since the book went to press, we find continuing instances of the Administration's involvement in the collective bargaining process. It is interesting to observe that in a press conference on July 25, 1969, Secretary of Labor George P. Shultz advised both unions and management to consider carefully the effect of reduced inflation when negotiating settlements. He acknowledged serious "reservations" concerning the recent settlements in the construction industry that provided for yearly increases as high as 15% for the next three years. He suggested that management should not assume it can indefinitely pass on increased wage costs in the form of higher prices. He implied that unions could possibly price themselves out of the market by negotiating high increases for long periods. He cited the Steel Industry settlement of 1956, which projected high increments into the future and proved to be out of keeping with the economic climate and caused no end

6. *Id.* at 12.
7. *Id.* at 13.
8. *Id.* at 26.
9. *Id.* at 38.
10. *Id.* at 282.

of trouble in the 1959 negotiations. Schultz stressed that he was not trying to tell bargainers what to do, but was merely pointing out the Administration's policy and advising management and unions that they should take it into account when bargaining.[11] This, of course, is reminiscent of the Johnson Administration effort to keep wages and prices within the 3.2% range.

Now Secretary Schultz, endeavoring to implement the Nixon anti-inflation program, finds himself in the midst of tensions in labor-management relations arising particularly out of the current nation-wide General Electric strike. Whether the present administration will involve itself in the collective bargaining process at this point is, of course, conjectural. However, what is certain is the generation of further economic pressures to the inflationary spiral.

The author concludes from a full discussion of the foregoing that the existing methods of intervention are unsatisfactory and that legal control of major disputes is inevitable. He emphasizes, however, the strong commitment of our legal order to freedom of contract:

> . . . I have insisted that labor policy, embodied in the federal statutes, supported by a legal theory of collective bargaining and by the rhetoric of the labor movement, reflects the commitment of our legal order to freedom of contract. While the collective agreement is not the traditionally free contract, many of the policies that support it pull in that direction. A major objective of policy and a central quest of law have been to create an environment that would produce agreements which are fair as between the parties; that is, fair enough to permit government to rely upon contract, upon private ordering to establish the terms and conditions of employment. This was made possible by law helping labor organize and bargain collectively.[12]

Throughout the book, the author has not only cited many relevant decisions, but with legal acumen has related these decisions analytically to the subject matter of his thesis. In this connection, mention must be made of the forty-five pages of notes including considerable bibliographical material as evidence of a scholarly and painstaking work. His incisive approach and style, spiced with historical background, engross the attention of the reader. The book cannot be read hastily since it is so pregnant with factual information. Like whipped

11. 70 LAB. LAW REP. 48 (1969).
12. WELLINGTON at 299.

cream, it is to be relished only in reasonable quantities. For the lawyer and judge interested in labor law, it is required reading. For the layman involved in labor relations, it is important for its historical background and information.

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