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Book Reviews

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DISSENT IN THE SUPREME COURT—A CHRONOLOGY. By *Percival E. Jackson*.† Norman: The University of Oklahoma Press, 1969. Pp. xii, 583. $14.95.

The preface of Mr. Jackson's book rather grandly proclaims that its purpose is "to enlarge the area of understanding of the Court and its work, to increase the potential of public opinion that may influence the Court's attitude and strengthen its support" by mirroring "the acts and actions of its members, their strength and weaknesses, restraints and excesses, philosophies and idiosyncrasies."[1] Unfortunately, this goal is not achieved, for Mr. Jackson has authored a dull work consisting chiefly of a catalogue by subject matter of Supreme Court dissents interspersed with lengthy quotations and the author's criticisms of many of the more controversial decisions of the Warren Court.[2]

That I cannot give the book a more favorable reception is indeed unfortunate, for its theme is timely. With the recent change of Chief Justices, the Warren Court is now history. Probably at no other time (except perhaps during the early 1930's) has the Supreme Court received more public attention. And the focus of that attention has frequently been the fact that the Court's decisions are often far from unanimous. The change in Chief Justices generates additional interest in the Court and offers a natural point for pause and evaluation of the Court's dissenters.

Having chosen subject matter with both wide appeal and currency, the author begins with a useful chapter entitled "The Anatomy of Dissent," in which he touches briefly upon the commonly given justifications for dissenting opinions—difficult legal questions which produce divergent views, appeals to future justices to right a wrong rule, varying perceptions of the underlying facts, etc. Although hardly a definitive work on dissenting opinions, the chapter does serve to give the reader reference points by which to measure the dissents that follow. From here the author moves to a largely historical section. A chapter is devoted to Justice William Johnson, the Marshall Court's

† Member of the New York Bar.

1. P. JACKSON, DISSENT IN THE SUPREME COURT—A CHRONOLOGY ix (1969) [hereinafter cited as JACKSON].

2. *E.g.*, JACKSON 377, 471, 523, 525.

chief dissenter, followed by one covering the relatively placid reign of Chief Justice Taney. The dissents during The Civil War and Reconstruction period are given cursory treatment. The author then develops the Court's early treatment of the Fourteenth Amendment and moves from there to three chapters covering in detail the expansion of judicial power during the pre-New Deal period of substantive due process. The sharp disagreement over New Deal legislation and the aftermath of President Roosevelt's attempt to enlarge the Court's size form the basis for three chapters tracing dissent in the 1930's. The last several chapters of the first section introduce the second section by following the transition from Chief Justice Stone to Chief Justice Vinson and concluding with two chapters titled "The Years of the Witch-Hunt." An historical survey of this nature tends to become pedantic. The tedium is somewhat relieved by the device of relating the issues faced by early Courts to those of today, graphically demonstrating the essential continuity of the Court's business.

The last half of the book is devoted to the dissents of the Warren Court. As one would expect, the author has isolated the major areas of disagreement and covers the Fourth Amendment, civil rights, criminal cases (chiefly those dealing with confessions and the right to counsel), obscenity, reapportionment and voting, the First Amendment, labor and anti-trust. Included in this section are a series of tables correlating dissents for the 1950 to 1967 Terms. These tables document what has now become widely known—that the Supreme Court has become increasingly contentious in recent years as it split into distinct "liberal" and "conservative" factions. Finally, the author concludes with a brief chapter suggesting that the Warren Court has gone astray in legislating rather than confining itself to the proper judicial function of deciding cases.

As should be evident from the preceding summary, to undertake in one volume a description of dissent in the Supreme Court is a major task. And the job is made more difficult when it is undertaken with the belief that lengthy quotation is desirable so that the Court's dissenters may speak for themselves. Unfortunately, the very scope of this attempt produces superficial treatment of the phenomenon of dissent and contributes little to the reader's understanding of why Supreme Court justices dissent or what role dissent plays in the judicial process. Mr. Jackson does emphasize the obvious—that though the Supreme Court has always had its dissenters, both the volume

and virulence of dissent have increased markedly during the last decade.[3] But dissent serves purposes beyond the mere verbalization of judicial disagreement over the resolution of complex political and social issues. It acts as a check upon ill-considered views of the majority and tends to confine the Court to the issues at hand. Dissenters provide assurance to the public and the litigants that the Court fully deliberated the issues, considered contrary views, and attempted to respond to divergent opinion. Often, the dissenter will dramatize the need for legislation to resolve a problem exceeding judicial capabilities.[4] Equally important, dissent may well be a reflection of a highly personal reaction to legal problems when the particular facts before the Court find a resonance in the background and experience of an individual justice.[5] Notably absent from the book is material giving the reader insight into the forces which shaped the views of the dissenters. Given Mr. Jackson's professed desire to enlighten the general public about Supreme Court dissenters, a fuller exposition of the reasons for and the motives prompting dissent would have advanced this goal.

Furthermore, the reader—especially the lay reader—will be left with a simplistic view of the judicial process. Typical of Mr. Jackson's approach is the introductory paragraph of his final chapter: "That the Warren Court consisted of a libertarian majority is open to little question. That, under the guise of interpreting the Constitution, the Court has been legislating and declaring policy for years, is and has been an accepted fact."[6] This comment seems to adopt the view often expressed by those critical of the trend of recent decisions that the Warren Court has somehow perverted the judicial process and distorted the traditional judicial role. Although the process and the role are not clearly defined, and although the reader is never told how the Court has gone astray, the distinct impression is that recent decisions were arrived at by impermissible techniques. However, whether the Court adheres to its prior decisions or establishes a new rule, every constitutional question involves the weighing of competing values.

3. That the Warren Court has had more than its share of judicial conflict has long been recognized. See, *e.g.*, K. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959); A. Sutherland, *Supreme Court Opinions: A Catalogue of Dissents*, 45 A.B.A.J. 1178 (1959).

4. See S. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923 (1962), cf R. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810 (1961).

5. For an excellent discussion of this subject, see J. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966).

6. JACKSON 520.

There is no objectivity in constitutional law because there are no absolutes. Justices legislate in any realistic sense any time they choose between two positions. In the final analysis, each Justice determines which set of values for his society he holds strongly enough to enforce when the opportunity arises. Justices have been deciding cases by this process since the Court was organized and will continue to do so.[7] To suggest that the Warren Court is doing something different is to mislead the reader.

The work has its redeeming features. If nothing else, it demonstrates that dissent in the Supreme Court is not a recent phenomenon. This alone may serve to convince the layman that the Court has always been the focus for many of the acute issues of each era and that this very fact will inevitably produce disagreement among men of different backgrounds and beliefs. Furthermore, the Supreme Court has had dissenters—Holmes, Brandeis, Douglas, Black—whose views anticipated the solutions of later judicial generations. The work, by giving each of these Justices ample treatment, illustrates the continuity from dissent to future majority opinion. Finally, the Court's most articulate spokesmen have often been its dissenters. Their dissents can be masterpieces of legal advocacy, persuasive, masterfully crafted, occasionally humorous or sarcastic and always literary gems. Through the vehicle of extensive quotations, this book exposes the reader to sheer good reading.

Reduced to its essentials, I have but one basic complaint with the work. In attempting to cover too much, the book's treatment of Supreme Court dissent is superficial. A less ambitious undertaking would have afforded the opportunity for in-depth treatment. By biting off more than the reader can conveniently chew, Mr. Jackson has unfortunately produced a somewhat indigestible book.

*Samuel J. Roberts**

7. See, *e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930).

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ADMINISTRATIVE JUSTICE. By *Philippe Nonet*.† New York: Russell Sage Foundation, 1969. Pp. 274. $——.

Professor Nonet has studied the evolution of the California Industrial Accident Commission from both a procedural and substantive standpoint. As compared to the usual administrative law studies, the author has blended the substantive problems with the legal procedures to present a case study of industrial development and change. To the typical lawyer who does not always examine the philosophic implications of the law that he helps to create, Professor Nonet's book provides a sociological challenge to the adjudicatory procedures used in the administration of welfare legislation.

The California Industrial Accident Commission, similar to the Pennsylvania Workmen's Compensation Board, was created in 1910 to mitigate the harsh doctrines of the common law which treated industrial accidents arising from employment in the same manner as a case of tort liability for negligence. In Pennsylvania, prior to Workmen's Compensation, the employee was required to go through lengthy and expensive court procedures, and he was barred from recovery unless negligence could be directly attributed to the employer. Even then the rules of "contributory negligence" and the "fellow servant" doctrine substantially reduced the likelihood of a successful court action. The Pennsylvania Constitution was amended in 1915 to permit legislation to require the payment of compensation by the employer to injured workmen, and Pennsylvania law further regards the right to compensation as a *contract* between employer and employee. However, it is interesting to note that in both California and Pennsylvania the early workmen's compensation laws were regarded as welfare measures, and even as late as 1960 the Superior Court of Pennsylvania referred to workmen's compensation as a humanitarian measure.[1]

In establishing the sociological climate in California in the early days of the California Commission, Professor Nonet has uncovered numerous early documents which characterize the problems of industrial compensation as an "attack on poverty."

Thus, because the California Industrial Accident Commission was regarded as a *welfare* agency, compensation payments were not a matter of "right", but the goal was made to administer the Program for

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1. Dupree v. Barney, 193 Pa. Super, 331, 163 A.2d 901 (1960).

the *rehabilitation* of each given employee with the cessation of payments at the point of rehabilitation.

Under this paternalistic concept, legal procedures were shunned in favor of administrative discretion and flexibility to enable consideration of the needs of the injured worker, the needs of the family, and the kind of supervision and support necessary to return the worker to employment. In fact, as described by Professor Nonet, the pre-World War I goals and procedures of the California Industrial Accident Commission followed the pattern which subsequently emerged in the Public Assistance legislation of the Thirties.

In California, however, as in Pennsylvania, litigation instituted by employers for review of compensation decisions very quickly established legal guidelines limiting the earlier concept of administrative discretion. The informality of the roundtable developed into the witness box, the hearing room and the legal transcript. For administrative flexibility to survive, both parties must accept the discretionary power of the administrative authority. Once the arsenal of legal defenses were brought into the hearing room by the employer, the discretionary and flexible procedures became subject to judicial scrutiny.

Professor Nonet provides a study in depth of the transformation and evolution of the Agency to a quasi-judicial body wherein the role of the Commission shifts from the "*advocate*" to the "*adjudicator.*" In other words, the social aspect of the Agency's function became secondary to its judicial role.

Professor Philip Selznick, chairman of the Center for Law and Society, in his introduction to this book describes this change in function as "the sociology of the cop-out." The author points out in his final chapters that as the "rule of law" has emerged, the reform measures of the early period were modified and adjusted to "the system" and under the process of "settlements" and fixed damages for injury, "individual" justice has merged into "average" justice.

This book is important for a number of reasons. On the substantive level of the evolution of the principle of the employer's responsibility to the employee for injuries received in the course of employment, numerous social problems still require resolution. The current "black lung" controversy from the West Virginia coal mines illustrates that we have not yet solved the problem of responsibility for industrial injury to the individual worker.

As a study in the evolution of an administrative agency it may be

instructive to compare the evolution of the Industrial Accident Commission to current problems in the areas of Public Assistance and welfare payments. It is interesting to note that, as welfare recipients have organized under anti-poverty programs, demands have been made to remove the concept of "welfare" or "charity" from these stipends and to establish in their stead certain basic "*rights*" on the part of the individual. From a reading of the history of the California Industrial Accident Commission, as set forth by Professor Nonet, the question arises whether the evolution of our concepts of workmen's compensation from "welfare" to "rights" does not also establish a pattern to support similar changes in other types of welfare legislation.

The major defect in Professor Nonet's study—and perhaps this is attributable to the fact that he is a sociologist and not a lawyer—is the partial failure to recognize the social value of "legal rights" as opposed to discretionary welfare. In fact, it would appear more appropriate to conceptualize compensation as a "right" similar to old age and survivor's insurance rather than a welfare measure based upon considerations of need.

Procedurally, discretionary justice to meet the needs of the individual has been subject to serious scrutiny within the decade of the 60's. Proponents of limited legal guidelines and discretionary power for administrators in such areas as juvenile courts and similar quasi-judicial institutions are now questioning the impact of such discretionary power on the individuals who appear before these agencies. One advantage of clear legal procedural guidelines is the protection of the individual against the vagaries of changing administrative officers. While the Rule of Law may be restrictive, it can also serve as a bulwark against abuse of power.

The history of the California Industrial Accident Commission also sheds additional light on other aspects of regulatory agencies. In Chapter IV the author notes that from the inception of the compensation law the injured employee and the employer did not operate on an equal basis, and that the legal establishment of the employer groups sought to strictly limit the benefits of the original statute. It was only when the employee also had access to the trade union establishment that equalization of forces occurred in these proceedings.

Unfortunately, many administrative agencies in the United States have become partial captives of the industry which they were set up to regulate. For example, the individual consumer is in no position

to utilize the state forums which provide for the regulation of public utilities. Many administrative agencies, originally established to simplify legal procedures, have acquired their own body of expertise, precedents and decisions.

Perhaps we have reached a point in the development of administrative agencies and administrative procedures where what is needed is a public defender or ombudsman to represent the individual claimant. The implementation of individual benefits is not so much a question of discretionary justice but the need for the individual claimant to have an advocate in the court.

In summary, Professor Nonet's book presents stimulating and provoking ideas. Even though sociologists and lawyers may not agree, there is value to the legal profession to view legal problems from the vantage point of another discipline.

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MOMENT OF MADNESS: THE PEOPLE VS. JACK RUBY. By *Elmer Gertz*.† Chicago: Follett Publishing Co., 1968. Pp. 564. $6.95.

Elmer Gertz's book is an account of the suffering of Jack Ruby. The book focuses on the post-trial and appellate stages of the case and on the efforts Gertz and others made at the appellate level to dissipate the heavy prejudicial atmosphere that hovered over the Ruby case at the trial level.

Gertz was brought into the case after Jack Ruby had been sentenced to death and Melvin Belli had departed. The author-defense counsel outlines the workings of the American system of justice as it grappled with Ruby, the problems created for the defense by publicity, and the efforts of the defense to utilize the expertise of professionals outside the field of law.

Gertz begins with a look backward to what happened to Jack Ruby before Gertz appeared. His position in time allows him to dissect the period of the trial objectively as he lays the groundwork for his discussion of his own involvement.

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The author tells us much about the separate proposed trial strategies of Tom Howard, local criminal lawyer, and Melvin Belli. Gertz believes that each man's personality played an important role in determining the outcome at the trial level. Tom Howard is the hero of the book. He was familiar with the case before Belli appeared and was "a man like Ruby", except that Howard was "a small success," and Ruby had always been "a big failure". Howard had been successful in defending his "lower class" clientele, none of whom had ever reached the electric chair. Gertz maintains that it was this success that led Howard to believe that he could save Ruby. His plan, as stated by the author in Chapter One, was simple.

> In brief, he planned to secure a short sentence for Ruby by pleading that this highly emotional, overwrought little fellow had shot Oswald, the sneak assassin of the beloved President, on impulse. Of course, shooting Oswald was an evil act, but it would be equally evil to punish Ruby excessively.[1]

Apparently, however, Tom Howard and his ideas were too simple. Jack Ruby's family wanted "legal eminence."

There has been much criticism of Melvin Belli's conduct in the Ruby case, but Gertz does not condemn him. Belli's plan was brilliant. During his time as defense counsel he posed almost every question relevant to the defense. The unprecedented nature of the Ruby case, the intense publicity, and Belli's efforts to make a local Texas jury accept the contributions of specialists outside the law made his role difficult. And though the trial verdict was death and Belli had lost, it was Belli and his plan that were instrumental in bringing the ultimate reversal of the death verdict.

Much of the voiced criticism of Belli's conduct could have been directed at the Dallas District Attorney's office and Texas law. One gathers from the book that the D.A.'s office was too loud. In Chapter Two, the author says, "District Attorney Henry Wade, who should have known better, was quoted as saying he would ask for the death penalty with full confidence that a Dallas County jury would return the correct verdict in the case."[2] The relentless Bill Alexander described Ruby's action as "the shooting of a manacled man down in cold blood, and this is a death penalty case."[3] Gertz reveals well the confusion of

1. E. GERTZ, MOMENT OF MADNESS: THE PEOPLE VS. JACK RUBY 3 (1968).
2. *Id.* at 26.
3. *Id.* at 26.

all the people involved. Pre-trial statements from the District Attorney's office, the indictment against "Jack Rubenstein alias Jack Ruby" (for purposes of creating prejudice), massive publicity, and Judge Brown's inability to understand his own actions all contributed to the confusion.

Moment of Madness offers to the student and the practitioner a basic case study of how the judiciary machinery affects human lives. It is Elmer Gertz's active concern for such knowledge that aids in preserving the inherent right of the individual to a fair and just trial.

Elmer Gertz has succeeded in assuming the difficult position of lawyer-author. It was his purpose to research and cover material that was little known. He has written an objective account of the later moments of the Jack Ruby case: *Moment of Madness.*

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