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Book Reviews

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Book Reviews

THE ART OF INSTRUCTING THE JURY. By *Robert L. McBride*†. Cincinnati, O., W. H. Anderson Company, 1969. Pp. 545. \$35.00.

The Art of Instructing the Jury is an excellent book on the subject of instructions which should be given a jury, in both civil and criminal cases, by the trial judge to enable the jury to perform its function properly so that impartial, intelligent and fair justice shall be done between opposing litigants. The Honorable Robert L. McBride, the author, speaks from experience as a trial judge of the Court of Common Pleas of Montgomery County, Ohio, and as Chairman of the Jury Instruction Committee of the Ohio Judicial Conference. The book demonstrates that the author is a scholar who has thoroughly studied the subject of jury instructions and that he is a courageous judge who does not shrink from the responsibility of a trial judge to preside over a trial in such a way that true justice is done. The book also reflects the fact that the author has written various published articles dealing with jury instructions.

The book is filled with pertinent information, rules and advice for trial judges and model forms of jury instructions on a wide variety of topics. The book is well worth reading by every trial judge. Since it is the duty of lawyers as officers of the court to assist the trial judge in giving correct and timely instructions to the jury, as well as to protect and advance the interests of their respective clients, the book should also be read by all lawyers who try cases. If they did so and followed the precepts contained in the book, the interests of all litigants would be better protected and advanced and the public's confidence in and respect for the administration of justice in our Courts would be enhanced.

A particularly commendable feature of the book is the recommendation for more meaningful and helpful instructions to the jury *before* and *during* every trial. Preliminary instructions of a general character are given to every new panel of jurors in both state and federal courts. The general instructions to all jurors when they first report for duty and before any of them are selected for a particular trial should in-

† Judge, Court of Common Pleas, Montgomery County, Ohio.

clude explanations of the function of the jury in the American system of justice; how they were drawn to serve as jurors in general and how they will be examined on voir dire and challenged to serve in a particular case; a rudimentary outline of trial procedure; the reasons for suspensions, delays and conferences between the trial judge and counsel during a trial; definitions of legal parlance commonly heard during a trial; and how they should conduct themselves during a trial. Instructions relating to trial conduct should include a request to be attentive, and warnings not to make any investigation themselves since their verdict must be based solely upon the evidence admitted in Court; not to read or listen to any newspaper, radio or TV comments regarding the case being tried before them; not to discuss the case with anyone or let anyone talk to them or in their hearing about the case; and to report immediately to the Trial Judge anyone who persists in violating these instructions.

Judge McBride recommends giving these preliminary instructions in writing by means of juror handbooks, which is the practice in the Court of Common Pleas of Allegheny County, Pennsylvania, which issues to every juror a "Handbook for Jurors" prepared by the Allegheny County Bar Association and covering the subjects heretofore mentioned. In the United States District Court for the Western District of Pennsylvania a "Handbook for Jurors" prepared by the Judicial Conference of the United States is issued to each new juror. These written instructions are supplemented by preliminary oral instructions in both courts to every new panel of jurors.

Jurors would also be greatly assisted, as Judge McBride points out, if they were given at the outset of their first trial instructions on their duties and how to discharge them. If jurors were told, for example, at the outset of their first trial that it is their duty and sole prerogative to find the facts and that in order to do so they must determine the credibility of conflicting witnesses using common factors which should be considered in determining credibility, such as the position of each witness to know the important facts, any interest or bias he may have, the apparent clarity of his recollection, and the consistency or inconsistency of his entire testimony, they would be better able to evaluate the testimony as it is being introduced than to do so retrospectively pursuant to instructions in the charge of the Court at the end of the trial—perhaps days or weeks after some of the testimony was introduced. Borrowing the words of Judge Prettyman of the United States

Book Reviews

Court of Appeals for the District of Columbia which are quoted by Judge McBride at page 61, the human mind "is not a magnetized tape from which recorded speech can be repeated" by the jury during its deliberations in the jury room.

Likewise, as Judge McBride points out, if evidence is admitted for one purpose only, such as to impeach the credibility of a witness, but is not admissible for other purposes, or if evidence is admitted with respect to one defendant but is inadmissible as to a co-defendant, the jury should be so instructed immediately upon the introduction of such evidence, because the jury then is much more apt to understand such instructions and correctly apply them than if such instructions are given to them only in the final charge hours, days or even weeks later.

Another subject about which jurors should be instructed before or during a trial arises from objections to questions of opposing counsel. The jury should be instructed that counsel have a right to object to improper questions and that no adverse inference should be drawn by them against counsel who object or who, after the Trial Judge's ruling, take exception thereto. The jury should also be instructed that they are not to try to surmise what excluded testimony would have been nor accept as evidence any statement by counsel in argument over an objection to evidence. Even if such instructions are given at the beginning of a trial, some such instructions, as to disregard an improper question or statement by counsel or testimony which, blurted out by a witness, was stricken by the trial judge, should be repeated during the trial immediately after such an occurrence. The jury should also be informed before or during the trial that they are not to infer from any ruling on evidence made by the trial judge that he is disposed in favor of or against any party to the lawsuit.

Two chapters of the book, chapters 4 and 5, are devoted to the general instructions or charge of the trial judge to the jury after the conclusion of the evidence and the closing arguments of counsel. They contain a comprehensive outline of what should be contained in the charge.

The main part of the charge is a clear delineation of the issues in the case and the principles of law applicable to them. This must be done in language understandable by the average man and not in stilted legalistic phraseology. To be understandable to jurors, the law should seldom be read from the opinions of appellate courts. Those

opinions are not written for juries and often are in abstract terms or interwoven with the facts of the particular case which the appellate court was deciding. A trial judge should be mindful of the distinction between a charge which is academically faultless and one which is understandable and helpful to the jury in applying the pertinent legal principles to the factual issues in the case which it is deciding.

The author says that the trial judge should withdraw from the jury's consideration all issues on which there is no evidence or which were eliminated by the evidence, by amendment of the pleadings, or by agreement of counsel. Such action will reduce the issues on which the jury must focus and may prevent unnecessary diversion of the jury.

Another vitally important part of the charge is an impartial explanation of how the pertinent legal principles apply to the evidence in the case and to the facts which may be found from the evidence. Such an explanation is usually far more helpful to a jury than an abstract statement of legal principles. To do this requires a summary of the evidence, often segregated into that bearing on each issue in the case. Other references to the evidence may also be required.

Such comments on the evidence were permissible at common law and are lawful and customary in Pennsylvania. At common law and in Pennsylvania, though not in all States, the judge may also express his opinion on the facts, provided that he makes it clear that the recollection and weight of the evidence, the credibility of the witnesses and the determination of the facts are exclusively for the jury to decide.

Obviously, as Judge McBride says, explanations of legal principles and their application to the evidence cannot be drafted in advance of the trial, but can only be done after all the evidence has been introduced.

The charge should also include instructions on subjects which are common to most cases. Among them are credibility, weight of evidence, burden of proof, proximate causation, exclusion of sympathy and prejudice, unanimity of verdict, that jurors have a duty to consult with each other with a view to reaching an agreement if that can be done without surrender of any juror's conscientious conviction, that in the course of the jury's deliberations a juror should change his opinion if convinced it is erroneous, and that no juror should surrender his honest conviction as to the weight or effect of the evidence for the mere purpose of returning a verdict. Some of these will repeat instructions given at the beginning or during the trial, but that is unobjectionable.

Book Reviews

As noted by Judge McBride, there is a movement afoot in some states to draft and use standard or pattern instructions. They are a practical necessity in large urban centers where trial judges do not have the requisite time to prepare their own instructions in full for each of a myriad of trials, one immediately followed by another. Standard or pattern instructions, if carefully prepared by competent draftsmen and promptly revised to conform with authoritative changes in the law, should also reduce the number of appeals based on complaints about the charge. If the old adage still obtains that two heads are better than one, standard or pattern instructions prepared by a well qualified committee should ordinarily be more intelligible than those prepared by a single trial judge.

It should be recognized, however, as Judge McBride indicates, that such stereotyped general instructions should be modified or extended by the trial judge when necessary to fit them to the idiosyncrasies of a case and should always be supplemented by instructions applying those general concepts to the infinitely varying facts of each case. Such tailor-made instructions fitting the precut material to the individual features of each lawsuit on trial is not only the most difficult part for the trial judge, but also the most helpful part of a charge to average jurors.

As noted by Judge McBride, the Pennsylvania Bar Institute, an adjunct of the Pennsylvania Bar Association, is busily engaged in drafting standard or pattern jury instructions for both civil and criminal cases in Pennsylvania. This is a monumental undertaking and is still far from completion, though definitely underway.

The charge should conclude with an explanation of the verdict forms and how they should be filled in correctly to express the jury's intentions.

Judge McBride also discusses at some length how a jury should be further instructed if it reports that it is deadlocked. Although it is proper for the trial judge to instruct the jury that each of them should listen to the others and reconsider his own conclusions in the light of what his fellow jurors say in the hope that by such reconsideration they will all be able to agree upon a verdict which reflects their unanimous final decision, it is erroneous for the trial judge to coerce the jury into rendering a verdict by telling them that they must reach a verdict or by threatening not to discharge them until they do so. What has become known as the Allen charge for this purpose is reviewed in Section 3.61. Forms for such additional instructions are offered in following Sections.

The book also contains sound advice with respect to appropriate instructions to be given the jury after it has returned a verdict and is being discharged, instructions, for instance, as to disclosure of deliberations in the jury room. See Sections 3.68 through 3.71.

Special findings or special verdicts, either with or without a general verdict materially help to attain true, exact and impartial justice and their more frequent use should be encouraged. Judge McBride devotes the whole of Chapter 6 of his book to them. Special findings or verdicts are obtained by having the jury answer specific interrogatories submitted to them by the trial judge with appropriate instructions. Although counsel should be given the opportunity to frame and criticize such interrogatories, their final form should be determined by the trial judge. The instructions needed for a special finding or verdict are comparatively simple because, in Judge McBride's words (p. 220), "the cumbersome 'iffy' conditions essential to the conclusions for a general verdict are eliminated." The interrogatories should be so framed as to place the burden of proof upon an affirmative answer. As Judge McBride concludes (p. 225):

When the modern principles of the special verdict are accepted and counsel become familiar with their use, the procedure will be recognized as the best and most impartial method of submitting a case to a jury.

The book also contains a chapter treating with requests for instructions or charge by counsel, which, Judge McBride says, are best prepared before trial. Of course, developments at the trial may require a revision in a request prepared before trial, but such a revision is comparatively easy. The trial judge should not be required to read a request of counsel for instruction verbatim; by varying the language he may be able to fit its substance into the relevant context of his general charge and thus make the requested instruction more meaningful to the jury.

Requests by counsel for instructions, colloquially called points for charge, should be settled at a conference out of the hearing of the jury. The trial judge should advise counsel of his decision regarding each request or point before their closing arguments to the jury. No party should be permitted to raise on appeal the giving of an instruction unless he objected to it at the trial or the failure to give an instruction unless he requested it.

Book Reviews

The following exhortation, from page 91, for trial judges to take the responsibility of directing a verdict when the law and the facts dictate that as the right course is so exhilarating that it is quoted in full:

There is a tendency to submit all cases, regardless of the facts, with an understanding that if the jury should blunder the judge will correct the mistake and grant judgment notwithstanding the verdict. This practice is an abdication of judicial responsibility. It destroys the integrity of the court and violates the professional canon that it is a violation of duty to disregard the general law as the judge knows it to be. A judge must squarely meet any motion for direction and unequivocally resolve it before proceeding.

The chapter in criminal law contains many up-to-date forms which should be helpful in view of the comparatively recent changes in the law governing criminal trials. The text of the book concisely reviews these changes. The essentials of the charge in a criminal case are outlined in Section 8.05, followed by model forms.

The book also contains a chapter on instructing the grand jury and a form of such a charge. The text concludes with a chapter on instructing a military court, including forms. Since these last two chapters are highly specialized, they will not be reviewed in detail. Six Appendices are attached at the end of the book illustrating the instructions given in civil and criminal cases in New York, Ohio and Old Bailey; setting forth the Ohio Handbook for Jurors; and quoting excerpts from fair trial orders in sensational cases. Each of these appendices will aid anyone who is confronted with the task of composing something of their respective natures.

In adverting to the deluge of litigation which has swamped the trial courts in metropolitan areas, Judge McBride gives an interesting statistic, viz. (p. 20), "Today in metropolitan areas one out of every one hundred citizens is involved in a new *major* law suit each year." Judge McBride apparently believes that pretrial conferences will not eliminate backlogs because in the aggregate the time of judges consumed in pretrial conferences is not equalled by the saving in trial time. The experience in Allegheny County has been to the contrary, i.e., that when efficiently and adroitly conducted, pretrial conferences produce enough settlements materially to reduce the backlog of civil cases awaiting trial. It remains generally true, nevertheless, that the rapid growth in our population, motor vehicles, expanding concepts of rights and liabilities, free legal services and other factors demand more judges if

our jury trial system is to be preserved. Judge McBride cryptically admonishes, however, that the executive and legislative branches of the government should help to reduce the judicial workload.

Although admitting that it is practically impossible to achieve, Judge McBride says that the choice between congested dockets and skyrocketing costs of judicial administration would not be necessary in this country if the English system were adopted of trying civil cases before a judge alone. As Judge McBride says (p. 24) "jury trials in civil cases have virtually disappeared in England." The result he says (p. 25) is that civil litigation in England "is quick, brief and inexpensive." Serious thought should be given to trying more civil cases non-jury because the volume of civil litigation in our metropolitan communities is so great, complex, expensive and delayed that the cost to the litigants and society is in danger of becoming intolerable. This recommendation does not apply as strongly to criminal trials because there the jury system is a safeguard against tyranny and the facts are usually within the comprehension of the average man.

In conclusion, *The Art of Instructing the Jury* is the product of mature experience and scholarly study. It contains comprehensive and excellent advice on all phases of instructing the jury in civil and criminal cases. It would improve every Judge and lawyer who read it. It is a book which should be in every law library so that it could be referred to for assistance in solving similar problems as they arise in the trial of cases.

William H. Eckert*

FRANCHISING: TRAP FOR THE TRUSTING. By *Harold Brown*†. Boston, Mass., Little, Brown and Company, 1970. Pp. viii, 222. \$15.00.

People look for the orange roof of a Ho-Jo; McDonalds claims the sales of billions of "hamburgers"; Spotless runs city-wide cleaning sales in New York; television shows are "brought to you by your friendly local Plymouth dealer." Who gets the money, who has the power?

Not the fellow in his white uniform, decked out with the company's

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Book Reviews

logos. Not him, indeed. This book, written with a single-minded vision, attempts to demonstrate that franchisors exploit the franchisees who invest their lives and fortunes in these local enterprises. A thin volume, the first 34 pages parade the horrors, and detail the various vicious devices used to "trap the trusting"; the next 40 suggest some legal attacks which might undo the traps, to end with a discussion of legislation in the automobile industry and in general. A 60-page appendix includes decisions, bills, proposed bills, etc.

Brown's essential contention is that the area of franchising is an unexplored legal arena in which new legislation and the extension of legal principles from analogous fields are needed to redress the balance of disadvantage that the franchisee confronts. Starting with the implicit (and perhaps questionable) assumption that people who become franchisees could earn a good living as an owner or laborer, Brown outlines many of the snares that scar franchisees: Pressured and propagandized into signing a document they don't understand, he says, they sign away autonomy in clothing, hair style, location, where they can purchase, future competition, etc., etc. The companies in turn exact large percentage of gross sales as well as initial large investment and use these powers to make more money for themselves alone. Under the guise, for example, of quality control, covered by the contract which allows the franchisor to dictate place of purchase, the franchisor can force its franchisee to purchase above the market price from a selected distributor and get a "kick-back" from that distributor. By regulating market operations as well as personal and business appearance, the franchisor can manipulate the local market and exercise monopolistic power to make additional income. Brown brings up example after example, repeats example after example, and reiterates his essential contention that the franchisee gives up a lot for a little, caught by an outrageous contract with "tying" clauses, "yellow-dog" clauses which hurt his freedom while creating a chance to reap hidden profits for the company.

Legal theories may help. Brown explores a few. The first obvious concept is that of fraud. Franchisees are trapped by advertisements and salesmen. Lawyers must show how these deceived them.¹ Another possibility is to conceive of the relationship as fiduciary. Since the fran-

1. For this author's idea how to broaden these attacks, (see Weiss, Book Review, 35 GEO. WASH. L.R. 627 (1967)). Cf. Willging, *Installment Credit, A Social Perspective*, 15 CATH. LAW REV. 45 (1966).

chisor can exert so much control that ought to invoke counterbalancing obligations against concealment or practice of kickbacks, etc. Anti-trust is perhaps the most fruitful field since franchise agreements have "tying-in" clauses, covenants not-to-compete, and exercise control over markets of purchase and sale. Brown discusses the well-known cases in the area. Finally, two other imaginative theories have seen the light of decisional judgment. A franchise agreement may be seen to be a security so that provisions like the "blue-sky" law apply. Or franchisees could be seen, given the element of control, to be employees so the protection of unions and labor law obtains.

In the field of legislation, Brown examines the attempt by Congress to protect automobile dealers from the big companies. He concludes it has not helped much. The book ends with advice to counsel and a discussion of suggested legislation designed to combat the abuses, with particular emphasis given to those that effect market transactions such as covenants not to compete or force buying from one producer.

This book enters a field where little has been written. It is terse and easy to understand. A large number of franchisees are working under deplorable conditions. All these factors make this book have value—particularly for those for whom either the broad outlines or specific details of the situation are still a mystery.

The only problem is that the work was constructed with tunnel vision. Brown is so eager to parade horrors and survey new remedies that he fails to place matters entirely in perspective or consider what his audience or audiences are. He tends, in the first place, to focus on food franchisees, without going into detail about dry-cleaning places, etc. The horror parade is, one would suppose, directed primarily at laymen. Then the scope of franchises should have been delineated—i.e. what sorts, what percentage each type of selling comprises of the franchise market, who owns them. But, more important, laymen need to know facts such as that there could be franchises inside department stores as components. Issues such as whether a franchisee can incorporate separately to avoid liability should be discussed. Statements to explain how the franchisor isolates himself from tort liability (treated technically later on) are necessary.

More basically, the ideology behind franchising could stand more severe scrutiny. Is it true, as Brown believes, that size in business is always a help? (Maybe location of a restaurant is more important than a brand name.) Doesn't size often mean bureaucracy, slowness, prob-

Book Reviews

lems in communication? Aren't the concerns of the big company often incompatible with local needs? Also, does franchising trade not only on the myth of bigness but also the American fictional ideal of ownership—so people buy houses rather than rent; “own” franchises rather than work for chains? What about a cynical Marxist approach that franchises are another dodge to enslave the working class? Tell a man to work 15 hours at a dollar an hour and both the law and he won't have it. Tell the man he is a franchisee and he'll keep his store open extra hours, for he thinks that since overhead is constant, each extra penny is worth the extra effort. Result: long hours and small pay as a slave for an industrial complex. These points could be multiplied. They all serve to suggest what Brown seems to ignore—franchising is not a discreet area of injustice but connected with cultural and economic patterns of a much larger order. (Brown's conventional bias in terms of specific statutes and increase in regulation is revealed in his mindless praise of the toothless dog called FTC.)²

On the technical side, Brown reveals some startling ignorance. Franchising is, after all, an act of vertical integration involving control of buying and selling markets. The pioneer and exhaustive work in this field is ignored in reference and analysis.³ In his chapter on automobile franchises (dealerships) he ignores the history of the Federal legislation and the extensive studies of the new warrants.⁴ In no place does he discuss the complicated economic theories about market control nor show how the disputes would affect his analysis. Rather, as in the layman part he is concerned only with the immediate concrete plight of the franchisee working long hours for little pay.

The book, in short, serves a purpose. It points out a problem and possible legal routes to minimize specific typical injustices. But it fails to seek the roots, broaden the basic perspective, or elucidate all necessary points, technical or basic. Although valuable, it ends up ultimately as a suggestion to other men to mine the rich field of possibility found in the social, economic, and legal world of franchises.

*Jonathan Weiss**

2. See, National Consumer Protection Hearings, FTC, Nov. 1968, especially Weiss, p. 308.

3. Kessler & Stern, *Contract, Competition and Vertical Integration*, 69 *YALE I* (1958).

4. See, e.g., Kessler, *AUTOMOBILE DEALER FRANCHISES*, 66 *YALE* 1135, (1957); Whitford, W., *Law and the Consumer Transaction, A Case Study of the Automobile Warranty*, 1968 *WISC. LAW REV.* 1006 (1968).

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THE LIMITS OF PROTEST. By *Peter Buckman*. Indianapolis, Ind., Bobbs-Merrill, 1970. Pp. 288. \$5.95.

All of us, upon picking up a mystery novel, have been tempted to read the last chapter first, in order to discover "who done it." In the case of Mr. Buckman's book, the last chapter of which is entitled, oddly enough, "Conclusion as Introduction," this is a recommended procedure for two reasons. First, the conclusion (introduction?) tells the reader what Mr. Buckman's book is all about, so that he can decide whether or not he wants to take the seven hours or so required to read it. Second, because Mr. Buckman tends to wander occasionally through the five chapters preceding the conclusion, it helps in understanding where he finally wants to arrive.

The Limits of Protest could be defined as a history of "radicalism," "activism," "Leftist movement," or any or all of those labels. But it is more than that. It is also a textbook on these subjects. Furthermore, it is a dictionary of the language and terms of protest.

The first chapter of the book is devoted largely to the historical aspects of protest movements. The many different groups arose, according to Mr. Buckman, because the ruling entities lost touch with the ordinary individual. These entities include government, union administrators and industrial management. Therefore, the Suffragettes, the Wobblies and the SDS were created, just to name a few.

The second chapter, "The Power and the People," deals, as you may suspect, with the individual, his government, and activism. In the American electoral system, we are told, the elector has really no choice. The parties we have today have no real differences. Either party will come up with the same result. Furthermore, the same people who participate in the decisions of government make the decisions of the "power elite" of industry. The heads of two of the largest corporations in America were recent members of the President's Cabinet. Robert McNamara (Ford Motor Company) under Johnson and Charles Wilson (General Motors) under Eisenhower were members of Cabinets. With the "consensus" in government, the power increases in the hands of a few and eliminates competition. With the reduction in competition there follows a decline in the qualitative needs of the individual. With this concentration of authority the democratic theory of checks and balances disappears. In this chapter Mr. Buckman unwisely casts innuendos about Eisenhower's "golf happy millionaires" and Kennedy's

"Eastern prep school college classmates." While this may delight those who may be close to Mr. Buckman, it could alienate those who otherwise may be converts to his theories.

In his chapter on "Campaigns and Causes," Mr. Buckman distinguishes between those demonstrators who demonstrate on general issues (nuclear disarmament) and those who adopt "creative disorder" to remedy a situation that affects them personally (jobs for blacks in a given area). The first demand a qualitative change in the ambitions of government while the second adopts a creative disorder in a desperate bid to change conditions. The remedy is its own reward. In this chapter Mr. Buckman makes the interesting statement: "The only viable *radical* solution is to support self-determination if the form of government that will replace the existing one permits and encourages the participation of every person in the making of decisions that affect them." That may have worked in the Colonial era of this country, but it sounds somewhat unwieldy today. This, however, is one of the principles of Mr. Buckman's radicalism. Everyone must have the chance to participate. Furthermore, Mr. Buckman states later in this book that everyone has the right "to do his own thing." He drew no limits.

The outstanding claim on the "Radicals and Revolutionaries" chapter is Mr. Buckman's belief that the only people in the affluent societies who are ripe for revolution are the black people. Mr. Buckman claims that the aim of the ghetto blacks is to take control of the cities. The feasibility of this is based on the move to suburbia by the whites. Mr. Buckman points out that such an idea would be doomed to fail since the isolated people in the cities would be greatly dependent on the whites on the outside who could really control the lives of those they surround. For the blacks to be successful, Mr. Buckman states, they must synthesize with the white activists. To date the blacks have been unwilling to accept this idea.

As Mr. Buckman moves into the chapter on "Revolution as a Way of Life," he explains that one of the problems of radicalism is that it has yet to prove itself capable of sustaining *workable* alternatives to the present system. Members of the radical underground only know what authority they do not like. Therefore, they live only for the present. There are no long range goals in the commune into which they migrate. Again, everyone does his own thing.

In reading Mr. Buckman's conclusion, one statement strikes home: "Perhaps the most depressing thing is that, from all the sound and fury

of recent radical protest, there have emerged so few pointers to a viable future.”

According to your own tastes, you may or may not find Mr. Buckman agreeable, but he tells it like he thinks it is. He may be right.

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