

REVIEWS

THE LEGAL PROCESS—AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE AGENCIES. By Carl A. Auerbach,¹ Lloyd K. Garrison,² Willard Hurst,³ and Samuel Mermin.⁴ San Francisco: Chandler Publishing Company, 1961. Pp. xxvii, 915. \$10.00.

BLACKSTONE defined his teaching role spaciously, in terms of "making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education."⁵ Two centuries later we have congratulated ourselves enough for recognizing his errors in executing those purposes. And we have begun lately to pay renewed tribute to the soundness of his overall aims. There has been much recent soul-searching among law teachers and their interested university brethren centering on the two distinct but interrelated tasks Blackstone set—to provide an "academical education" for lawyers suited to their powers and duties in the community, and to present at least "the rudiments of the law" to those who will not make it a profession but who are invited to deem themselves "liberally" educated for citizenship in a legally ordered society when they take their college diplomas.

Though they have no cause to be smug, the law schools, or at least their leaders, have begun to act upon the realization that it no longer is and probably never was enough to teach the "science" of law as Langdell pioneered it. There is increasing awareness that the American lawyer, starting with the early days of constitution-making, has consistently and uniquely held "an unassailable strategic position to influence, if not create, policy."⁶ Both the profession and the schools have sensed and worked at the resulting demands for "education in professional responsibility."⁷ Law teaching and teaching materials have not only ranged outside the confines of case law into the broader "legal" environment of the legislative and administrative processes, but in addition, there has been hopeful experimentation in bringing the perspectives of non-legal scholars to bear upon the search for understanding and justice.⁸

Recognition that the law is no island has led also to a revival of Blackstone's concern over the essential ignorance among even most educated laymen re-

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1. Professor of Law, University of Minnesota.
 2. Member, New York Bar and formerly Dean of the University of Wisconsin Law School.
 3. Professor of Law, University of Wisconsin.
 4. Professor of Law, University of Wisconsin.
 5. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 33 (Lewis ed. 1897).
 6. LASSWELL, THE ANALYSIS OF POLITICAL BEHAVIOR 27 (1947).
 7. The lower-case quotation is borrowed from the illustrative title of the American Bar Foundation's National Council on Legal Clinics—"A Project for Law School Education in Professional Responsibility."
 8. Cf. HARNO, LEGAL EDUCATION IN THE UNITED STATES 185-87 (1953).

garding the nature and functions of legal institutions.⁹ If work is to be done toward narrowing this large gap in the usual liberal arts curriculum, some primary efforts must obviously stem from the law schools. Encouragingly, law teachers among others have observed and accepted the challenge. A notable Harvard conference in 1954 and a steady stream of germinal writings have considered the dimensions of the educational problem and the diverse and endlessly debatable techniques of attempting to cope with it.¹⁰ Textual materials have been prepared and courses created, and it may be expected that such developments will continue.¹¹

The potential values of such enterprises seem obvious. For the students who will not be lawyers—but merely voters, jurors, litigants, witnesses, citizens—it is difficult to reconcile ignorance of the law's workings with their supposed credentials as educated adults. For those who may go on to law school, a sound course of law study cannot hurt and may help. Such courses may even deter those who should be deterred and invite those who might mistakenly have gone elsewhere. Not least of all, the introduction of law into the liberal arts curriculum holds promise for the more effective study and betterment of the law itself. If, as no one should doubt any longer, the law and other disciplines have useful things to tell each other about the single world they work in,¹² the beginnings of mutual understanding can only serve to improve the dialogues. Having acknowledged unguardedly that law "is too important a matter to be left to the lawyers,"¹³ the lawyers are entitled at least to hope for aid, along with the occasional discomfort of informed scrutiny from the outside.

The Legal Process is an impressive contribution to both of the efforts mentioned above—the broadening of the law school curriculum and the introduction of law to undergraduates. Like Blackstone, but with the fuller vision vouchsafed to four able scholars two hundred years later, it accepts in its first prefatory sentence¹⁴ the imposing challenge of introducing "the beginning law student and

9. The word "revival" seems as good as any to suggest renewed interest in a subject which has not, of course, gone unnoticed from Blackstone's time until just now. For example, as the authors of the present volume observe (p. vi), Woodrow Wilson's voice was a noted one among others testifying that "anyone seeking a broad liberal education should have some acquaintance with the functioning of the legal system as a social institution."

10. See BERMAN, ON THE TEACHING OF LAW IN THE LIBERAL ARTS CURRICULUM (1956), reporting on the Harvard conference. For a sampling of other papers on the subject see Beaney, *Teaching of Law Courses in the Liberal Arts College: A View from the College*, 13 J. LEGAL ED. 428 (1953); Freund, *Law and the Universities*, 1953 WASH. U.L.Q. 366; Harum, *The Case for an Undergraduate Law Elective in Liberal Arts*, 12 J. LEGAL ED. 418 (1960). It is worth noting, too, that the general enthusiasm of the lawyers may still have to reckon with the notion, among the exponents of which Veblen was characteristically pungent, that law schools and other professional schools should be quarantined (or, better, divorced) by the universities to avoid mutual contamination by the "pure" and the "practical." See Geis, *Thorstein Veblen on Legal Education*, 10 J. LEGAL ED. 62 (1957).

11. See, e.g., in addition to the work here reviewed, BERMAN, THE NATURE AND FUNCTIONS OF LAW (1958); SHEPHERD & SHER, LAW IN SOCIETY (1960).

12. *But cf.* Veblen's view which undoubtedly has its disciples, mentioned in note 10 *supra*.

13. BERMAN, *op. cit.* *supra* note 10, at 28.

14. P. v.

the college upperclassman and graduate student to the operation of our legal system." The book is the product of successive revisions¹⁵ of materials first published in 1941, in mimeographed form, by Messrs. Garrison and Hurst under the title *Law in Society*, revised under the present title in 1956, and again revised for this publication. It is a careful, compendious, imaginative collection of cogent materials and illuminating editorial comment. For reasons suggested below, it may be that it is better suited to a law school course than to an undergraduate or graduate introduction to law. This reviewer believes, however, that a teacher could work happily and effectively with the volume in either of the capacities for which it is designed.

As its preface promises, the book's vistas are sweeping. It undertakes to describe, and to point up the perennial questions about, the methods, assumptions, and varying goals of "legal decision-making" (to use the authors' modern but narrow term) by courts, legislatures, and administrative agencies. Focusing on the "process" of civil conflict and ordering, it does not purport to teach a comprehensive body of substantive law. Its concern is with legal procedure, organization, and techniques in the fundamental sense of these terms—in the sense, that is, which recognizes "procedure" as a central determinant of a legal system's character and values.

The materials are well chosen and interestingly organized around the problem of industrial accidents as a kind of dramatic motif. The account begins with the 19th century handling (or mishandling) of this problem by the judges, recalling the creation and persistence of the fellow-servant, assumption-of-risk and related rules which left the human risks of the new industry so largely with the worker. With this topic as the central theme and the subject of the actual cases (mostly from Wisconsin) offered for study, Part I of the book ("The Judicial Process in Common Law Development") introduces in didactic form—through a rich array of textual selections plus editorial notes, comments, and questions—most of the key elements of common law operations. It considers, *inter alia*, court organization and procedure; the nature and uses of precedent; the problem of holding and dictum; the role of the judge as policy maker, with some of its political, social and ethical implications; the nature and tensions of the adversary system; the jury and the continuing debates about it; some aspects of the relationships between custom and law; and the mechanics and theory of judicial decision. In terms of bulk these general expository materials far exceed the relatively few cases on industrial injury; the authors' computation for the book as a whole reports the proportions as approximately eight to one. The result is that the running account of the injury cases serves as a thread of substantive interest both to motivate and to help in defining the text's main concern, with the "process" as such.

Parts II ("The Legislative Process and Its Relation to the Judicial Process") and III ("The Administrative Process and Its Relation to the Legislative and Judicial Processes") follow the same conception. The Wisconsin legislation is traced from the early statutes mitigating the common-law rules

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restricting employer liability to the achievement of the workmen's compensation law. Surrounding this focal concern, the materials range over the legislative process generally—the play of interest groups, legislative fact-finding, lobbying, etc.—and consider the judicial function and technique in statutory interpretation. Similarly, Part III illustrates rule making, administrative adjudication, and problems of judicial review in terms of the administration of workmen's compensation in Wisconsin. Again, this is staged upon a broader background of materials exploring the procedures, issues and evolving problems (down to the Landis Report to President-elect Kennedy) of the administrative process in American experience.

As suggested above, the book's engaging plan—orchestrating its broad subjects around the running theme of the handling of industrial accidents—has strong organizing and dramatic values. Like everything, however, it has its price. Perhaps the gravest loss from confining the case materials to this one area is the resulting tendency to distort the role of the judges in the legal process. Though one doubts that the authors sought such a result, the judges emerge almost inevitably as the villains of the drama. We meet them first¹⁶ in the person of Lord Abinger, misbegetting the fellow-servant rule of *Priestley v. Fowler*,¹⁷ after parading horrors so imaginary and so legally dubious as to have evoked Patterson's dry conclusion "that he was emotionally upset."¹⁸ We observe the continued reign of the rule, largely intact, until the enactment of workmen's compensation legislation in the present century. The judges' unmourned career in this field is then traced through their rearguard fight on the constitutional barricades, their grudging retreat to the role of sniping at the statute and its administrators, and their belated acceptance of the minimal demands upon industry to safeguard against or partially pay for its human wreckage.

The story is an important one, to be sure, and not less worth the telling because its heroes are not judges. It stirs issues and suggests insights of some moment. It provides an apt point of departure for the book's introduction to the legislative and administrative processes, and to the materials relating these to each other and to the judiciary. It illuminates, and is in turn illuminated by, the materials concerned with the elements of technique, ethical choice, policy judgment and taught tradition comprising the judicial process as we strive to know it. Above all, it poses vividly some crucial and perennial issues about this process—about how far it is, or must be, or should be disabled to lead effectively in prescribing new responses of the legal order to revolutionary social change.

Regardless of one's position on such issues, the roles of the common law judges are by no means exhausted on this level. It is not news that the skeptical and experimental genius of the common law has much to commend it—

16. P. 15.

17. 3 Mees & Wels. 1 (Exch. 1837).

18. P. 387, quoting from PATTERSON, JURISPRUDENCE—MEN AND IDEAS OF THE LAW 580 (1953).

and, more to the point, a great deal to teach—beyond its characteristic inability to cope creatively with the transformations wrought by industrialization. The concern for concrete cases in all their unpredictable individuality, the steady willingness to challenge and adapt generalities, the capacity for wise and flexible accommodations, at least within the framework of broadly settled or accepted social policies—these enduring qualities of the common law are stated among the writings this volume collects, but they tend to be lost or belied by the story of the actual cases selected for study.

This suggested defect is probably not of the first importance for purposes of the book's use in a law school curriculum. There is a large portion of three years available for finding a reasonably rounded perspective from which to view the common law. For non-law students, however, the problem is more serious. If, as seems likely, the liberal arts curriculum in the near future will find room for only one such course, it should not fail to convey some concrete feeling for the creatively pragmatic capacities of the common law method. The purpose has nothing to do with providing a good press for the judges. The purpose is to promote substantial learning goals the authors define¹⁹—to build appreciation, and perhaps emulation, of a powerful technique of rational decision, to enrich the capacity for critical thinking, and maybe even to "sharpen [the] sense of justice."

Recognizing that even a book of this one's impressive size must omit some things, it may nevertheless merit another note of regret that there is no material on the criminal law. Again, the loss is graver for the liberal arts student, and again on the assumption that this will be his only broad-gauged introduction to legal institutions. To be sure, the law schools themselves have tended to slight the problems of criminal justice to a remarkable degree for sad reasons, mostly of professional economics, which cannot continue to justify such neglect. The fact remains that the problems of criminal responsibility, punishment and procedure go to the heart of a society's values. Granted the painful choices entailed by the confines of a single course, one would hope that a place could be found for some exploration of this area.²⁰

Of course, there can be no final decisions about such matters of choice. And it is neither likely nor desirable that any instructor using *The Legal Process* as a teaching vehicle would fail to make exclusions and additions of his own. The important judgment for present purposes is the one already submitted: that this volume, in its overall direction and content, should on the whole serve admirably in either of its proposed functions. As the text for a first-year law course, it offers large jurisprudential horizons to widen a curriculum that tends still to be weighted heavily on the side of substantive "coverage."²¹ As an un-

19. P. vi.

20. Cf. the remarks of Judge Wyzanski at the 1954 Harvard conference quoted in BERMAN, *op. cit. supra* note 10, at 85.

21. This is not the place to take on the perennial debate as to whether the striving for breadth warrants such a separate course or should rather be the pervasive function of all the law school's subject-matter courses. It may be suggested, however, that the answer need not be in either-or terms. Perspective may be sufficiently cherished to be sought by a variety of teaching techniques and course materials.

dergraduate or graduate student's introduction to law, it promises enlightenment not only, or mainly, from its wealth of information about the legal system, but because it displays the system as it should be perceived—in process, questioning.

MARVIN E. FRANKEL†

FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA. Edited by Albert P. Blaustein.* South Hackensack: Fred B. Rothman & Co., 1962. Pp. xxix, 603. \$14.00.

The triumph of Communism in China made the world's most populous country the subject of a gigantic social and economic experiment. If Western social scientists have been slow to face the challenges implicit in this experiment, the response of their lawyer colleagues has been even more disappointing. Anglo-American and European journals contain merely a scattering of articles on Communist Chinese law, and except for the careful work of Leiden's M. H. van der Valk,¹ these articles are general in nature and reveal meager research. Elsewhere the situation is no better. While Japanese writers have published profusely and have occasionally transmitted data not otherwise available outside the mainland, for the most part they have been either unwilling or unable to subject their materials to serious and impartial analysis. More predictably, much the same can be said of both Soviet and Nationalist Chinese sources. Thus, thirteen years after the founding of the People's Republic of China, we know little of its legal system.

This state of affairs does not reflect subject matter intrinsically lacking in interest. Study of the role of law in the application of the Communist formula for rapid industrialization of Asia's major society should add to our understanding of law, of Communism, and of the process of modernization. Nor can our present ignorance of Chinese law be attributed to its lack of political significance. It has by now become commonplace to note the need for "a study of Communist Chinese legal principles, seeking for any indication of possible common grounds upon which, on a long-range basis, a world legal order embracing the communist and non-communist countries can be built."² We should also expect lawyers to contribute substantially to the more immediate task of comprehending political developments in Communist China. We might recall that a principal purpose of Henry VIII in establishing chairs in Roman Law at Oxford and Cambridge was to educate English diplomats for dealing with the countries of the Continent.

How then explain this failure to undertake serious research on contemporary Chinese law? The Chinese language is only the foremost deterrent to Western

†Professor of Law, Columbia University.

*Law Librarian and Professor of Law, Rutgers University.

1. See, e.g., Van der Valk, *China*, in *THE LAW OF INHERITANCE IN EASTERN EUROPE AND IN THE PEOPLE'S REPUBLIC OF CHINA* 297 (1961); *The Registration of Marriage in Communist China*, in *16 MONUMENTA SERICA* 347 (1957); *CONSERVATISM IN MODERN CHINESE LAW* (1956).

2. LARSON, *DESIGN FOR RESEARCH IN INTERNATIONAL RULE OF LAW* 89 (1961).