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Book Reviews

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BOOK REVIEWS


One aspect of the passport picture which impresses the reader of the Report of the Special Committee to Study Passport Procedures is the area restriction, under which passports are issued as valid only for travel to certain countries. As the Special Committee indicates, not only is the area restriction frequently of doubtful justification in terms of policy, but its effect can in some instances be more pervasive than that of the individual passport denial. The ban on travel to Communist China has, for example, prevented American newsmen from witnessing important events there firsthand, yet has not had appreciable effect in terms of bringing about the release of American citizens held prisoner by the Peking regime. Because the area restriction is thought an exercise of the plenary power of the Executive in respect of the conduct of foreign affairs and because it applies equally to all citizens, thus avoiding problems of discrimination among applicants, it is regarded by the Committee as peculiarly impervious to constitutional attack. And there, for the most part, the Committee lets the matter rest. The bulk of the Report, as though by default, concerns the individual passport denial for security reasons. The Report, publication of which was withheld until the decision was handed down in Kent v. Dulles, 357 U. S. 116 (1958), makes substantive and procedural suggestions calculated to conform the issuance of passports to the precepts of a constitutional system in which both freedom of travel and the freedom of political belief, association, and activity occupy high positions.

The proof problem involved in the passport denial cases is one of inferring the probability that the applicant will engage in activity detrimental to national interest while abroad from the data respecting the applicant available to the State Department. Invariably the inferential chain is from some external fact such as membership in the Communist Party, previous political activities, or association with others known or suspected to be espionage agents to the applicant’s state of mind at the time of applying for a passport, and thence to the probability of dangerous activity when abroad. Whatever weakness exists in the inferential chain must, I think, be considered in the light of the magnitude of the danger involved in the conduct which is inferred and of the fact that few preventive steps can be taken once the applicant has departed, as well as in the light of the importance which we attach to freedom of travel.
One cogent criticism of the State Department regulations in force prior to the Kent case is that § 51.135 had in effect conclusively resolved the inference of conduct detrimental to national interest against the applicant upon a showing that he is a member of the Communist Party or that he is under Communist discipline. Here the circumstantial case is quite weak and warrants a conclusive inference only under the most compelling of circumstances. The Committee, quite sensible in its disapproval of § 51.135, has this to say: "Travel of an individual should be restrained only upon a clear showing of real danger to the nation which would follow from the travel abroad of the particular applicant. The generalized taint which properly attaches to the Communist Party as an organization should not be carried over to restrain the travel of an individual without evidence which specifically links the individual to dangerous activity abroad."

Beyond this, however, there remains the problem of the degree of proof burden to be placed on the State Department in passport denial cases in order to satisfy the requirements of the Fifth Amendment. Here the Report is singularly uninformative, and indeed, there is perhaps little that is specific which one can say: circumstantial cases of varying strength or weakness will arise in the course of administering the passport program, and only the vague outlines of a proof burden can be drawn. But this much seems clear and bears repetition: the decision in any case to deny a passport is a factor not only of the strength of the circumstantial case for the applicant's conduct abroad, but also of the degree of danger to the nation involved in the conduct abroad the applicant is thought to contemplate. In a way, one of the Committee's suggestions is material here. The Committee is willing to specify three kinds of conduct which it believes justifies the denial of a passport. The Committee is "impressed" by: transmittal of United States secrets, incitement of hostilities which might involve the United States or endanger national security, and incitement of attacks upon the United States. But again, I think the emphasis is rigid: the degree of danger to the United States is not the only proper variable to consider. Very weak proof that the applicant will transmit state secrets is much greater justification for denial of a passport than extremely convincing proof that the applicant will attend a "youth festival" in Moscow. And, of course, the flexible proof burden should always be calculated in the light of the high position occupied by freedom of travel in our constitutional value system.

Another point which the Report raises is the problem of the administrative finding based wholly or in part on the hearsay evidence of the confidential informer. Here the Committee distinguishes the passport application from the case of classified employment. Not only is employment of less importance to us constitutionally than freedom of travel (one is a
“privilege” and the other a “right”), but the unreliable employee who has access to secret information presents a greater threat to national security than does the traveler abroad. Accordingly, five of the eight members of the Committee insist that the applicant at least ultimately have the privilege of full confrontation of witnesses upon whose evidence a finding rests. Two members of the Committee would withhold confrontation, but only where the highest degree of danger to national security is threatened, i.e., where the applicant has had access to “highly classified” security information and the denial of a passport is based on the charge that the applicant will disclose the information abroad.

The remaining procedural suggestions of the Committee are of a routine character calculated to bring hearings before the Board of Passport Appeals, which are not within the Administrative Procedure Act, more in accord with standards prevalent in other agencies. Thus, counsel for the State Department should not act as prosecutor, fact finder, and general friend of the court; a transcript of the hearing should be available to the applicant; and on recommendation of denial the Board should provide findings of fact and conclusions of law for submission to the Secretary. If the latter denies the passport, he should make written findings based upon the record.

The last decade has seen a great deal of strain on traditional civil liberties notions. In a period of international tension which is preeminently ideological in character, the political activities and associations of Americans have perhaps understandably acquired a kind of loose relevancy with respect to a great many things. And the problem of the passport denial for security reasons is very much a product of the cold war. Ordinarily, one would look primarily to the lawyers for guidance in traversing the delicate path circumscribed by national expediency on the one hand and observance of the constitutional ideal on the other. But in looking back one sees that the chief contribution of the organized bar to the cold war civil liberties problem in this country has been loyalty oaths for lawyers. To witness the appearance of another contribution of the Association of the Bar of the City of New York to the civil liberties literature is therefore a very refreshing experience indeed.

Neville Ross


The legal profession, long the private preserve of the male, first opened its doors in Illinois to admit a lady, and then only under compulsion,1 in 1874. Since that day, while women have not swept in with such numbers

1 In re Bradwell, 55 Ill. 535 (1889), affirmed in 83 U. S. 130, 21 L. Ed. 442 (1873). But see Ill. Laws 1871-2, p. 578.
as to gain ascendancy in terms of percentages, the bar has been infiltrated by enough members of that sex so as to reach the point where the presence of a female advocate in the legal arena no longer causes comment. It is to the credit of these women lawyers that, by persistent effort and quality of performance, some of them, perhaps a higher proportion than would be true for males, have penetrated into every corner of legal activity. They serve on the bench, preside over administrative agencies, manage title companies, keep governmental offices running smoothly, work in legal aid, represent private clients, and even teach in the law schools. Individual illustrations among the living are not hard to find, but biographical works regarding them seldom appear as most women lawyers rest their case for acceptance into the profession on the basis of their deeds.

One of them, however, has used the pages of this sprightly autobiographical account to tell the tale of a "homely little girl" of eleven who, quite early, determined to become the lawyer partner of her lawyer father and made good on that ambition. Her colorful account of days in law school, at this College to be explicit; on the quest for a law license; in practice as attorney, later head attorney, for the Legal Aid Society; and in private practice as the partner of her father, should both amuse and beguile the reader. In support of the thesis that "women are wonderful," with which most male readers would agree, the author concludes her story with some well-chosen remarks of advice to the girl who decides to study law. An appendix provides some nut-shell references to the many women lawyers of Illinois, among whom are not a few alumnae for whose stature in the profession this College can claim a justifiable degree of pride.

W. F. Zacharias


Addressing himself primarily to the student about to enter a law school, Professor Cooper sets out to chart a pathway through conventional law school materials so that the beginner may have some understanding of what he is supposed to be doing as he struggles over assigned cases in a casebook. But his fundamental purpose goes far beyond that of helping the tyro through the schooling period, for he keeps in mind the fact that, some day, the tyro may be a practicing lawyer and will then, in fact, be "living" the law he professes. This, then, is a book designed to sharpen the student's techniques against the day when those same techniques will serve him in good stead.

Without question, and properly so, the bulk of the material is devoted to the difficulties inherent in the job of arriving at the triad of facts,
issues, and law which enter into the cases, past cases for the student and prospective cases for the lawyer, with which his life will be concerned. Nevertheless, the skills needed in the jobs of dealing with administrators of specialized tribunals, of legal planning, of negotiation, and in legal drafting are not neglected.

The quality of the rather abbreviated treatment given to some of the last-mentioned topics, as if produced by a rush to close the book against the publisher's deadline, would cause any reviewer to express the hope that the author would develop his ideas at greater length, for these are areas in which few good books can be found. Certainly, no single part of the book could serve, as text or otherwise, for a complete course in Legal Method, in Legislation, in Administrative Law, or any other conventional area of the law school curriculum. But parts of the book could serve as decent abbreviations in some of these areas and should, at least, get some students to embark on the arduous task of independent thought therein.

Returning to the main area covered, that relating to the schoolroom work of analyzing old opinions of courts in decided cases and in bridging the gap between this "book law" and the actual operations of courts and lawyers, it is evident that Professor Cooper is a "realist" who writes from the viewpoint of a Holmes, a Cardozo, or a Jerome Frank. Such classification is intended neither as a compliment nor an epithet but simply as an illustration of the method of approach advocated by the author in dealing with the problem.

Granted that, for the unusual case involved in the judicial process, traditional ideas concerning the doctrine of stare decisis may not work well, or even work at all; still, the bulk of law practice is not with the unusual but more nearly the conventional type of matter. In that connection, one could well contrast the Holmesian epigram that "law has not been logic; it has been experience," with the witty remark of Disraeli to the effect that the lawyer's work chiefly consists in "illustrating the obvious, explaining the self-evident, and expatiating on the commonplace."

Great judges, faced with unusual cases, may seek a motivating impulse for their determinations in an "intuitive sense of what is right or wrong" in the particular case, but the average judge, faced with the average case, is probably more concerned with fitting it into some logical category suggested by an application of the principles underlying the doctrine of stare decisis. Without this, the law, not left powerless to grow, would have no pretense of being a science and would degenerate into a system wherein each judge was a law unto himself. There is, then, something to be said for the proposition that students should be warned, as the author does not do, that the syllogistic processes of logic do play some part in
"living the law." It could prove fatal in an ordinary case, once the particular facts thereof have been ascertained, to disregard the commonplace out of an overweening concern for the personal attributes and the like of the judge who is to handle the occasional unique case.

This is not an argument that judges and lawyers should be "the most unlearned kind of learned men," afraid of no conclusion that is implicit in the premises of a logical system based on *stare decisis*. It is, however, a caveat to the effect that somewhere in the law school there should be room to train students in both approaches to legal problems; the one conventional, perhaps even concerned with some degree of "logic-chopping," and the other as unconventional as Professor Cooper's illustrative book would have that approach appear to be.

W. F. Zacharias


This provocative set of essays challenges some of the almost settled ideas and structures of logic. Lawyers who use traditional forms of logic as a device for making their arguments explicit or organized may be surprised to find that Professor Toulmin treats the procedures and rules of legal argument as a favored analogy or model for logic, and after reading the third chapter may be persuaded to cease wrenching arguments into the rigid and insufficiently candid form: major premise, minor premise, so conclusion. The author's inquiry, however, is addressed primarily to logicians, and lawyers who are unfamiliar with problems in logic may find parts of it obscure notwithstanding the clarity and simplicity of the style.

In the first essay the author articulates a distinction between the force and the criteria of logical terms. He observes that the former does not vary from one field of argument to another and that the latter does. Using examples involving the verb "cannot" he shows that the criteria, grounds or reasons that lead one to contend that something cannot be done, vary in physical, mathematical, terminological, moral and judicial fields of argument, but that the force of the modal term remains the same—something has to be ruled out. His observation is generalized with respect to the "canons" for the assessment of arguments, and he suggests that the criteria for the assessment of arguments vary with the field of argument, though the force of the assessment is field-invariant. Then he asks whether the differences in the criteria for logical argument are irreducible and whether the ambition of logicians to produce a system of logic that is field-invariant as to its criteria can be achieved.
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The notion of probability is studied in the second essay with special reference to the writing of William Kneale and Rudolph Carnap. It is suggested that the term “probable” keeps an invariant force in presenting guarded or qualified assertions and conclusions, and that the term becomes ambiguous only when evidential support is identified with the notion of probability instead of being treated, though the author is not explicit as to this, as a criterion of probability.

The lay reader will find the third essay the most stimulating. The author asks whether all the elements of our arguments can properly be classified under the traditional headings of “major premise”, “minor premise” and “conclusion”. He retains the term “conclusion”. After asking whether there is enough similarity between major and minor premises for both to be called premises, he uses “data” where “minor premise” has customarily been used. His innovations begin after the explicit form of an argument has been set out as: “Data, so Conclusion”. The concept of a “warrant” is introduced to describe propositions which make explicit the step which is implicit in moving from data to conclusions. In general form a warrant is a statement that, given certain data, one is entitled to reach the conclusion in question. The legal distinction between questions of fact and questions of law is analogized to the distinction between data and warrants. After recognizing that warrants confer different degrees of force on the conclusions they justify, the essayist introduces two concepts which are distinguished from warrants in that they comment implicitly on the bearing of the warrant for the step from data to conclusion. A “modal qualifier” indicates the strength conferred by the warrant on the step by such adverbs as “necessarily”, “probably” and “presumably”, whereas “conditions of exception or rebuttal” indicate circumstances in which the general authority of the warrant would have to be set aside. The form of the argument at this stage of the analysis is considered to be field-invariant.

Then the concept of “backing” is introduced to describe the authority for the “warrant”. The author attempts to show that the backing, unlike the warrant, does vary from one field of argument to another. Moreover, it can, like data, be expressed in the form of categorical statements of fact. This reviewer suggests that the operation of warrants and backing can be exemplified to a lawyer by his briefs. The brief points operate as warrants, and the citations in support of the brief points operate as backing. The main contribution of the author lies in his recognition of the distinctions between warrants and backing, which the traditional usage of the phrase “major premise” has obscured. It is especially the concept of backing, and its field-dependency, that strikes a critical blow to the notion that the soundness of arguments depends on formal properties.
In the last two essays the author shows how the treatment of "analytic" arguments, those in which the backing for the warrant includes the information conveyed in the conclusion itself, as anything but a special case leads to trouble in logic and epistemology.

The author's layout of arguments strikes this reviewer as insufficiently candid in one respect. No concept is introduced to make explicit the step from backing to warrant. There seems to be no reason why this step should not, like the step from data to conclusion, be made explicit. That there is something like a warrant that authorizes the step from backing to warrant appears when one considers that the doctrine of *stare decisis*, which is neither backing nor warrant as the author uses the terms, may be taken as authorizing the step from citations to brief points. In other fields there may well be a role for similar propositions which authorize the step from backing to warrant. No concept of the author takes them into account, but in all fairness it must be said that he does suggest that his layout of arguments is not final.

*Louis T. Marlas*


Although there are thousands of articles on various aspects of the law produced each year, there is an unexplained neglect in the area of non-profit organizations. This neglect becomes more amazing when one visualizes the number of such organizations and the wealth which they control. The author, undoubtedly motivated by this important gap in legal literature, has attempted to fill this void. To say that he has succeeded would be overly generous; to say that he has made an important contribution is another matter indeed. The book, which might be denominated as a survey of the law in this area, contains a little bit for everyone, since it seems to be directed at no particular audience. The text should prove to be informative to the layman, but would hardly excite the lawyer who has the barest familiarity with the subject. The forms included therein should prove useful to the lawyer, but their number and variations would overwhelm the layman.

The topical organization of the book generally follows the chronological life of such an organization, dealing first with its creation, then with its operation and management, and finally with its dissolution. Nowhere does the author attempt to discuss completely any particular topic so as to furnish a thorough analysis and solution to the problem. The treatment given any specific subject, however, may be used as a checklist or a warning of pitfalls to be avoided.

This little book, one small in size if not in compass since it was designed to fit conveniently into a coat pocket from whence it might be drawn and consulted frequently rather than be shelved and soon forgotten, has been prepared by a local practitioner, experienced in the trial of personal injury cases, with a view toward acquainting the members of the medical profession with those things which might reasonably be expected of them when called to aid in personal injury matters. Written primarily for the information of doctors who may lack the seasoned experience of the expert witness, the book deals with the importance of the physician or surgeon to the case; the compilation of medical and similar reports; the aspects of court procedure; the conduct of the case; the examination and cross-examination of the medical witness, of the attending as well as of the expert variety; and with other related topics. It contains, as could be expected, a glossary of legal terms which might tend to confuse the uninitiated and much explanatory matter which the lawyer would be likely to consider as being of trivial significance. Nevertheless, the book presents the subject in a crisp and sufficiently comprehensive fashion so that any medical man, after a consideration of its rather brief contents, might well gain an understanding in enough of the trial process and his particular relation thereto as to make him a relaxed, and possibly even a more effective, witness.

This is not to say that a lawyer could not profit from the use of a book of this nature. If he did not peruse its contents himself, he could at least save himself much time in the organization and presentation of his personal injury cases provided he would see to it that his medical associates gave it some attention and followed its many simple suggestions. Mr. Liebenson has, therefore, through this book provided the bar with an object lesson, first, as to what can be done to promote co-operation between the two professions, and second, in relation to a desirable improvement in the realm of trial techniques.