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Book Reviews: Labor and the Legal Process, by Harry W. Wellington

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BOOK REVIEWS

LABOR AND THE LEGAL PROCESS. By Harry H. Wellington. New Haven, Connecticut: Yale University Press, 1968. Pp. xi, 333. \$10.00.

Harry Wellington, in *Labor and the Legal Process*, presents an excellent, incisive analysis of the federal institutional arrangement for regulating union-management relations — the collective bargaining system. The book will be of great interest not only to students of labor law but also to those who are interested in the “legal process” — the manner in which legal institutions are and can be adopted and modified to meet social problems.¹ It is tightly written and has the virtue of analyzing the strengths and weaknesses of all positions described, including those advocated by the author. Wellington argues vigorously that the law ought to refrain as much as possible from interfering with the rights of unions and management to make their own economic arrangements but that it should be highly active in protecting the rights of individuals to fair representation from their unions.

The book examines and attempts to answer several troubling and enduring legal questions in the industrial relations sector: (1) To what extent should the law interfere with the natural clash of economic forces and the private rights of unions and companies to determine their own economic relations? (2) How can the law protect the rights of the individual worker from destruction by the union which represents him? (3) Should unions be feared as an excessively powerful political force and how should their political activities be regulated? (4) Should the law seek to prevent union power from adversely affecting the economy through major work stoppages and inflationary wage settlements? If so, how can this best be done?

Although he expresses general satisfaction with the collective bargaining system, Wellington believes that recent court and National Labor Relations Board decisions have interfered too substantially with private decision-making. He notes that the National Labor Relations Act was adopted to achieve industrial peace in such a way as to minimize governmental interference with freedom of contract. Thus, the law helps unions to organize and re-

¹ Materials for studying the “legal process” in the sense described in the text are contained in H. M. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

quires employers to bargain with them but Wellington insists that it should leave the parties free to work out their own fates at the bargaining table. For instance, he is highly critical of the *Borg-Warner*² decision which prohibits the parties from arguing to the point of impasse over nonmandatory terms — issues other than wages, hours, and employment conditions.³ He argues that the law cannot tell a company or a union that an item to which it is deeply committed is not really important enough for the party to be insistent upon it.

Wellington does believe strongly in extensive governmental action to preserve the rights of individual workers. Since the Act is responsible for making unions exclusive bargaining agents for employees, he feels that the law has a high duty to see that the employees are represented fairly. He calls for expanding the definition of unfair representation by requiring unions to do more than show that their decisions in representing workers are based on rational criteria. He argues that they ought to be required to show that their behavior would fulfill community expectations for "fair conduct."

In discussing the regulation of union political activity, the book describes federal legislation limiting union expenditures and argues that unions do not have disproportionate power and that the public has been overly concerned with regulating the total amount of their political contributions. However, consistent with his deep concern for the interest of the individual worker, Wellington calls for new legislation to protect dissenting employees from political expenditures of their dues.

In the final section of the book, the author studies the impact of our present labor policy on the economy. He examines the emergency provisions of the Taft-Hartley Act⁴ which are designed to avoid major work stoppages and concludes that because of their rigidity and predictability, they often function as an impediment to free collective bargaining. He argues that unions and companies tend to assume they will be invoked, calculate their precise effect in advance, and refrain from serious collective bargaining until after they have been lifted. Wellington calls for their replacement by a new, flexible work-stoppage policy allowing the President to choose one of several alternative procedures depend-

² *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

³ National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1964).

⁴ Labor Management Relations Act §§ 201-210, 29 U.S.C. §§ 171-80 (1964).

ing on which is most appropriate for the particular labor dispute involved.

Although the author believes the law should take into account society's interest in non-inflationary wage settlements, he criticizes the obsession of news media with the amount of wage hikes and questions the accuracy of the cost-push inflationary theory on which public concern in this area is based. He is particularly critical of attempts to impose uniform, unsophisticated wage-price guideposts on all industries. As an exponent of the freest possible collective bargaining, he asks that we require the parties themselves to bargain about the inflationary effect of their settlement with flexible criteria rather than pressuring them to accept absolute standards.

Labor and the Legal Process does have certain limitations. It is presented almost entirely on a theoretical plane and contains little empirical data. At times, the reader has the impression that the intellectual arguments in the text float on a level high above the realities below. Empirical studies, moreover, are really necessary to answer some of the questions Wellington poses. For instance, a study showing the extent to which blue-collar communities have followed labor union policy in political elections is highly relevant to the question of whether unions have grossly disproportionate political power and require some regulation. Economic data is essential to assess the effectiveness of our current work-stoppage policy and to study the effect of bargaining settlements on inflation. As is inevitable in a book this comprehensive, there are also some possible inconsistencies. One questions whether some of Wellington's proposals would interfere with free collective bargaining even more than present arrangements. For instance, his solution to the *Borg-Warner* problem is to make all subjects of bargaining mandatory if they are arguably mandatory. This would require employers to bargain with unions (and vice versa) about matters they are now free to refuse to discuss. Also, (and Wellington himself recognizes this danger) the choice of procedures approach to major work stoppages which the author advocates might give the President overwhelming power to affect collective bargaining and leave the parties with less control over their own fates than they now have. Finally, Wellington is deeply committed to the principle of free bargaining and his book is premised on the need to preserve it. This view seems consistent with the original purpose of the National Labor Relations Act. Neverthe-

less, the reader is left with a feeling that he would also like to hear the story from one who is less concerned with the enormous importance of free bargaining and one who is more willing to utilize public intervention.

The above, however, are more in the nature of limitations than serious faults. Essentially, the book is highly useful and interesting and the author is to be commended for a lucid and penetrating study of the effectiveness of the legal system in grappling with a major social problem.

EARL M. LEIKEN*

GOVERNING NATURE. By Earl Finbar Murphy. Chicago, Illinois: Quadrangle Books Inc. 1967. Pp. x, 333. \$7.50.

Our foul air and stinking waters have at last been recognized as a national problem at the highest policy level of our government. In the last presidential campaign all three candidates recorded their interest in environmental improvement. Nevertheless, while the displacement of "motherhood" and "apple pie" as subjects of political rhetoric is an optimistic sign of impendent political maturity, a platform constructed on sewage is expensive to keep afloat and thought must be given to meeting the costs necessary to minimize the destruction of our water, air, and soil resources. Mr. Murphy has provided a source for obtaining this necessary information in one of the best books this reviewer has read concerning natural resource policy.

Through numerous examples, Mr. Murphy develops the theme that man has consistently wasted his natural resources. For example, he recognizes our society as an economically unstable one, where immediate economic gain demands the sacrifice of renewable resources. At the same time he recognizes that the vastly different economies of nations with state managed systems have similarly treated their renewable resources with the same cavalier attitude, allowing them to be consumed as if they were "free goods." In addition, he points out the problem is not of modern creation. Primitive man burned his land, utilized poor irrigation practices,

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and caused the destruction of indigenous fish populations. Man, according to Murphy, has not suddenly become insensitive to the harm he is inflicting upon his environment. Rather, increased population combined with technological advances have now given modern man the capacity to inflict injuries on his biota far beyond the capacity of nature to absorb this damage without general qualitative deterioration of the renewable resources.

The author's answer is that we internalize the costs of such harm being inflicted upon the environment so as to limit spill-over effects or the externalization of costs. Individual resource users should not be allowed to reduce the quality of renewable resources and force other users, or the general treasury, to absorb the costs. Such a limitation on external diseconomies can best be achieved by recognizing air and water as waste carrying mediums and allowing the use of them as such under a permit system. A flexible system would encourage emitters to minimize the impact of their activities. If some costs were also absorbed by those who benefited from a pure environment, then the cost of providing for an undefiled environment which will avoid aesthetic if not also pathological harm could be met.

The permit system by making polluters absorb most of the costs of their pollution would take the profit out of commercial polluting activities. Pollution can not be stopped as long as private profits enure to the pollutor from his socially undesirable conduct. As long as the Federal Treasury is the source of funds for rehabilitating our renewable resources, uneconomic utilization and continued destruction is encouraged.

The remedy suggested is a good one, but it has been proffered by others and is not the book's primary contribution. It is the journey, not the destination, that is the value of this volume. The author, to justify his solution, has with unusual insight and exhaustive research placed our renewable resource issue in perspective. He has presented and integrated its philosophic, economic, political, and scientific aspects and attempted to explain why we have the problem.

With the understanding the reader gains from Professor Murphy's text, a solution to the problem of environmental destruction is more feasibly developed. While other writers continue to reiterate the story of the myriad destructive forces adversely influencing our environment, this text goes beyond the setting forth of the "what" and "how." In order to reverse the destructive trend

we must understand why these forces flourish and grow. For the answer, Professor Murphy's book is highly recommended.

ARNOLD W. REITZE, JR.*

ELECTING THE PRESIDENT. By Daniel M. Ogden, Jr. and Arthur L. Peterson. San Francisco: Chandler Publishing Co. 1968. Pp. ix, 335 (rev. ed., paperbound) \$2.95.

Last August, the major political parties predictably nominated Richard Nixon and Hubert Humphrey as their presidential candidates. Manifestations of discontent soon became apparent. For example, mob violence was countered by police over reaction in Chicago and a third-party candidate insisted there was not a dime's worth of difference between the major candidates. Many people asked: "Is this anyway to choose a president?" Some critics may be dismissed as ideologues unwilling to believe that their candidate was not the choice of the majority of their party members. Yet, there could be structural defects in the convention system of nominating candidates which distorts public participation in the selection process. At the same time, mistaken political strategies or inadequate planning, rather than the system, could be the basic factor in dictating convention results.

Electing the President is an effective discussion of the role parties play in presidential elections. Its authors, Daniel M. Ogden, Jr., and Arthur L. Peterson,¹ theorize that the federal system with its separation of powers, so imposes on the United States political parties as to make them "arenas of compromise" united primarily by the desire to win office but so heterogeneous and decentralized that each accommodates a range of political views wide enough to bid for an electoral majority.² Thus, the ideologists' dream of a contest between competing ideologies is shattered because such could occur only in a relatively homogeneous society that is divided on its basic goals. To win elections the political parties must develop practical solutions to the problems which concern their members and still appeal to the sufficiently large portion of society.

The parties meet every fourth year at formalized "areas of compromise" — the national conventions — to choose their presiden-

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tial candidates. Each state party is allocated delegates by a formula based on electoral votes and party performance.³ Small, one-party states tend to be over represented at the expense of larger states, and similar states can have disparate delegations. The situation is inconsistent with the spirit of the Supreme Court's reapportionment decisions. If, as Ogden and Peterson suggest, political parties are semi-public associations and not private clubs, then parties should be subject to a standard of fairness in performing their public duties.⁴ A pure population standard, however, would over represent party members from states where the party is weak. But who is a party member? There is no consistent definition, but for purposes of conventions, "Republicans" can be considered the greatest number of voters to have voted for the GOP candidates in a given state since the last convention. Allocating delegations by membership, with a proportional bonus for party success in all elections, results in a ballot system recognizing the integrity of the state party.

The methods of selecting delegates — state conventions, primaries, or party committees — have also been criticized.⁵ The official state party will play a significant role in any system of selecting delegates because it is organized and in a favorable position to publicize its choices who are generally representative of the community as well as loyal to the organization. Given this fact, our goal should be to achieve effective public participation in the delegate selection process, but how can those who disagree with the local party be heard? When party committees make the final selection, the minority is represented only so far as the party deems expedient. A state convention, chosen through precinct, county, and district conventions, favors the best organized minority (which may be out-of-power forces) at the precinct level, but at higher levels, the minority can be represented only to the extent that the majority allows. In primary states, the organization often controls delegate selection. For example, in Oregon the party virtually

¹ The authors are both academicians with experience in practical politics. Dr. Peterson, for example, is now the president of the American Institute for Foreign Trade. He has been a member of the Wisconsin Legislature, Chairman of the Ohio Civil Rights Commission, and special assistant to former Republican National Chairman Ray Bliss. Dr. Ogden has long been active in Democratic Party politics in the State of Washington.

² D. OGDEN & A. PETERSON, *ELECTING THE PRESIDENT* 1-2 (Rev. ed. 1968).

³ *Id.* at 43-49.

⁴ *Id.* at 4.

⁵ *Id.* at 50-54.

names the delegates who are, in turn, required by law to vote for the winner of the state's presidential preference primary.⁶ California party leaders select delegates pledged to a given candidate, and in the primary, the voters choose one slate which gives the winning candidate all the state's convention votes.⁷ Such systems distort the electorate by magnifying the voice of a plurality, and perhaps they weaken the group's ability to compromise when its candidate is eliminated. These systems require months (or years) of advance preparation which restrict entry into the political arena. The public can be heard most effectively when delegates are elected in hard-fought district level primaries, a goal which can be reached only through state legislation.

A critical problem in political reporting is generalization from isolated events. Does the 30-second film clip show the only cheers or the only boos? *Electing the President* considers far more than the aspects of nominations discussed above, and generally does its job well. The authors present incisive studies of the organizational problems of the presidential campaigns on which they have worked. Because the book has a functional emphasis, however, the rapid shift between the campaigns can be somewhat confusing to their reader.

STEPHEN H. HUTZELMAN*

⁶ ORE. REV. STAT. §§ 249.031(3), 249.210 (1967).

⁷ See CAL. ELECTIONS CODE § 6057 (West 1961).

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