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Book Reviews

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Book Review

INTRODUCTION TO LAW, LEGAL PROCESS AND PROCEDURE. CASES AND MATERIALS. By *Cornelius F. Murphy, Jr.* † St. Paul: West Publishing Co., 1977. Pp. 772.

Considerable uniformity exists among the first year curricula of American law schools. Torts, contracts, property, and civil procedure claim almost total adherence while continuing ambivalence characterizes the choice between constitutional law and criminal law for the fifth slot. But, there is a wide variation with respect to a frequent sixth course purporting to introduce students to the law without specific uniform subject content. It has been variously entitled: legal method, legal history, legal process, judicial process, introduction to law, etc. The label matters little, but the general task undertaken is simply described: to accommodate the newly initiated to the grandeur and rich complexity of the law and the legal system without constraints imposed by the specific subject matter of one traditional legal cubby hole. Professor Murphy's book suggests a fresh take-off for this introductory course. He singles out four separate themes for consideration—Jurisdiction, A Cause of Action, Statutory Interpretation, and Equity—and by thoughtful selection and arrangement of opinions and notes that do speak to a first year student, he makes a good case for his proposal.

1. *Jurisdiction*. The first section follows the traditional sequence of jurisdiction cases used in most courses in civil procedure—in personam jurisdiction through in rem jurisdiction and related concepts such as notice and attachment. Notes following each case not only explore jurisdiction problems but attempt to develop in the student technical skills required in law school. Otherwise, nothing particularly noteworthy here. Like all books in print when the Supreme Court gave us *Shaffer v. Heitner*,¹ some reshuffling will be needed to reflect the substantive changes. A question is necessarily raised by Professor Murphy's treatment of jurisdiction: can the first year curriculum afford to be twice blessed by jurisdiction? My belief

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1. 433 U.S. 186 (1977).

is that it cannot, which leads to realignment possibilities that I shall discuss below.

2. *A Cause of Action.* Under this guileless heading, Professor Murphy challenges the student to take an in depth look at, and firmly grasp, the manifold possibilities and perils of judicial law-making. First, he deals with the "Claim of Injury." In this subsection he probes the sense of "cause of action" or "claim" through the leitmotif of a wife's only recently recognized claim for damages for loss of her husband's consortium as a result of a defendant's negligence—the cause of action did not exist at common law.

With continuing interest, we are led through various state court decisions that remain steadfast to the old rule, or, in one way or another, open the door to full recognition of this new "claim" or "cause of action" at law. We see the impact of a groundbreaking decision made in one state upon the case law of another, a halting recognition of a need, a cautious "let's be sure" before we create something where there was nothing before. Finally, we are shown the impact of emerging constitutional considerations, imperfectly formulated in equal protection terms, upon an eventual acceptance of the new "claim."

The same motif of a wife's loss of consortium is used as transition material to the next subsection, "Stability and Change." While we see some courts backing off from formulating the new claim on grounds that such new thrusts should be the legislature's work and not the courts', others see no such barrier to judicial creativity. The court-legislature frontier is further examined in the context of a series of decisions on merely prospective overruling. One sees the tremendous impetus given this recent device by the Supreme Court's line of decisions commencing with *Linkletter v. Walker*² in 1965. This opinion is unfortunately omitted in favor of an ample sampling of its Supreme Court sequelae. Again, the cases in this subsection are selected with an eye to rich contrasts among state courts. The final subsection combines "Joinder, Collateral Estoppel and Res Judicata." The joinder material, another detachment from (or supplement to) civil procedure, could well have been omitted. But the case and note material on collateral estoppel and res judicata is choice, and most welcome, since this increasingly important

2. 381 U.S. 618 (1965).

area frequently falls between our instructional chairs, or is hastily treated at best.

3. *Statutory Interpretation*. An experienced contrast between the law-making of the courts, and of the legislatures and administrators, is too rarely afforded first year law students. The individual faculty member does his best as the occasion presents itself to make the necessary points. However, we assume, rather than being sure, that the student is sufficiently versed to do the job. Following his stress on judicial ways in "A Cause of Action," Professor Murphy sets out useful cases and notes on statutory interpretation. The notes lack the analytical power of the memorable sections on statutory interpretation in the now classic Hart and Sacks materials,³ but so do most later efforts. The basic tools and labels such as plain meaning, text and context, purpose, legislative history, fair warning, ejusdem generis, pari materia, and repeals by implication, are given exposure through an interesting selection of cases. There are familiar old favorites such as *McBoyle v. United States*⁴ and *Caminetti v. United States*,⁵ but largely there are fresh state court cases. To examine a court's use of legislative history, many would prefer Justice Harlan's dissent in *Wesberry v. Sanders*⁶ to Justice Stewart's tour de force in *Jones v. Alfred H. Mayer Co.*⁷ and *Runyon v. McCrary*⁸ (cases that will certainly be covered in constitutional law). But these are tempting cases and one can't fault Professor Murphy for finding them irresistible. Particularly suggestive is Justice Stevens' concurrence in *Runyon*, where he gives a non-doctrinaire account of his reasons for voting against his view of the meaning of the legislative history.

In a subsection on legislative intent, Professor Murphy quite ingeniously inserts some long arm statute cases, thus making a second incision from civil procedure. Less helpful, in my view, is the inclusion of ad hoc decisions with no immediately apparent teaching value such as *Hamm v. City of Rock Hill*⁹ and the *Amtrak Case*.¹⁰

3. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

4. 283 U.S. 25 (1931).

5. 242 U.S. 470 (1917).

6. 376 U.S. 1 (1964).

7. 392 U.S. 409 (1968).

8. 427 U.S. 160 (1976).

9. 379 U.S. 306 (1964).

10. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974).

But even these, on reflection, warn students that despite all assurances that there *are* canons of statutory interpretation, there remains the ever-present threat of judicial ad-hocness.

4. *Equity*. To this reader the best assortment was saved for last. Professor Murphy fills a need I have long felt in first year curriculum by collecting a choice sequence of cases that presents equity as a living factor in current litigation. The familiar maxims are here, but with the special twists that judicial craftsmen have lately given them: how equity acts in personam (except when it acts in rem), how its reach is limited to the home jurisdiction (except when it reaches outside). He accents the familiar archways of equity—fraud, harassment, grave wrong or oppression—and the barriers and limitations to equitable relief, both judicially molded—adequate remedy at law, unclean hands, etc.—and constitutionally fashioned—prior restraint, the mandated *Freedman*¹¹ procedures in first amendment situations, and arguable jury trial issues. A particularly incisive patch of cases on the equitable sanction of contempt reminds the new law student that equity is not all peace and light.

There are matters here that I would have handled differently, but Professor Murphy's preferences are clearly defensible, and possibly more rewarding than mine. For example, he gives what seems over-long consideration to the *Younger v. Harris*¹² line of cases in his subsection on equitable relief (47 pages, about one-half of the subsection). As one who rarely gives these cases adequate space in either constitutional law or federal jurisdiction, I should be perhaps grateful to know the students will do them once, early and thoroughly. My reserve comes from feeling that the cases are more rooted in concerns of federalism than in those of general equitable relief.

Another subsection of the Equity chapter is called "Influence of Moral Principles." The implication, never totally removed, is that "equity" rather than "law" has a special claim on "moral principles." This gives more credence to a lingering positivism than many of us are prepared to concede, especially when it develops that by "moral principles" Professor Murphy intends largely overriding ideas of justice and fairness in a nonconstitutional context. But the

11. *Freedman v. Maryland*, 380 U.S. 51 (1965).

12. 401 U.S. 37 (1971).

cases are apt and reassure one that these fears are overblown. In fact, they make the point that in recent times the "law" has taken responsibility for many "fairness" concepts previously rooted in equity, *e.g.*, unconscionability.

This book is well worth a try in any law school still unsatisfied with its "introduction to law" course. For it to be fully used in its present form, with the introductory chapter on jurisdiction, I think general curriculum arrangements should be made detaching the jurisdiction (including long arm statutes) material from the civil procedure course. I am ready to propose this to my own faculty (although as a civil procedure teacher I would agonize losing those cases on jurisdiction). On the other hand, the book seems valuable on its Cause of Action, Statutory Interpretation, and Equity chapters alone. True, later sections refer back to the jurisdiction material. But by that time students could certainly have absorbed the same cases in their civil procedure course. Either way, I believe, it flies.

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