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Law and Social Action: Selected Essays of Alexander H. Pekelis edited by Milton R. Konvitz

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Seventy-nine pages are given to the consideration of “Direct Examination”; ninety to “Cross-Examination and Impeachment”; forty-seven to “Objections to Evidence”; and a lesser number to “Motions during Trial,” “The Charge,” “The Jury,” “The Non-Jury Case,” “Preparation for Trial,” “Pleadings,” and “Proceedings before Trial.”

For beginning the preparation of a case, the author sets out the importance of making a thorough study of the case law on the subject involved. On page 295, he says:

In addition to the ascertainment of substantive rules which may be applied to your case, a number of other matters are also deserving of your attention, though relatively less important to the outcome of most cases than the ascertainment of the substantive rules within which your case will be developed. . . . Study reports of cases of similar facts to yours for the purpose of noting types of evidence developed. . . . As an example, you may find indications of the type of expert evidence used by the parties, perhaps revealing to you a field of inquiry that you would otherwise have overlooked for lack of familiarity with the subject matter of the expert testimony.

It is hard to find a law treatise so concise in statement and so crowded with valuable suggestions as is this work by Professor Keeton. It should readily make a place for itself in every lawyer's library.

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W. Lewis Roberts


The principal concern expressed in these posthumous essays is the legal protection of the rights of individuals or groups against coercion by "private governments." The papers fall into two broad groups, the first exploring the adequacy of existing constitutional provisions for implementing these rights, and the second suggesting that the peculiar history of our common-law system offers sufficient ground for an unfolding jurisprudence of courts and administrative agencies able to cope with the tenser issues of the day. These essays merit, and will doubtless receive, more careful attention today—since the Supreme Court pronouncement on segregated schools—than earlier.

The first theme, typified by one essay, "Private Governments and the Federal Constitution," emphasizes the place of private governments (unions, real estate boards, etc.) in our political structure, and argues that we need defense against these local powers as much as against the legislatures or the federal government. Despite our growing body of law dealing with trusts and unions, Pekelis argues, we have not suf-
ficiently constrained private officials who interfere with private rights: the president of a real estate board has more control over the residence of races than a mayor. Indeed, Pekelis argues that “the protection of individual rights is the primary, direct and basic content of constitutional guarantees, rather than a derivative and indirect result of restraints on governmental power.” The bearing of this philosophy upon segregated schools, licensing of radio stations, defense of groups against racial libel, and similar problems is explored in the several essays. “A private government must behave in accordance with the same principles of decency which are imposed by the Fifth and Fourteenth Amendments upon a legislature. . . .”

Exemplifying the second theme in the book are the essays supporting his assertion that “a jurisprudence of welfare is in no way inconsistent with that of government by law.” Tracing the history of our legal system, Pekelis contends that administrative law is a natural outgrowth, inconsistent with civil law systems, that provides a mechanism short of totalitarian controls for insuring government responsive to welfare traditions. He bolsters this position by a long comparative study of “legal techniques and political ideologies.”

These essays have one shortcoming. Too little attention is devoted to the general question of how a jurisprudence with definite welfare principles built into it can insure the protection of private and minority rights—a protection hitherto derived in large part from a rigidly individualistic conception. This dilemma is not a new one, but to shrink the sphere of freedom of private associations to injure each other or individuals may well tend to remove one of the main bulwarks of freedom against the state. Positive welfare principles are so much more elusive and expansive in contrast to “negative” rights against uncontained power. To draw the line between proselyting and religious bigotry would tax the courts.

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That shortage of labor resulting from the Black Death enhanced the status of agricultural workers is a platitude. The present treatise documents a rather different situation: the creation of a “free labor market” among innumerable unskilled laborers (in large part of a despised race) lacking capital or other guarantees of fair bargaining