

One reason for this surely is that the writing of a textbook is quite as foreign to the work of a law teacher as it is to that of a lawyer. It is never used in class (a very different situation from that in, say, economics). Hence if one is primarily involved in a subject as a teacher of it, one is much more likely to devote one's energies to constructing a casebook which can be so used. The result is that we have myriads of brilliant casebooks and very few treatises of comparable quality. (Of course there are a lot of not very brilliant casebooks too.) This reflects the emphasis on teaching, as opposed to research, that there is in law schools compared to other departments of universities. It means also that one does not get consistently in our legal system (since practitioners have almost totally ceased to do scholarly work) the criticism and synthesis which are the product of efforts to write a systematic treatise—as opposed to the detailed treatment of isolated aspects which is typical of periodical writing—the sort of thing that used to be called “scientific.” This means that professors are much less influential here than would be the case if texts were better and more important than they are, and this may be a bad thing. Or it may not.

At any rate, so long as we are to have casebooks or something that goes by the name, we should be most fortunate if they were all as good as this one.

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PENSION FUNDS AND ECONOMIC POWER. By Paul P. Harbrecht, S.J. New York: The Twentieth Century Fund, 1959. Pp. 328. \$5.00.

The growth of pension funds in recent years has introduced a new force into our capitalistic society, and Father Harbrecht's book is an analysis of their origins, workings and impact. Pension funds represent vast aggregations of wealth, neither public nor private, except in the sense that they are not controlled by the government. They are “owned” by no one in the meaningful sense of the term and, as a result, the author propounds that there arises a need for a rational framework to accommodate the distinction between public and private ownership. Father Harbrecht has been a member of the District of Columbia Bar since 1950 and his main work has been at the Institute of Social Order in St. Louis, the national Jesuit social science center. The book is an expansion of his doctoral thesis at the Columbia University Law School.

The book consists of two main themes: a description of pension funds and an analysis of the changes in the structure of our society as the result of the growth of pension trusts to massive proportions. The

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description of the origins, structure and shortcomings of pension funds as now constituted seemed adequate to this reviewer. The analysis of the impact of pension funds on contemporary capitalism contains some penetrating insights. Unfortunately, this section also leaves the reader with a desire for fuller development of the thesis that our society has passed from a property system to a power system.

The description of pension funds is introduced with a chapter on corporate ownership and control, in which the growing importance of financial institutions is portrayed. The author concludes that "as the institutional intermediaries become more deeply interested in the equities of corporations, their very obligations to the individuals they represent will force them to exercise the control powers that have come to them as the result of their investments." Yet, most investment managers prefer to control the earnings of their trusts by withholding funds from companies with poor profit records. Furthermore, the mechanics of corporate control are so cumbersome as to make it difficult for outsiders to gain controlling representation on a board of directors. There can, nevertheless, be no denial that pension funds are a growing force in our economy and society. More than one-fourth of the nation's working population is covered by some type of private pension plan. And students of pension funds are agreed that their rapid growth rate is likely to continue during the current decade at least.

The author points out that under the terms of most plans it is questionable how many employees would realize the expected benefits from them in a period of prolonged depression. There is lack of protection to workers in companies which may fail or go out of business or whose directors may feel that the obligations of the pension funds are too heavy. There can be no doubt that the book has pointed to a serious shortcoming of pension funds as established in many firms, where continuation of operation is not as certain as in larger firms. Yet, the reader gains the impression that the charge is too broad and may never come to pass for many workers. The author fails to recognize the growing concentration of employment in large firms, which by their very nature have the greatest chance of survival and continuity of operation.

As pension plans mature and expenses rise sharply, there is danger that an unfunded or pay-as-you-go plan will not be able to meet its obligations and possibly force an employer into bankruptcy. In funded pension plans, the cost of providing a pension rises with the age of the new employee. Unfortunately, the cost of funding a pension plan for those over 45 years of age is so high as to become a barrier or obstacle to being hired. Yet, the rate of unemployment is lower for men over 45 years of age than for most lower age groups.

The study points to a number of practices that need reform. One is that trust indentures contain sweeping escape clauses making it impossible for the beneficiaries to call the financial trustee to account for stewardship. The trustee is protected from a charge of anything short of gross negligence in handling funds and cannot be blamed if reserves are inadequate to meet liabilities.

Looking toward possible improvements in present pension arrangements, Father Harbrecht points out that there are serious legal problems which must be attacked before present pension plans can be more fully safeguarded. It might be logical for the courts to say that pension fund assets belong to the employee on the premise that pensions are actually deferred wages rather than a gift or gratuity from the employer. While courts have declared that pensions are wages for purposes of collective bargaining and part of the compensation for work done, they have not declared that pension fund assets belong to employees. The author asserts that this is a logical step to take. There is a gap between this concept of pensions as a postponed wage and the rights of an employee in pension funds. According to the law, except for a small class of funds, a pension beneficiary acquires almost no rights at all until he has completed a lifetime of work for an employer. Even then, his rights are limited to his monthly allowance and are conditioned by certain provisions in the pension plan that are subject to the discretion of his employer. At this point, the author states, whatever rights, prospective or actual, pensioners may have are contractual rights and not property rights. This lack of vesting—in which an employee is entitled to receive a benefit from the fund although he may not have reached the full requirements of age or service before leaving the employer—is one of the critical defects in most present pension plans. Few plans have this feature. Vesting of pension benefits as they accrue would make the employers' powers of termination, amendment and restriction more equitable because at any given time an employee would be able to claim the funds that had been set aside or receive them at retirement.

Because so many pension plans resulted from collective bargaining between unions and management, employees now are tied more closely to their unions, Father Harbrecht says. They also are dependent for adequate retirement benefits upon the economic welfare of the nation. In effect, individual initiative in providing for retirement has been supplemented or replaced by the growing institutionalization of retirement needs.

Turning from the analysis of pension plans to their larger impact, Father Harbrecht points to the transformation brought about by the growth of pension funds, mutual funds and other new financial institutions, which represent the latest step in the organization and control

of productive property. These have created a new type of society, which Father Harbrecht calls "paraproprietal," a society beyond property. It is not, he claims, a society organized by individual property ownership and diffused power, but rather one organized by power itself. While the term may be new, the concept of power without ownership has been realized for some time and has been more effectively portrayed by other students. Economic power now resides in men of position in corporations and financial institutions, although they may own no part of the organizations. Ownership has been divorced from control of productive property.

The growth of pension trusts, mutual funds and large accumulations of corporate stock in the hands of bank trustees has added a new dimension to this trend. Ownership itself as an operating reality is diminishing. As a result of the growth of financial institutions and their acquisitions of corporate shares, control over property has gravitated to their managers. The author argues that the concept of ownership has become meaningless because "ownership" resides in what he calls a legal fiction, the financial institution. The concept of ownership has no functional meaning in the financial institution. Economic power really attaches to those who control the use of property, including the expanding financial institutions. The growth of the new power in the financial institutions along with the powers already in the hands of the corporations is producing a society whose economic life is based on a structure of powers that result from control of property. Property ownership is not the organizing principle; power is, Father Harbrecht says. Our society has passed from a property system to a power system.

However, the author has apparently confused the changing structure of our economy for a new power system. All societies basically are organized around the control of productive property but it is only natural that there will be changes in the organization as the economic structure shifts to meet the needs of new technologies, knowledge and methods. The reviewer does not agree that power over men has become centralized, although it has changed in orientation. The rise of labor unions and stronger national governments has offset any tendency toward concentration of power in the hands of those who control property.

Unfortunately, this concluding chapter is the weakest in the book, which, otherwise, is an able and constructive effort. The problem the author attempts to sketch in the final chapter is a complex one and does not appear to have been adequately examined.

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