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BOOKS REVIEWED

Land Transfer and Finance: Cases and Materials. By Allan Axelrod, Curtis J. Berger and Quintin Johnstone. Boston: Little Brown and Company. 1971 Pp. xxx, 986. $16.00.

The pressure for change in legal education has many dimensions, several of which cut across the entire law school program—for example, evaluation of clinical education, teaching, grading and examination methods. Often, however, the crisis has arisen within a particular subject area. Perhaps, teaching of property law, more than any other subject, has been plagued by an outlook and content which has remained literally medieval to a degree that has left too many young lawyers inadequately prepared to advise clients in modern property transactions. Less concern with wild animals, fee tail, the Rule in Shelley's Case and more attention to the Uniform Probate Code and real estate syndication would produce law school graduates with a better understanding of modern property concepts.[1]

Teachers and students who share these views will probably be cheering one of the latest entries in the property casebook sweepstakes,[2] *Land Transfer and Finance* by Professors Axelrod (Rutgers), Berger (Columbia) and Johnstone (Yale). Its organization and contents represent a sharp departure from standard practices. This may be troublesome to otherwise sympathetic teachers who may not be able to squeeze the book into their property curriculum without a general overhaul, which, of course, requires a consensus within the property faculty at each school. Though not expressly so labeled, the book functions as a sequel to Professor Berger's own *Land Ownership and Use* (1969). The latter, which is intended as an introduction to property for first-year students, covers estates in land, landlord-tenant, and private and public land allocation devices. The major missing ingredient, called "conveyancing" by Professor Berger, is reserved for an advanced course when students would be better prepared to grapple with the finance, tax and contract aspects of modern land transactions. The Axelrod-Berger-Johnstone book, the subject of this review, is intended for use in such a course. While it includes materials not found in typical real property books, the main section (running from pp. 240 to 818) covers land contracts, deeds, boundaries, priorities and land title assurance—all of which are traditionally found in the first-year real property books. In other words, significant duplication will result if the usual real property book is followed in a later course with complete

1. While the remainder of this review is necessarily confined by the contents of the principal book to the subject of commercial real property transactions, the textual comment is intended to convey the reviewer's conclusion that the problem reaches into the area of gratuitous transfers of property and the content of trusts and estates courses.

2. A possible alternative, not yet used by this reviewer, is G. Lefcoe, Land Development Law: Cases and Materials (1966).

use of the principal book. To be sure, many property teachers will prefer the more modern coverage of the conveyancing subject. Nevertheless, its use requires either reliance on the earlier Berger book or jettisoning a substantial hunk of the standard works and then using the principal book to cover conveyancing, probably in the second or third year.[3] This reviewer has adopted the book for his course at Tulane Law School in common law real estate transactions, which is taken almost exclusively by fourth semester students who have previously had five semester hours of property. (My colleague who is responsible for these courses presently uses the introductory Berger book plus supplementary materials.) Teachers who find a spot in their property curriculum for this book should find, as this reviewer has, a splendid teaching tool with several advantages and no serious drawbacks.

Consumers of legal education easily accept the general necessity for subdividing the study of law into subject areas which are consciously interrelated in the classroom only to a limited extent. First-year students, in particular, would normally be overwhelmed by frequent attempts to analyze issues from different areas of the law which are raised by a single transaction, for example, sale of goods or real property. Unfortunately, segregation has been such a dominant theme of American legal education that most law students graduate with insufficient experience in synthesis of related areas. Second and third-year students should be deliberately exposed to more transactional analysis of legal problems. Transfers of real estate afford an ideal opportunity for students to experience the reality of practice where a client expects his lawyer or his firm to handle all but the most specialized aspects of a single deal. A general practitioner representing a client in the sale of his home obviously does not tell him that he is a "contract" but not a "property" lawyer. That segregation in legal education has never been complete is confirmed by the fact that standard first-year property courses always have been a mixture of contract and property law. However, missing from these courses has been any serious consideration of financing and tax aspects of real estate transactions. The deficiencies in the property education of typical law students may arise at the level of strict legal problems of financing and also the nonlegal aspects of the money market. The principal book supplies some fine descriptive materials on the money market (e.g., the various institutions supplying mortgage funds) and the structure of the standard financing deal (as tagged by the authors, the "credit quartet": (1) down payment and loan-to-value ratio, (2) length of mortgage, (3) rate of interest and (4) rate of amortization). Principal reliance is placed on textual development of the subject with excerpts from non-case sources. A few straight legal problems such as prepayment of mortgages and usury are included.[4] The succeeding section of the book deals with the basic security de-

3. The authors in their Preface contemplate that the book could be used for an advanced course in land transactions where the chapters (other than those on contracts of sale and title protection) would be stressed. Use of these portions, which amount to approximately four hundred pages, may be viable for such a course, but the problem of where and how to cover the excluded materials remains.

4. The choice of materials on usury did not strike this reviewer as ideal. Active problems in the definition of "interest", e.g., charges for credit reports, appraisals, etc., and creditor

vices, which again are introduced through textual coverage. Contemporary problems with installment land contracts and exploitation of blacks and other minority groups in urban areas are given special treatment. Legal aspects of mortgages are sampled: open-ended mortgages, "assumption" v. "subject to," special mortgage take-over problems, and, of course, remedies.[5] A question left open by this section of the book is whether it is sufficient to replace a complete course in mortgages.[6] Though the authors would probably disclaim such a purpose, this reviewer, based upon his experience to date, is inclined to regard this treatment of mortgages as adequate law school coverage of the subject for most students. Surely, this book's approach is preferable to the over-emphasis on procedure and remedies in traditional mortgage courses. It raises some important scope of mortgage problems which remind students of the need for care in drafting in an area of practice permeated with the use of forms. That mortgages is a tough subject will be confirmed by students (even the best) and teachers using this portion of the book.

Needless to say, income taxation of real estate transactions is, like mortgages, an open-ended subject which can only receive illustrative treatment in a single book on land transfer. On the other hand, the coverage in the principal book is not superficial, but rather forces students to deal with specific, typical income tax problems, (e.g., character of income: ordinary v. capital gain,[7] deductions, and timing for reporting gain in installment payment arrangements). Some tax teachers, sensitive to jurisdictional matters in the law school curriculum, may resent this intrusion into their usually well-protected territory (non-tax teachers are often the border patrolmen for this exclusive grant). This reviewer is less troubled by some duplication in law school coverage, particularly where it results from secondary treatment in a transactional analysis course. Furthermore, at least in smaller law schools, the tax and real estate teachers should attempt to coordinate their instruction, preferably toward the goal of reserving detailed discussion of the land transfer income tax problems to the transactional course. Property teachers without a tax background will have to do considerable homework before using this section of the book.[8]

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participation in profits, are relegated to a note following a Florida case, of marginal interest, on intermediaries between borrower and lender. An interesting case on creditor sharing in profits from the property is Kessing v. National Mortgage Corp., 278 N.C. 523, 180 S.E. 2d 823 (1971).

5. Surely, there must be a better case on appointment of receivers than Wingfoot Cal. Homes Co. v. Valley Nat'l Bank, 74 Ariz. 287, 248 P.2d 738 (1952).

6. Recent books with a principal emphasis on financing of real estate transactions include: G. Lefcoe, Land Finance Law (1966); N. Penney and R. Broude, Land Financing (1970).

7. The choice of cases here was excellent. Malat v. Riddell, 383 U.S. 569 (1966), documents an unproductive controversy between taxpayer and government over the general meaning of the word "primarily" as used in section 1221(1), Internal Revenue Code of 1954; in contrast, Goodman v. United States, 390 F.2d 915 (Ct. Cl. 1968), compels the student to deal with a fact pattern rich in details relevant to the ultimate determination of whether the taxpayer was a "dealer" in real estate.

8. Generally, the number of substantive or typographical errors in the book appears to be minimal. However, one crept into the discussion of non-recognition of gain in the sale of residences, which is applicable to purchases within a one-year period before (not beyond)

Another subject not found in typical real property books is professional responsibility. Included here are some excellent current materials on (1) violation by attorneys of the canons of ethics (e.g., dual representation and solicitation) and (2) the controversy between the bar and real estate brokers over unlawful practice. Perhaps no American law school has yet devised a wholly satisfactory method for coverage of legal ethics. Too often the response has been a nominal set of lectures which enables the Dean or his delegate to sign the routine certification to bar examiners. This reviewer's experience with the principal book suggests that the general subject should be subdivided and allocated among the substantive law school courses. In other words, each instructor would be expected to cover and examine in class the ethical problems raised in his area. Coordination and compliance may discourage this approach, though fragmentation would appear preferable to many current "efforts" at general coverage of the subject. Possibly, a required, in-depth course taught by a single instructor will appeal to many faculties. Unfortunately, active ethical issues are most effectively taught by the specialists who can contribute insight into the practical aspects. Dual representation, for example, is not unusual nor necessarily bad in home sales where clients have legitimately begun to resist charges for nominal and duplicate services in simple, standardized transactions. In any event, slender coverage of professional problems remains a major defect of contemporary legal education. Law schools have to a scandalous extent failed to assume their share of responsibility for instilling a strong commitment to high standards of professional conduct. The "new youth" now filtering into the country's law schools may be more receptive than earlier generations to a conscientous effort to confront this particular hypocrisy in our society.

Coupled with the professional responsibility materials in the book's first chapter is a section on real estate brokerage contracts. Some teachers using this book may be inclined to delete or skim this section, though brokerage contracts persist as a source of controversy between parties to real estate transactions.[9]

Beyond the incorporation of these less standard subjects, the principal book must be appraised for its approach to the traditional conveyancing area. On the whole, it does a much better job here than most of its competitors. The selection of topics and the extent of their coverage reflects a balance more appropriate for contemporary land transactions. A land deal can go sour for many reasons and not merely for the title defects or encumbrances which tend to dominate the contract of sale portions of older property volumes. In the principal book, a substantial portion of the long Chapter III on contracts of sale is devoted to such problems as financing, quality, and overreaching by buyers. The failure of the buyer to close because of financing troubles is well represented by a set of Wis-

or after the sale of the old residence. A. Axelrod, C.J. Berger & Q. Johnstone, Land Transfer and Finance: Cases and Materials 197 n.46 (1971) [hereinafter cited as Axelrod, Berger & Johnstone]. See also note 16 infra.

9. For example, nearly every edition of the Real Estate Law Report, a new monthly summary of legal developments in the real estate area (published by Warren, Gorham & Lamont, Inc., Boston) contains at least one case involving a real estate broker. The principal book considers some of the reasons for the litigious aspect of brokerage contracts.

consin cases illustrating the range of financing conditions in land contracts.[10] Together with the Chicago Title and Trust form in the appendix, the student can develop some familiarity with a contract clause which will be specific but flexible. Though drafting cannot be "taught" in the large classes which unfortunately dominate contemporary legal education, good instructors make an effort to highlight drafting problems and the alternatives designed to reduce risk of dispute and, later, litigation. Students should not come out of a property course (or any other) simply with a rote knowledge of court responses to bad contracts.

The principal book rejects the comfortable assumption that most land transactions involve a transfer of improved property, usually single family residences. The purchase of unimproved property followed by the search for development financing and the attendant problem of relating the latter to loans supporting the land purchase are discussed in a brief note and then illustrated by some California materials on automatic subordination clauses in original trust deeds.[11] An excerpt from a California law review goes behind the legal authorities to examine the function and abuses inherent in such clauses.

Relief for sellers from "speculators" and "sharpies" is illustrated by cases ranging from a 1905 Arkansas action on behalf of two illiterate black girls to set aside conveyances on the ground of fraud (unsuccessful), to a 1969 federal class action regarding unscrupulous practices by real estate men in Chicago's black neighborhood (successful at the preliminary motion stage).[12] Orthodox property courses often presume that change in law can be illustrated only by falling back to the middle ages and the Statute of Uses.

Missing from too many older property books is any consideration of warranty and tort aspects of real estate transactions, which possibly may flow from a conclusion that the quality questions are adequately covered in other courses. One result has been the traditional preoccupation in real property courses with title problems. A partial explanation here has been a chilly common law response to vendee complaints regarding quality of land and improvements, which has only begun to thaw in serious proportion during the past decade. This is a reminder that even property teaching materials need to be regularly updated. Even the principal book focuses almost entirely on warranty developments with only a passing reference to building codes and other governmental regulations. Hopefully, a later edition will pick up some materials on, for example, the Interstate Land Sales Full Disclosure Act of 1968,[13] which probably came too late for a 1970/1971 book that previously appeared in temporary edition.

The usual subjects of destruction during the executory interval, seller's title obligations and boundaries, receive compact and interesting treatment. The first problem is quite adequately presented by a modern Missouri case which discusses the various rules in the process of determining the disposition of fire insurance proceeds.[14] The basic marketable title rules (including types of deeds) are covered

10. Axelrod, Berger & Johnstone 240-51.
11. Id. at 252-60.
12. Id. at 325-42.
13. 15 U.S.C. §§ 1701-20 (1970).
14. Axelrod, Berger & Johnstone 342-56.

largely by authors' notes.[15] The boundaries materials, with two reservations discussed below, give the students both a good general background on the different descriptive methods and an opportunity to work through specific situations which are challenging but not overwhelming. This reviewer experienced no real difficulties guiding his students, with these materials, through this highly technical, error-prone phase of land transactions.[16] But this section of the book contains no illustrations, which leaves both teacher and student in the position of studying geography without the aid of maps. Particularly unfortunate is the failure to include any examples of the township/section method. This criticism does not imply that the cases should also include maps because students should be compelled to reconstruct the specific boundary problems. The second drawback is the inadequate coverage of "practical location" of boundaries under concepts of parol agreement, acquiescence or estoppel.[17] This subject exposes students to accepted methods for informal resolution of boundary disputes short of litigation.

Authors of real property books must determine the extent to which they will invade the jurisdiction of their contract colleagues. Such general contract formation problems as preliminary negotiations, indefiniteness, and significance of "formal contract to follow" were deliberately (and, to this reviewer, appropriately) given lighter treatment by the authors of the principal book. Some teachers may object to the inclusion of substantial materials on breach of contract remedies. This reviewer does not share the possible criticism of "duplicate" coverage for an area that most students find difficult to understand, particularly the interrelationship of damages, specific performance and rescission. The book includes a fine set of California materials in which the state supreme court, under the guidance of Justice Traynor, refined the California law on earnest money contracts and liquidated damages provisions. Here again the depth of coverage is increased by appropriate excerpts from law review articles.[18]

Title protection receives extensive coverage in another long chapter which most instructors will probably use selectively in basic conveyancing courses. Detailed treatment of such items as title plants, title guarantee funds, government regulation of title operations might be omitted or assigned without class coverage. "Miscellaneous Title Protection Devices" are assigned one hundred pages—approximately ten percent of the entire book. This will strike many teachers as excessive coverage for curative acts, marketable title acts, statutes of limitations and suits to quiet title. Conceding the sorry state of our title system and the depressingly slow pace of revision, many will, nevertheless, doubt the wisdom of forcing students to wade through this amount of material on these items.

With occasional lapses,[19] the title protection materials otherwise seem very

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15. Id. at 464-76.

16. Id. at 361-406. The description for the tract in example 2 on page 382 appears to place it west of the Smith property line though the discussion refers to a stake location east of the line.

17. Compare O. Browder, Jr., R. Cunningham & J. Julin, Basic Property Law 765-67 (1966).

18. Axelrod, Berger & Johnstone 271-93.

19. This reviewer has never been enthusiastic regarding the teaching possibilities of the

good. Heavy reliance is placed on textual coverage, both original and secondary. The book offers significant exposure to substantive and procedural aspects of title insurance which can be examined not only through cases but the complete text of two sample policies. The Torrens registration system is effectively placed after the recording system and title insurance but before miscellaneous title protection devices. While some may object to this arrangement, it makes sense historically because the marketable title acts, curative acts, etc. were largely an attempt, after the unsuccessful introduction in this country of the Torrens system, to accomplish minor surgery on the basic recording system. Many students using these title protection materials will properly develop the view that title assurance is not one of the glorious chapters in the saga of the American law. Skeptical students will suspect that, in practice, assumption of risk and, more dubiously, seat-of-the-pants lawyering is not unusual in this area.

A relatively short chapter on cooperatives and condominiums is dominated and, in this reviewer's opinion, marred by an unabridged reprinting of lengthy documents for stock-cooperatives and condominiums (over thirty pages or nearly half of the entire chapter). For teaching purposes, these materials would appear to have minimal value unless the instructor supplies independent problems and requires only selective reading. Otherwise, few students will be motivated to plow through these documents and instructors will have virtually no sanctions through the examination process. The subject is completed with a brief note on a federal tax problem and duplicate coverage of restraints on alienation of cooperative and condominimum interests.[20]

In the final chapter, complex forms of land finance are represented by excellent materials on shopping center leases, ground leases, leasehold mortgages, sale and leasebacks, real estate syndication and real estate investment trusts. This entire unit will probably be deleted if the book is used in a first-year course where students will find the tax and financing discussion difficult to absorb. Supplementary materials may be required for use in advanced courses though this book's coverage is an excellent point of departure. In this reviewer's second-year basic conveyancing course, exhaustive treatment was obviously not attempted but the challenge of identifying and solving specific illustrative problems of coordinating the rights of the various parties to these complicated deals was effectively met. Perhaps the best segment of this chapter is the portion devoted to sale and leasebacks, which includes a long excerpt from Professor Cary's fine 1948 article in the Harvard Law Review (with footnotes on more current developments by the principal book's authors), and useful tax materials on non-recognition of losses on sale where it is accompanied by leaseback.

Based upon a single use during the past year, this reviewer strongly recom-

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long case on the Minnesota Marketable Title Act, Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957), which also appears in Browder, Cunningham and Julin, supra note 117, at 922. The chilly response to Torrens registration in the United States may discourage most instructors from using the long case involving registrar error under the Alberta system, Canadian Pac. Ry. & Imperial Oil Ltd. v. Turta, [1954] 3 D.L.R. 1 (1954).

20. The reviewer suggests deletion of Gale v. York Center Community Coop. appearing in Axelrod, Berger & Johnstone 869.

mends the adoption of the principal book for the purpose of eliminating deficiencies present in older, traditional competitors. In general, topic selection is more contemporary, and materials are current and more varied. Particularly appealing is relief from over-reliance on cases which is here supplied by greater use of law review excerpts or non-legal items. The organization is obvious though not perfect.[21] While, as noted previously, the book covers the full range of general problems raised by land transactions, the integration experience of students exposed to this book will be incomplete prior to examination unless the teacher drafts some problems which will force the students to analyze the financing, tax, property, and contract aspects of a single fact situation. An appendix of sample forms to implement various phases of land transfers will assist instructors wishing to highlight drafting alternatives to the problem documents which led to controversy and litigation. Most users of the principal book will graduate with a more balanced, practical and sophisticated introduction to the important area of commercial real estate transactions.

JOHN L. PESCHEL*

Black Employment and the Law. By Alfred W. Blumrosen. New Brunswick: Rutgers University Press. 1971. Pp. ix, 416. $15.00.

Black Employment and the Law is an unimportant book about an extremely important subject. It attempts to deal with the racial and sexual discrimination that permeate the practices of American business and labor and to analyze the effect of Title VII of the Civil Rights Act of 1964[1]—particularly the Equal Employment Opportunity Commission (EEOC)—in combating that discrimination. It fails, however, to present a clear picture of the totality or comparative effectiveness of the legal tools available under the federal law. Much of the material has been outdated, both by recent court decisions[2] and by Congressional action.[3]

The book is poorly organized and poorly edited. It pays inordinate attention

21. The seller's obligations regarding title curiously appear as the final section of the chapter on contracts of sale while other seller and buyer obligations are interspersed throughout the long chapter. Remedies might be the most appropriate concluding section. Also, one specific suggestion in the income tax materials: the installment method of reporting gain on sale of real property is easier to explain if the cash equivalence test, represented by Estate of Hurlburt, 25 T.C. 1286 (1956), is covered first.

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1. 42 U.S.C.A. § 2000e (Supp. 1972).

2. The book is a compilation of essays written by Professor Blumrosen before the fall of 1969. During 1970 and 1971 the protections provided under Title VII were greatly extended by a number of important court decisions. See, e.g., cases cited note 6 infra.

3. The Congress recently enacted a basic restructuring of the EEOC which gives the Commission court enforcement powers and significantly expands its jurisdiction. 42 U.S.C.A. § 2000e (Supp. 1972).

to bureaucratic, in-house EEOC debates that hindsight renders unimportant and that are irrelevant to an understanding of the present law. Pages are devoted to lively debates about dead issues such as the importance of changing people's attitudes as compared to making them obey the law, and the negative effects of the Moynihan Report. Much of the text consists of unsupported allegations and conclusions—particularly in the sociological realm, while what hard, legal and factual material is included, is relegated to the footnotes or appendices.

For example, in the realm of sociological conclusion Blumrosen pontificates:

> One of the basic contrasts between the labor movement and the civil rights movement is the persistence and staying power of the labor movement at all levels of lobbying, pressuring, and influencing activity . . . . [I]n comparison with the civil rights movement, the labor movement is sophisticated and consistent. . . . The civil rights movement is virtually without theory—or has an embarrassment of them—and lacks staying power. . . . It rouses itself as a sleeping giant and takes a symbolic step—a march on Washington, a riot in a large city—and then falls back to be further disheartened when nothing happens. Its staying power is low. Its complement of men with expertise is limited.[4]

The book traces the historical inadequacy of state measures for combating employment discrimination, discusses briefly early federal equal opportunity efforts and then focuses on the role of the EEOC. Blumrosen endorses the 1964-69 status quo: a weak conciliation agency backed by a private right of action when conciliation fails.[5] His primary thesis appears to be that the EEOC, because of its very weakness, has greatly advanced the development of anti-discrimination law in the employment field. Unlike other regulatory agencies that possess cease and desist powers, the complainant before the EEOC, Blumrosen argues, can exhaust his administrative remedies easily and painlessly and thereby gain prompt access to the courts. The courts have been uniquely receptive to Title VII litigants and, in some instances, have expanded the law dramatically.[6] Neither corporate nor union discriminators have seriously bothered

4. A.W. Blumrosen, Black Employment and the Law 37-38 (1971) [hereinafter cited as Blumrosen]. This is a misplaced and offensive comparison. Union membership is a lengthy commitment to joint action for the continued personal and economic benefit of the particular members. Involvement in the civil rights movement is often temporary, lasting only until a particular pattern or type of discrimination is removed. In fact, the staying power of the labor union is due much more to the statutory scheme granting them a guaranteed position of influence in the development of industrial relations than to the relative charisma of their leaders, or the sophisticated, philosophical underpinnings of the movement. The Civil Rights movement can be more fruitfully compared to voluntary organizations whose members join together to overcome specific hardships or wrongs, such as the various consumer, environmental or poverty groups.

5. Id. at 7-9.

6. See, e.g., Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1972); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). The courts have greatly extended the reach of Title VII

the EEOC because it is a weak agency—unlike more powerful regulatory bodies which the business and labor interests have traditionally attempted to capture. The EEOC has, therefore, been free to plod along doing research and developing new legal concepts for the benefit of the private litigants.

This is an interesting interpretation. However, it is difficult to evaluate because there is virtually no exploration of the counter thesis: that the important factor has been the private right of action and a strong EEOC, coupled with that right of action, could have accomplished twice as much as the weak agency has. Civil rights leaders and the Congress apparently disagree with Blumrosen and have opted for the strong agency approach.[7]

In the first part of his book, Professor Blumrosen demonstrates the historical need for Title VII by tracing the early experiences of state regulatory agencies in dealing with problems of employment discrimination.[8] He shows that the state anti-discrimination agencies, like their federal counterparts in the economic regulation sphere,[9] generally became captives of the interests they were intended to regulate and chalked up a poor record in terms of expanded employment opportunities for minorities.[10] Although Blumrosen does not make the connection, the role of powerful corporations and unions in drafting and controlling the enforcement (or non-enforcement) of anti-discrimination laws is a repeat—in the civil rights context—of the history of corporate sabotage of environmental protection, worker safety, antitrust, and other laws, traced by Jerry Cohen and Morton Mintz in *America, Inc.*[11] Unlike Cohen and Mintz, however, who recommend greater sanctions against corporate law violators,[12] Blumrosen concludes that to prevent the capture of state administrative agencies by business and unions, the agencies should *not* be given strong powers.[13]

Blumrosen fails to discuss the current status of the state anti-discrimination agencies or the impact the EEOC has had on them since its creation in 1964. The Commission provides technical assistance to the state agencies, including

by a process of "creative" judicial interpretation. However, there is no reason to believe that the judicial activism resulted from or was caused by the lack of EEOC enforcement powers.

7. See N.Y. Times, Feb. 16, 1972, at 1, col. 3.

8. Blumrosen 9-23.

9. Id. at 14.

10. The most telling presentation in this regard is a table of "Comparative Complaint Experience under State Fair Employment Practice Laws", which shows that in 13 states that enacted such laws, performance from date of enactment to December, 1961, included the opening of 19,439 cases that resulted in 62 hearings, 26 cease and desist orders, and 18 court actions. Blumrosen 13, reproducing in part S. Rep. No. 867, 88th Cong., 2d Sess. 7 (1964).

11. J. Cohen & M. Mintz, America, Inc. (1971).

12. Id. at 357-77.

13. Blumrosen 8. Blumrosen's recommendations are opposite to those proposed by Clifford Alexander, former chairman of the EEOC. In testimony before the House Committee on Education and Labor, Alexander stated: "Job discrimination is a gross form of lawlessness. To eliminate this lawlessness, the Federal Government should have a strong agency with the requisite tools and budget to do the job." Hearings on H.R. 6228 and H.R. 13517 Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor, 91st Cong., 1st & 2d Sess. 129 (1970).

the training of state personnel and guidance in improving compliance procedures. These operations have not been overly successful. Most of the state agencies continue to operate on a level substantially below the level of the Commission. The Fifth Annual Report of the EEOC states that: "At the beginning of Fiscal 1970 over 85% of the complaints that had been deferred to state agencies for investigation ultimately came back to EEOC for handling."[14]

Blumrosen shows that at the state level, the criminal law approach has been as ineffective as the administrative/regulatory agency approach. There have been almost no prosecutions. He attributes the lack of prosecutorial vigor to the nature of the problem under attack—a "social problem."[15] This is misleading. *Some* social problems that have been labeled as criminal are vigorously prosecuted—those where the defendants are weak. Good examples are prostitution, "crossing state lines with intent to incite a riot," and vagrancy. The criminal laws go unenforced only when the defendants are powerful, and the sanctions weak in relation to that power.[16]

After reviewing state experiences in the field of employment discrimination Blumrosen traces two prevailing official attitudes or philosophies that hindered effective enforcement of the civil rights laws in the 1960's. The relationship of these trends to the EEOC is never made clear, but apparently, they affected the Commission's willingness to exercise its full powers.

The first deterrent to effective enforcement identified by Blumrosen was the concept that discrimination could best be eliminated by educating the discriminators and thereby changing their attitudes.[17] This concept, a blatant but successful tactic for avoiding enforcement of the laws, has been so discredited that one wonders why a book published in 1971 even deals with it. As Blumrosen points out, the "change-their-attitudes" approach places heavy reliance on voluntarism and reflects great concern for the delicate sensibilities of offenders or discriminators—as opposed to an emphasis on the rights of the individuals who have been discriminated against.[18] Blumrosen points to Plans for Progress, a voluntary association of 100 major corporations who gained favorable publicity and government endorsement in exchange for pledges not to discriminate, as epitomizing the "education instead of enforcement" approach.[19]

14. 5 EEOC Ann. Rep. 43 (1970). In those jurisdictions where a state anti-discrimination agency exists, the EEOC is required to defer complaints to the local agency for a period of 60 days. 42 U.S.C.A. § 2000e-5(c) (Supp. 1972).

15. Blumrosen 10.

16. Professor Blumrosen's summary dismissal of criminal sanctions is debatable. The National Commission on Reform of Federal Laws recommended stronger criminal sanctions, including personal penalties for corporate violators of a number of laws. National Comm'n on Reform of Fed. Crim. Laws, Study Draft of a New Fed. Crim. Code 29-34 (1970).

17. Blumrosen 14-19.

18. Id. at 14-15.

19. Id. at 42. An EEOC study of 100 large corporations based in New York concluded: "While there were individual exceptions, those companies (46) within the 100 which are signatories of a 'Plan for Progress'—a public posture of affirmative action in minority employment, utilized minorities in 1966 at a substantially lower rate as a group than the 54

He could also have pointed to the equally ineffective "affirmative action" programs of labor unions (which also substituted pledges of good intentions for law enforcement), or to the proclivity of high-level Justice Department officials—so well documented by Victor Navasky in *Kennedy Justice*[20]—for treating even the most blatant discriminators as "reasonable men," whom the government should take infinite pains to persuade—rather than as violators of the law, as crude and willful as burglars whom the government should vigorously prosecute.

Blumrosen fails to discuss the inherent weakness of the informal conciliation procedures followed by the EEOC[21] which, in many respects, are only slightly modified extensions of the education/persuasion approach.[22]

The second deterrent to the enforcement of the laws prohibiting discrimination in employment was, according to Blumrosen, the attribution by the so-called Moynihan Report[23] and the War on Poverty of the inferior status of minorities to their "disadvantaged" status in society,[24] rather than to institutional racism or discrimination. Blumrosen claims that the "disadvantaged" explanation was so broad as to be unremediable and that it delayed the definition of concrete wrongful discriminatory offenses that could be taken into court and addressed in a specific fashion.[25] Blumrosen does not substantiate this. It is probably unsupportable. The Economic Opportunity Act[26] and the Civil Rights Act of 1964[27] were passed at roughly the same time. If *any* relationship exists between the two, it is more likely that the deflection of national attention to poverty issues and the subsequent congressional disenchantment with the poor and their problems provided a smokescreen behind which civil rights attorneys were able to aggressively develop the law of employment discrimination.

The remaining sections of the book detail the evolution by the EEOC of administrative regulations and enforcement procedures under Title VII, discuss

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companies not party to a comparable public pledge. For example, while nonmembers had 1.2 percent Negroes in positions as officials and managers, Plan members had only 0.3 percent in these jobs." EEOC, Hearings on Discrimination in White Collar Employment at 598 (1968), quoted in Blumrosen 42.

20. V. Navasky, Kennedy Justice 193 (1971).

21. 42 U.S.C.A. § 2000e-5(b) (Supp. 1972).

22. The book suggests that such procedures are not inherently defective but simply have not been effectively applied. It is Blumrosen's position that "voluntary" agreements by business and labor to adhere to civil rights guarantees have great undeveloped potential. However, the only concrete example of success that Blumrosen cites is the Newport News Agreement. Blumrosen 328-366. This agreement was hardly voluntary. The cooperation in the Newport News situation resulted from spectacular pressure by an array of federal agencies—Justice, the Office of Federal Contract Compliance (OFCC), Defense and EEOC —threatening jointly—a unique event—to apply their combined powers to insure compliance with the civil rights laws. The threat of real sanctions, particularly the termination of defense contracts, engendered the "cooperation."

23. Department of Labor, The Negro Family: The Case for National Action (1965).

24. See Blumrosen 30-31.

25. Id. at 31-33.

26. Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-2994d (1970).

27. 42 U.S.C. §§ 1975-2000h (1970).

the dimensions of the employment discrimination problem and its most typical manifestations, and point to some of the remedies fashioned by the EEOC and the courts. Chapter 3, on the scope of discrimination, is both informative and shocking.[28] Chapters 5 and 6 deal with the major manifestations of discrimination in employment—promotion procedures as defined by seniority systems and recruitment practices—which have been combatted under Title VII's broad proscriptions against employment discrimination. In these chapters, it is sometimes difficult to differentiate between statements that are simply Blumrosen on Blumrosen and those that are Blumrosen on the law. Moreover, the discussion tends to focus on incidents of discrimination directed at particular individuals, rather than upon the less obvious, systemic problems of discrimination more recently attacked under Title VII.[29]

The major quarrel of this reader with *Black Employment and the Law* is its lack of clarity in setting forth the overall federal role in combatting discrimination in employment and the dubiousness of the conclusions it reaches concerning Title VII and the EEOC.

The federal enforcement apparatus as of December, 1971, consisted of the following five components:

(1) The Attorney General (through the Justice Department's Office of Civil Rights) who has the power to initiate "pattern or practice suits" in regard to any industry or union that appears to be characterized by a pattern of employment discrimination.[30] Cases are initiated, based on information collected by the Justice Department, by the EEOC or by other federal agencies. From the Fall of 1967 to the present, the Justice Department has initiated over 70 lawsuits and joined as amicus in many more.[31]

28. According to the book's Preface, "Chapter 3 is an official report of the Equal Employment Opportunity Commission, prepared under the supervision of Mr. Charles Markham." Blumrosen x. Chapter 3 documents racial and sexual discrimination according to its regional and industrial distribution. Its report of findings concerning the extent to which additional educational achievements on the part of Negroes fail to eliminate discrimination in promotion practices are of particular interest. The study states: "These findings strongly indicate that more education is only a partial solution to the Negroes' problem of low employment status because a lessening of the difference in years of schooling between Negroes and Anglos does not produce a proportional narrowing of the gap in employment status." Id. at 127.

29. Court decisions handed down in the past few years have attacked the more difficult systemic problems. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (invalidation of the use of unnecessary and discriminatory testing procedures cloaked as neutral practices); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), petition for cert. dismissed, 404 U.S. 1006 (1971); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) (invalidation of seniority systems that appeared color-blind but actually operated to lock in the victims of past discrimination).

Except for some statistics in Chapter 3, the book totally ignores sex discrimination, an area of increasing importance under Title VII. No mention is made (again because of the outdated nature of the subject matter) of such important cases as Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) (vacating a decision allowing different hiring policies for women and men having pre-school children).

30. 42 U.S.C. § 2000e-6(a) (1970).

31. The Department has created an Employment Section within the Civil Rights Division with over 30 full-time attorneys. Although the Department was initially engaged in a range

(2) The Office of Federal Contract Compliance (OFCC), which is located within the Department of Labor. It is responsible for securing compliance with national antidiscrimination employment policy on the part of businesses and unions that (1) contract with the federal government or (2) engage in federally assisted construction contracts. The OFCC has the power to: cancel contracts, debar contractors from future federal contracts, and publicly list noncomplying contractors.[32]

(3) The Civil Service Commission which is responsible for implementing national policy, as articulated in Executive Orders[33] concerning fair employment practices for the federal government. The Commission provides leadership to other federal agencies, reviews their performance and administers a system of hearings for aggrieved federal personnel.[34]

(4) The Equal Employment Opportunity Commission[35] which is a five-man, presidentially appointed commission, empowered to combat discrimination on the part of all employers and unions with 25 or more employees or members, as well as discrimination by union hiring halls and employment agencies.[36] The Commission has the authority to: provide technical assistance for the elimination of discrimination; to produce studies concerning the causes and manifestation of discrimination; to hold hearings; to investigate charges of discrimination; and, after a finding of "reasonable cause" to negotiate conciliation agreements that attempt to eliminate the complained of discrimination. The Commission is substantially involved in litigation through the participation of its General Counsel's office.[37]

(5) Private right of action. If the Commission fails to act within 60 days or is unable to obtain voluntary compliance by the employer or union charged with dis-

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of suits of varying significance in terms of number of potential beneficiaries, it is presently targeting its effort to major industries with (a) a large number of employers and (b) substantial discrimination against minority employees. In 1971, the 12 pattern or practice suits filed by the Department challenged practices by defendants who employed over 65,000 people.

32. Exec. Order No. 11,246, 3 C.F.R. § 209 (1972), 42 U.S.C.A. § 2000e (1970).

33. Exec. Order No. 11,478, 3 C.F.R. § 432 (1972), 42 U.S.C.A. § 2000e (1970).

34. 34 Fed. Reg. 5368, 5370 (1969). The current law gives federal employees a private right of action under Title VII after exhausting civil service proceedings. 42 U.S.C.A. § 2000e-16(c) (Supp. 1972).

35. 42 U.S.C.A. § 2000e-4(a) (Supp. 1972).

36. The EEOC originally did not have jurisdiction over the employment practices of federal, state or local government agencies, with the exception of state employment services. Nor did it have jurisdiction over employment practices in private clubs and Indian tribes, or over the employment of individuals performing educational functions. 42 U.S.C. § 2000e (1970). Amendments enacted in March 1972 eliminated most of these exceptions and gave the EEOC jurisdiction over most employers and unions with 25 or more employees during the first year after its enactment and 15 or more employees thereafter. 42 U.S.C.A. §§ 2000e(b), (d), (e) (Supp. 1972).

37. As noted in note 3 supra the current law gives the EEOC court enforcement powers. During fiscal year 1971, the General Counsel participated in 436 cases, a fourfold increase since 1969. Court decisions have frequently relied heavily on the legal and factual arguments advanced by the EEOC. See, e.g., Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1972); Young v. I.T.&T., 438 F.2d 757 (3d Cir. 1971).

crimination, the individual aggrieved may file a civil action in federal district court.[38] The court may appoint an attorney for the plaintiff and can waive costs; attorneys' fees can be collected from the defendant upon a finding of guilt. The courts are empowered to, and have awarded broad remedies, including substantial back-pay,[39] where discrimination has been proven. The grounds for private challenges to discrimination have been expanded beyond Title VII to include an independent action under the Civil Rights Act of 1866.[40]

Of the five methods for combatting employment discrimination discussed above, the private right of action—particularly in the class action form—has unquestionably been the most effective.[41] The courts have recognized Title VII complainants as "private attorneys general," performing a quasi public function.[42] The private cases have given content to the provisions of Title VII in a manner that the EEOC—because of the statutory limitations on its power—has not been able to. They have consistently provided "the major impetus for progress in the field of civil rights,"[43] and have opened up new directions under the law that the government has subsequently followed. Equally important, the cases have provided concrete assistance to thousands of litigants. In the courts, the minority complainants are given the parity of bargaining power that is generally lacking in EEOC or administrative proceedings. Moreover, during an administration notorious for its backsliding in the enforcement of equal opportunity goals, the private right of action has assured consistent, uninterrupted application of the law.[44]

38. Under the present law the Commission is given 180 days in which to act. 42 U.S.C.A. § 2000e-5(f)(1) (Supp. 1972).

39. Id. § 2000e-5(g) (Supp. 1972). The court is now limited to a maximum award of two years back pay. Id. The federal courts may "enjoin the respondent from engaging in such unlawful practices, and other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . ." Id.

40. 42 U.S.C. §§ 1981-82 (1970). See, e.g., Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1972); Young v. I.T.&T., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Workers, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970). These cases follow the United States Supreme Court finding in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), that 42 U.S.C. § 1982, which was derived from the Civil Rights Act of 1866, prohibits acts of private, as well as state discrimination. The 1981 decisions make it unnecessary to first exhaust EEOC administrative proceedings, but permit the court to require EEOC conciliation efforts where appropriate.

41. See, e.g., Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

42. See, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).

43. Hearings on S. 2515, S. 2617, and H.R. 1746 Before the Senate Subcom. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., at 63 (1971) (statement of William H. Brown, III, Chairman, EEOC).

44. NAACP, Inc. Fund Attorney William L. Robinson testified in hearings on H.R. 6228 and H.R. 13517 in favor of retaining a private right of action: "It is important that black communities maintain confidence in the legal system as something that they and their lawyers can invoke, even if a government agency will not. . . . Their rights to state their case and bring it before federal courts with their lawyers are the basis of assurance against cynicism

Black Employment and the Law deals extensively only with the EEOC, failing to measure its weaknesses against the gains that have been or should be achieved by other federal enforcement avenues or, more importantly, by private litigation. As the above discussion has shown, in terms of resources and accomplishments, the EEOC is only one small segment of the total federal enforcement apparatus. The book also fails to take cognizance of the consistent and successful attempts of the EEOC's General Counsel's office to bolster private litigants' position through amicus briefs, making available facts and research developed by the EEOC staff. Further, some of Blumrosen's conclusions concerning the major strengths and contributions of the Commission are highly questionable. Five of his theses deserve attention:

(1) *The EEOC has developed effective tools for the collection of data on discriminatory practices.*[45] It is indisputable that EEO-1 (the form which the EEOC requires employers to file) and EEO-3 (the form which unions must file) have created an effective data base for government enforcement efforts. However, it is disputable whether the EEOC has itself done or has been able to persuade its counterparts, the Justice Department, the OFCC, and others to do all that is within the federal powers to act upon the data, once it is collected. Most critics feel that the federal government has been less than vigorous in pursuing employers and unions with poor records. The EEOC statistical analyses have, however, as Blumrosen points out, been put to effective use by private litigants.[46] EEOC-developed statistical analyses have been recognized by the courts as important tools of proof.[47]

(2) *The EEOC has developed important techniques for assisting employers and unions to combat discrimination.*[48] The Commission's technical assistance role has been limited in scope and has generally not been effective unless incorporated into the law by the decisions of federal courts. In one field, the validation of qualifying tests and exams, the Commission has made an important and meaningful contribution. EEOC-developed standards[49] were translated into law and given force by the U.S. Supreme Court in *Griggs v. Duke*

developing in the black community concerning enforcement of the law."[11] Hearings on H.R. 6228 and H.R. 13517 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st & 2d Sess., 95, 96 (1970).

45. Blumrosen 27.

46. Id. at 47. The efficacy of private actions is demonstrated, in part, by the fact that the Chamber of Commerce-American Retail Federation sponsored Erlenborn Amendment (reportedly drafted by an attorney for Sears Roebuck) that passed the House of Representatives in 1971, attacked many of the results achieved by private suits. The bill proposed to prohibit class action suits under Title VII, limit back pay recoveries for aggrieved individuals to two years prior to the filing of a lawsuit, and make Title VII the exclusive federal remedy for private civil suits—barring reliance on the Civil Rights Act of 1866, the National Labor Relations Act or other laws.

47. See, e.g., Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971), and cases cited therein.

48. Blumrosen 262-65.

49. Equal Employment Opportunity Comm'n, Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 to .14 (1972).

Power Company.[50] The Court ruled that section 703(h) of the Civil Rights Act of 1964[51] permits only such testing as is directly related to the individual's competence for the specific job sought, and that general ability tests may not be used to exclude minorities—regardless of the nondiscriminatory intent, unless the *direct relationship* between test performance and job performance is proven.[52]

(3) *The EEOC has developed a conciliation process that gives minorities equal bargaining powers in dealing with discriminating employers and unions.*[53] Professor Blumrosen claims that by involving minority-complainants in the conciliation process and, particularly by requiring them to sign the conciliation agreement, the EEOC has placed them on a parity with employers and unions.[54] This interpretation would be correct if the EEOC operated as the advocate of the complainant. More often, the Commission conciliators serve as mediators between the complainant and the alleged discriminator rather than assuming an adversary relationship towards the discriminator. And, of course, the alleged "parity" is greatly weakened by the offender's knowledge that the Commission has no power to enforce the conciliation agreement once it has been signed.[55] The achievement of equality in a power vacuum is probably not very important.

(4) *The Commission has contributed substantially to the elimination of discriminatory practices through its informal negotiation and agreement procedures.*[56] Blumrosen's own statistics and the annual reports of the EEOC show that the disparities between job opportunities for whites and blacks have not narrowed significantly. The number of complaints filed annually with the EEOC has increased substantially—rather than decreasing or leveling off. If the Commission is judged by the success of its conciliation efforts, its chief contribution to improving the status of minority employees may well be the relatively prompt exhaustion of administrative remedies which paves the way to a private civil suit.

The EEOC received more than 52,000 charges during the first five years of its existence. Of that number, 35,445 were recommended for investigation. Following these investigations, the Commission found reasonable cause to believe that discrimination had taken place in over 63% of the cases. Despite these findings, the Commission failed in over half of these cases to achieve a totally

50. 401 U.S. 424 (1971).

51. 42 U.S.C. § 2000e-2(h) (1970).

52. 401 U.S. at 436.

53. Blumrosen 95-101, 149-151.

54. Blumrosen states: "By requiring their [the charging parties'] signatures, we opened a new chapter in the history of race relations." Id. at 95. "Multi-lateral bargaining is quite possibly one of the ways of the future in resolving the increasingly more complex disputes within our society." Id. at 97. Both of these conclusions are greatly exaggerated, considering the results achieved.

55. At least one conciliation agreement has been signed where the employer granted the Commission a right to sue under the agreement, should it be violated. This provision has not yet been tested. Interview with Robert Wallace, Esq., former EEOC attorney, Jan. 1972. But cf. note 38 supra and accompanying text.

56. Blumrosen 150-51.

or even partially successful conciliation agreement.[57] Many of the successful agreements were violated. During fiscal 1970, the Commission reported that it received 20,310 complaints of discrimination, 4,045 investigations were completed and 613 conciliations reached,[58] and "the corresponding figures for successful conciliations also showed a decline."[59]

There have, unquestionably, been situations where the intervention of the Commission has improved hiring practices. But major corporations have frequently refused to negotiate in good faith or have flouted the terms of conciliation agreements. In fact, in Blumrosen's entire text, the only victory against a major corporation that he cites is the Newport News agreement.[60] Furthermore, this agreement was reached only after the OFCC threatened to cut off the shipyard's defense contracts and the Justice Department suggested that a pattern or practice suit might be warranted.[61]

(5) *The Commission has played in the past and will be able to play in the future a more effective role because of its lack of hearing and decision powers.*[62] Blumrosen feels that the weakness of the Commission has allowed it to survive attacks from and efforts to control by business and unions, leaving the task of defining the law to private litigants—buttressed, of course, by EEOC expertise.

This writer is in complete disagreement with Blumrosen's advocacy of a weak EEOC. There is no question that private litigation has been widespread and effective, that it has greatly served the victims of discrimination by bringing concrete relief and the public by defining the law.[63] Nor is there any question that the federal government, since the passage of the Civil Rights Act of 1964,[64] has made progress in defining the nature and measuring the pervasiveness of employment discrimination. A substantial body of expertise has been developed on the subject and some strong actions have been initiated against discriminatory businesses and unions. But, measured by results achieved and jobs obtained, progress has been slow; only a small dent has been made in the problem. The achievement of equal employment opportunity would be substantially accelerated if the efforts of private litigants were supplemented by strong EEOC enforcement powers. An EEOC with cease and desist powers would provide a prompter remedy to supplement lengthy court procedures. It would allow overall planning and direction that the necessarily ad hoc efforts of private litigants lack. Equally important, it would demonstrate a national commitment to enforce

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57. Democratic Study Group, Fact Sheet 92-12, Aug. 16, 1971, at 4.

58. 5 EEOC Ann. Rep. 35-36 (1970).

59. Id. at 34.

60. Blumrosen 328-66.

61. See note 22 supra.

62. Blumrosen 7-9.

63. In fact the provision of a private remedy has provided an indispensable guarantee that the executive will not frustrate the promises made by the Congress (and an important aspect of that guarantee has been the provision of attorney's fees, giving the victims of discrimination the wherewithal to take on major commercial interests). 42 U.S.C.A. § 2000e-5(k) (Supp. 1972).

64. 42 U.S.C. §§ 1975-2000h (1972).

anti-discrimination policies that in itself should have an impact on discriminating employers and unions.

The anti-discrimination laws have been neither adequately enforced nor obeyed. Blumrosen is willing to accept this and to hold the various responsible agencies to a strict standard. He suggests that the success of the anti-discrimination agencies must be measured by gains in the marketplace, specifically: the ratio of minority unemployment to white unemployment in all crucial categories.[65] Yet, despite the hard evidence concerning the dismal record of the present federal enforcement mechanisms in meeting that standard, Blumrosen continues to endorse the conceptual structure of a weak conciliating agency complemented by overlapping and only slightly stronger federal agencies and by an individual right of action. By the test of more than five years of actual performance, this is not enough. The logical choice for the past few years has been to retain the private right of action alone, relegating the EEOC solely to a research and technical assistance function, or to build the EEOC into an agency with real powers, that truly supplements the efforts of private litigants. Fortunately, the Congress has chosen the latter course. This is an important step forward. If it is followed by an aggressive commitment by the federal government to exercise all the powers it possesses for combatting employment discrimination, the goals articulated by Title VII may eventually be realized.

SARAH COLLINS CAREY*

The Kennedy Round in American Trade Policy—The Twilight of the GATT? By John W. Evans. Cambridge: Harvard University Press. 1971. Pp. x, 383. $13.95.

At a time when the United States is undergoing a drastic reappraisal of its objectives and accomplishments in the field of world trade, nothing could be more beneficial than a careful historical perspective of the etiology and development of U.S. trade policy. Mr. Evans' book, although at times somewhat too thorough for all but the most serious student of foreign trade policy, is most valuable as an overview of the rise and fall of free trade in the last forty years. While the focus is on the Kennedy Round of trade negotiations in the early sixties, this merely highlights the inherent obstacles to successful multi-national trade negotiations that have existed for some time and which have led us to the brink of international economic crisis today.

In Evans' view, the failure of the trading nations of the world to develop a sane and progressive approach to trade negotiations centers around one concept: "reciprocity". Trade negotiations are no more than a sophisticated game of diplomatic horsetrading, with economic factors less important to the participants than gamesmanship. Thus high tariffs have achieved an intrinsic value as a bargaining weapon to be traded in future encounters for various concessions.

65. Blumrosen 23-27.

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Since there will be less in the cupboard to trade, every reduction in tariffs is viewed by the countries as a loss of future leverage in bargaining. Evans astutely observes:

Tariffs that have no intrinsic economic value for the country that maintains them have acquired value because of the insistence of other countries on reciprocity in the bargaining process.[1]

This observation would be passed off as simply an astute insight into the foibles of the human species, wherein the shadow of power often has more value than the substance of economic well-being, were it not for the grave economic consequences that result. For the high tariffs, maintained as a bargaining tool, result in higher prices to the consumers in the country maintaining them and often result in a decrease in real income for the country as a whole. Although Evans unfortunately does not focus on the impact on the consumer, he does acknowledge this problem. He notes:

Once it is recognized that governments attach value to tariffs for the bargaining power they represent, there is no need to assume that the levels of existing tariffs reflect their judgment of the margin of protection required for maximum collective satisfaction. *Tariff levels may be maintained in spite of the fact that a lower level would raise the country's real income.*[2]

Until recently no one has measured the effect of tariffs and trade restrictions on the consumer. However, a recent study by C. Fred Bergsten, formerly on the staff of the National Security Council, indicates that the cost to consumers may exceed 15 billion dollars yearly, or $300 per family.[3] Thus it becomes clear that high tariffs that have no economic basis are really tragically self-defeating. Moreover, even when there is a purported economic basis, such as severe foreign competition with a struggling domestic industry, tariffs are not the most rational way to deal with the problem. Evans, for example, points out that:

Any transfer of income that can be effected by tariffs could in theory be accomplished more directly, without incurring the same risk of reduced efficiency. Where, for example, all political parties agree that it is desirable to improve the lot of unemployed coalminers, it would probably be less costly to the economy to pay them a subsidy until they can find other employment than to stimulate demand for coal by restricting imports of petroleum.[4]

Perhaps the most illuminating and disturbing aspect of the book deals with the failure of the GATT[5] to fulfill its purpose as a vehicle for world wide cooperation towards the elimination of trade barriers. The inherent weakness of

1. J.W. Evans, The Kennedy Round in American Trade Policy—The Twilight of the GATT? 31 (1971) [hereinafter cited as Evans].

2. Id. at 32 (emphasis added).

3. C. Bergsten, The Cost of Import Restrictions to American Consumers 4 (1972). See also Remarks by Andrew F. Brimmer before the Foreign Policy Ass'n, Feb. 16, 1972, at 22-23.

4. Evans 27-28.

5. General Agreement on Tariffs and Trade, adopted Oct. 30, 1947, 61 Stat. pt. 5, at A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948).

the GATT goes back to its very inception when a "Protocol of Provisional Application" was included under which each government committed itself to carrying out Part II of the GATT only insofar as "not inconsistent with existing legislation."[6] Since the charter was never ratified, all contracting parties still apply the agreement subject to this qualification. Therefore, those restrictive trade practices in force prior to January 1948 have not been affected. Perhaps equally as significant is the fact that violations of the GATT by contracting parties have generally been permitted with little or no reaction. Canada, the United Kingdom and most recently the United States have all imposed import surcharges without waivers from the GATT.[7] In the majority of cases such violations have been condoned because other contracting parties have either committed similar violations themselves or anticipated doing so in the future.

Many of the inherent weaknesses of the GATT did not really become apparent until the Kennedy Round. Ironically, the Kennedy Round was thus both the climax and denouement of the GATT approach to trade. For it soon became apparent that despite the unprecedented negotiating power granted to the U.S. President by the Trade Expansion Act of 1962[8] and the noble commitments of the contracting states, the obstacles to a complete disarmament of trade barriers could not be overcome. There are several reasons for this that are explored by Evans. First and perhaps foremost was the growth of preferential trading blocs, notably the European Common Market (EEC). The GATT philosophy of multilateral negotiations on a most favored nation basis required a commitment to nondiscrimination among the contracting parties. The EEC, however, created its own preferential trading system among member states. This was soon emulated by the European Free Trade Association (EFTA) and numerous smaller alliances such as the Arab Common Market. The result of this phenomenon was a growth of free trade within preferential groups with a concomitant increase in trade barriers between the trading blocs and non-members.

A second problem that became apparent during and after the Kennedy Round was the futility of negotiating tariff reductions without insuring that they would not be replaced by non-tariff barriers which would accomplish the same result. For example, the U.S. currently has reduced its tariffs to the lowest level in recent history. However, protectionist sentiment and political pressure have resulted in a toughening of the enforcement of customs laws, especially in the area of anti-dumping. The Treasury Department, which is responsible for apprehending narcotics smugglers, counterfeiters and tax evaders has now become the chief arbiter of international trade. By tightening or loosening its enforcement of customs regulations, trade can either be encouraged or discouraged. The dangers of allowing world trade to be controlled by customs officials was recognized by Evans, who observed:

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6. Id., pt. 6, at A2051, T.I.A.S. No. 1700 at 2041, 55 U.N.T.S. at 308.

7. J. Jackson, World Trade and the Law of GATT 712-13 (1969); see Presidential Proclamation No. 4074, 3 C.F.R. 80 (Supp. 1971).

8. Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-991 (1970).

Who is more familiar than a customs official with the maze of regulations created by governments to insure that duties are fully paid, statistics collected, and the health, safety, and morals of the citizenry protected? Why should he not conclude that his government's intent was to reduce trade to a minimum and, accordingly, do his patriotic bit toward that end?[9]

Yet this is only one of many ways that the letter and spirit of the GATT have been violated by contracting parties. "Voluntary restraint programs" have successfully been used to avoid the prohibitions on quotas. The U.S. has successfully restrained trade in steel and textiles in this manner, although technically without violating the GATT. Similarly the variable import levies of the EEC on agricultural products do not explicitly violate any provision of the GATT but have resulted in the insulation of one of the world's largest agricultural markets from price competition.

If there is a general conclusion in Evans' book it is that the outlook for freer world trade in the years to come is uncertain and that any new advances will have to be made through a reworking of the basic GATT concepts. The picture is not a particularly hopeful one. Evans points out that the U.S., caught in an inflationary crisis which is largely the by-product of the war in Indo-China, is unlikely to initiate trade liberalizations in the near future. Similarly, the EEC, which is now expanding its membership, will have little incentive to seek a renewal of open multilateral trade. Finally, the less developed nations, whose influence on the world scene is increasing, appear to be interested not in genuine free trade but merely in protecting their domestic industries while obtaining access to markets in richer countries. If Evans' gloomy forecast is correct, we can anticipate continued world economic instability and an overall decline in world prosperity with nations and regional groups seeking to maximize their own welfare with little concern for the fate of other nations. This is not dissimilar to the events that led to the depression of the thirties and the World War that followed.

Ironically, it is the United States that has generally considered world economic stability as the *quid pro quo* for the development of the democratic capitalist system that we wish to spread. We have seen fit to defend other nations of the world with soldiers and billions of dollars in military aid, which, in itself, has led to balance of payment difficulties. But we are not apparently now willing to export our dollars in the interest of maintaining stable world trade, even though this would support our long range political interests. If a new initiative towards reducing trade barriers is to come from within the United States it will have to result from a number of important changes. A decrease in our military involvement abroad would undoubtedly stem the largest source of the dollar drain and inflation and place the United States in a position to once more resume leadership in the trade area. Moreover, an increased awareness by consumers that protectionism is paid for out of their pocketbooks may result in new political and social pressure both here and abroad to undertake new trade initiatives.

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9. Evans 87-88.

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Mental Disability and the Criminal Law. By Arthur R. Matthews, Jr. Chicago: American Bar Foundation. 1970. Pp. xi, 209. $3.50.

The written rule of law frequently is modified and altered before it emerges as a rule of everyday practice. Most lawyers would probably agree with this thesis in the absence of supporting data. But if proof of this written law-applied law dichotomy is needed, it is certainly provided by Mr. Matthews in his work entitled *Mental Disability and the Criminal Law.* This "law in action" study was conducted by the American Bar Foundation and pertains to an area of law of immediate concern to most citizens, whether waving the banners of Law and Order or simply observing highly publicized trials.

The author's introductory comments explain that his work is based upon a field study which occurred during 1963 and 1964 and which concentrated on criminal law practices in the District of Columbia and major urban centers in California, Florida, Illinois, Michigan and New York. The nature and purpose of the study is stated simply: to observe how various officials involved in the mentally disturbed person's encounter with the criminal law actually perceive and implement the written rules of law; and to improve the workings of the criminal justice system by concentrating on and thereby exposing the "practical operations" of the system. To the extent that myriad deficiencies were revealed and examined, and to the extent that constructive ameliorative proposals were articulated, the study satisfied its objectives. Whether the system of criminal justice and the mentally ill will thereby be improved, however, remains to be seen.

The scope and breadth of the book can best be stated by highlighting the six chapters, all of which were clearly written and organized coherently. The first chapter conveniently provides the reader with a brief review of existing legal standards relating to the insanity defense and competency to stand trial. In contrast to this segment's emphasis on the current state of the law, the remaining chapters catalog and articulate the results of the field study augmented by specific recommendations for improvement.

Chapter Two is devoted to the insanity defense in criminal cases. Buttressed by empirical evidence, it is established that assertion of the plea is infrequent because it is usually raised only in violent, capital cases in which it is the "only real defense."[1] One reason for this, which may not be obvious to laymen—and I daresay some lawyers—is the dispositional consequence of proving insanity: a lengthy stay in a maximum security institution frequently under conditions which invite the question whether the term "insane" applies more to the operational procedures than the patients allegedly being treated. Mr. Matthews sets forth pertinent statistical data, details myriad procedural disadvantages of asserting the defense and analyzes the unique features of the

1. It will be interesting to observe whether this contention is borne out under the recent decision by the California Supreme Court holding that the death penalty is cruel and unusual punishment. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). Similarly, the capital punishment decision by the U.S. Supreme Court, Furman v. Georgia, 408 U.S. 238 (1972), should, according to this argument, have some effect upon the frequency with which the insanity defense is asserted.

D.C. practice (under the *Durham*[2] rule) insofar as better mental health-care facilities and use of the defense in misdemeanor cases—a practice unheard of in most jurisdictions.

Competency to stand trial, the subject of an important but commonly unpublicized stage in criminal proceeding, is explored in the next two chapters. Matthews cites numerous practices which support his charge that the competency proceeding is actually a vehicle for sought-after dispositional consequences. First, the formal criminal trial can be side-tracked via a finding of incompetency, the result of which is institutionalization for the accused. Second, the competency procedure serves as a discovery device: initiation of the proceeding results in access to psychiatric testimony, a tactical maneuver which can be favorable to both prosecution and defense. Finally, Matthews charges that trial judges have failed to clearly apprise expert witnesses of the precise matters under investigation at competency proceedings. This, it is argued, is the primary reason that psychiatrists are confused as to (1) the purpose for which they are testifying and (2) the content of the legal standard for competency.

Chapter Five, concerning restoration to competency, concisely sets forth a number of conclusions and recommendations which mirror the rather bleak picture facing an institutionalized defendant desiring a speedy return to society. It is urged by the author, for example, that if a defendant is adjudged incompetent to stand trial, his commitment should be predicated upon a plan of treatment showing reasonable promise of early restoration; otherwise, he should be institutionalized under the civil commitment alternative discussed in the final chapter. Additionally, an incompetency commitment should be limited to a stated period of time (12 to 18 months), after which time the case should be reconsidered. This proposal, and many others, while limited to the criminal context, might well be appropriately applied to *all* cases of involuntary commitment.

The last chapter discusses civil commitment of the mentally ill. Despite the apparent contradiction between this topic and the book's title, its inclusion was necessary for a complete coverage of mental disability and the *criminal* law. For, as Matthews emphasizes, civil commitment is used extensively in all of the studied jurisdictions as another device by which society can clear the streets of social misfits without the concomitant burdens of criminal law procedural niceties. The author devotes most of the chapter to describing various police-initiated and court-initiated commitment practices. By so concentrating on pragmatic considerations, however, Matthews neglected to effectively respond to the hard philosophical questions frequently raised in this context (e.g., Should police be allowed to avoid the restrictions of a formal criminal trial by employing civil commitment to remove an undesirable, yet "innocent" person from society? If civil commitment results in long-term institutionalization, should basic constitutional freedoms be applied to such proceedings? Should any person be institutionalized against his will in the absence of an overt, anti-social act?). Admittedly, some of these inquiries may have been beyond the scope of the study; nevertheless, it seems reasonable that some effort should

2. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

have been made to at least acknowledge the existence of these and other troublesome questions.

The book's conclusion succinctly articulates some of the important findings of the study: the weight and notability of the insanity defense are exaggerated; competency to stand trial is a critical stage of a criminal case because of discovery possibilities and dispositional consequences; civil commitment provides a legal basis for removing the criminal defendant—sometimes even a minor offender—from society; there is a severe shortage of resources to deal with the numerous facets of the mentally disturbed person's confrontation with the criminal law; and there is poor communication and conflict of purpose between the various agencies routinely involved in these cases. In response to these exposed deficiencies, the author calls for greater cooperation between criminal and medical agencies, increased resources on all fronts and improved techniques for the in-court presentation of expert psychiatric evidence.

The results, appraisals and recommendations thus far outlined are clear-cut, reasonable and relatively uncontroversial. But can the same be said for Matthews' final observation that there is no need to abolish the insanity defense? Indeed, does it not seem odd that our system of jurisprudence sanctions the legal treatment of the mentally disturbed within the realm of criminal law when the fundamental issue may more accurately be described in terms of medical care and treatment of the mentally ill? Matthews brushes aside the suggestion of abolishing the defense in the following fashion:

> Critics of the defense of insanity have to supply some acceptable alternative rationale [concept of blameworthiness] for the criminal law if they are to make the case for abolishing the defense of insanity.[3]

Yet seven years prior to this book, Professors Goldstein and Katz, in a thought-provoking challenge to this position, argued that the notion of blameworthiness and abolition of the defense are *not* mutually exclusive concepts.[4] To summarize their position, they maintained that society's affirmative case against an accused obligates the state to prove that the defendant committed the alleged unlawful act *and* that he possessed the requisite "criminal intent."[5] Failure to prove each and every element results in a judicial determination of not guilty. Thus an accused who desires to defend on the basis of no "criminal intent"—whether he be sleepwalking at the time of the crime or suffering from some mental disability—simply offers evidence to disprove the existence of intent. Such an approach is consistent with our common law tradition of blameworthiness and yet need *not* entail the "insanity defense" as a clearly identifiable affirmative defense which must be proven by the accused.

If this hypothesis is true, then why was the defense of insanity manufactured and why does it remain a crystallized doctrine of criminal law? According to Goldstein and Katz, insanity is not really a defense, but rather serves as a device

3. A. Matthews, Jr., Mental Disability and the Criminal Law 198-99 (1970).
4. Goldstein & Katz, Abolish the "Insanity Defense"—Why Not?, 72 Yale L.J. 853 (1963).
5. As used, this description satisfies Matthews' concept of blameworthiness.

for restraining people who are feared by society and yet have actually committed no crime:

Though unpleasant to acknowledge, the insanity defense is an expression of uneasiness, conscious or unconscious, either about the adequacy of such material elements . . . as "*mens rea*" . . . for singling out those who ought to be held criminally responsible, or it is an expression of concern about the adequacy of civil commitment procedures to single out from among the "not guilty by reason of insanity" those who are mentally ill and in need of restraint.[6]

In light of this reasoning, it is altogether possible that the existing insanity practice could be replaced with the following scheme. A defendant claiming to be suffering from a mental disease or defect to such an extent as to negate the intent element of a criminal offense is entitled to a verdict of not guilty—just as if the commission of the physical act had been disproved. Where, however, during the course of the criminal proceeding it becomes reasonably doubtful that defendant's mental state is normal and well-balanced, defendant must undergo psychiatric examination under the civil commitment procedure. Such a proposal presupposes the abolition of the insanity defense but maintains the protective and rehabilitative features of the existing "defense" under a more rational scheme. While a hypothetical case under this alternative would be entirely consistent with the "fault" rationale of criminal law, the end result (commitment to a mental institution) could be attained under a vigorous, well-staffed and adequately funded civil commitment program. Obviously, this suggestion may be less than ideal, and perhaps no better than the existing system, but few would assert that it abrogates the core concept—blameworthiness—of criminal law.

Aside from this consideration, which deserves serious study, Matthews' work offers keen insights into the plight of the mentally ill criminal defendant and makes a valuable contribution to a pressing and long-standing societal problem. The inadequacies and shortcomings so neatly outlined in this book bespeak the need for immediate improvement. But without conscientious men willing and able to tackle these problems, and, similarly, an attitudinal change of our citizens from retribution to rehabilitation, Matthews' pleas may go unheeded. It is indeed a cruel paradox that this work may fall prey to the very kind of evil that it exposed: express rules (and books) do not always translate into meaningful results.

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6. Goldstein and Katz, supra note 4, at 868.

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