

1970

## Book Reviews

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

*Book Reviews*, 38 Fordham L. Rev. 837 (1970).

Available at: <https://ir.lawnet.fordham.edu/flr/vol38/iss4/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## BOOKS REVIEWED

**International Legal Process: Materials for an Introductory Course (2 vols.).** By Abram Chayes, Thomas Ehrlich & Andreas F. Lowenfeld. Boston: Little, Brown and Company. 1968. Pp. xxiii, 1402. Documents Supplement. Pp. vi, 635. \$22.50.

The basic thrust of the highly innovative Chayes, Ehrlich, and Lowenfeld text book, *International Legal Process* was expressed by Professor Chayes in 1962 while he still was serving as Legal Adviser to the Department of State. At that time he condemned some international lawyers for seeking "a norm that says this is legal or it is not legal. . . ."<sup>1</sup> He argued that "institutional components . . . are as important in the development of law as the elaboration of substantive norms."<sup>2</sup> In *International Legal Process*, the student tests this premise as he confronts a series of problems taken from contemporary experience to illustrate the role of law, lawyers, and legal institutions in facilitating international cooperation and in adjusting conflicts among nations. As the authors acknowledge,<sup>3</sup> they are heavily indebted to Professors Hart and Sacks whose materials on domestic legal process<sup>4</sup> have contributed so significantly toward better appreciation of our own legal system.

The problems in the Chayes book, falling under three subheadings—Limits of Adjudication, Economic Affairs, and Political Problems<sup>5</sup>—have been selected for maximum relevance to contemporary international life and for the broad overview of international legal studies which they provide. They incorporate a wide variety of materials—excerpts from U.N. and O.A.S. debates, diplomatic correspondence, New York Times clippings, as well as the more traditional court decisions and treaties. Throughout the book, one finds textual material providing historical economic and political background and outlining applicable rules of international law. Of critical importance in aiding student analysis are

---

1. Hammarskjold Forums, *The Inter-American Security System and the Cuban Crisis* 56 (1964).

2. *Id.*

3. A. Chayes, T. Ehrlich & A. Lowenfeld, *International Legal Process: Materials for an Introductory Course* xxi (1968) [hereinafter cited as Chayes].

4. H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958). The preface of this book indicates that its purpose is "the study of law as an on-going, functioning, purposive process and, in particular, with the study of the various institutions, both official and private, through which the process is carried on." *Id.* at iii.

5. Among the seventeen problems included are: "Problem I, International Law in National Courts: The Sabbatino Case;" "Problem IV, International Trade: The Chicken War;" "Problem IX, An International Operating Agency: The Communications Satellite Corporation and the International Consortium for Satellite Communications;" "Problem XII, Bilateral Treaty Relations: The Panama Canal;" and "Problem XIV, The Cuban Missile Crisis."

the series of highly incisive questions focusing from varying perspectives on key issues raised by the problems.

The approach just described contrasts dramatically with the other textbooks in the area. Professor Bishop's work, which has long been the principal law school international law text<sup>6</sup> and is presently undergoing revision, concentrates on the definition, elaboration, and analysis of rules of international law. In this respect it is excellent and comprehensive, constituting a valuable teaching and research tool. The book's thrust was well described in a review of the 1962 edition:

Editors of casebooks on international law have by now developed a standard outline—in terms of system as well as method—in the best tradition of occidental legal thought. They prefer the abstract and legalistic over the somber facts of international life, including diplomacy, for the understanding of the gist of conflicts.<sup>7</sup>

A more recent international law text book by several Columbia University professors<sup>8</sup> substantially resembles the Bishop book in its "cases and materials" orientation. However, the selection and quantity of materials represents a recognition of new far reaching developments in international law, particularly those in the areas of international organization and regulation of the use of force.

Both *International Legal Process* and the two other books discussed were designed for introductory courses.<sup>9</sup> The extreme divergence in approach between Chayes and these other books presents the international law teacher with a difficult choice. This reviewer decided to adopt *International Legal Process* for his course. The opinions expressed therefore to some degree result from the experience of utilizing the book in a small class in a three semester hour course as well as from having studied with Professor Chayes when the book was not yet in its final form.

The book's authors recognize that "no limited group of problems can present the entire spectrum of international legal questions."<sup>10</sup> Thus, at the outset, the teacher must reconcile himself to the fact that the student utilizing this book will not have the opportunity to become conversant with significant segments of substantive international law. This is not to suggest that the student does not amass considerable knowledge of substantive principles while working through the problems. A possible answer to the problem of substantive gaps is to assign for outside reading, as this reviewer did, Brierly's *The Law of Nations*,<sup>11</sup> a traditionally oriented short text on international law. Another significant factor in evaluating Chayes for classroom use is that the student prob-

---

6. W. Bishop, *International Law: Cases and Materials* (2d ed. 1962).

7. Bayitch, 16 J. Legal Ed. 243 (1963).

8. W. Friedmann, O. Lissitzyn & R. Pugh, *International Law: Cases and Materials* (1969).

9. Of course, the Chayes book can be utilized in connection with specialized courses such as those in International Trade or International Organizations.

10. Chayes at vii.

11. J. Brierly, *The Law of Nations* (6th ed. H. Waldock 1963).

ably will face a rather unfamiliar pedagogical approach since his law school experience unfortunately still tends primarily to consist of case method study.<sup>12</sup> As the book's introduction states:

[T]he reader is not asked to analyze from the point of view of the appellate judge a case already abstracted from the give and take of real life. Rather, he is asked to place himself in the various roles of litigant, advocate, policy-maker, and observer, as well as judge, trying to resolve a situation in which, as in practice, the facts are not all "given" and the procedures not already decided.<sup>13</sup>

Thus, there is unlikely to be the same comfortable sense he gets from studying the subject matter on a chapter by chapter basis with everything organized under neat headings and subdivisions. This is a virtue. Despite difficulties encountered, the reaction of the reviewer's students was enthusiastic.<sup>14</sup> Their interest in international law was stimulated; they regarded the problems as a challenge, calling for creative thinking. While the reviewer was pleased with the results obtained with Chayes, it is important to note that use of the book in larger classes, as is currently being done in many schools, would appear to present substantial difficulties calling for a more rigid structuring of class time.<sup>15</sup> However, the decisive factor in choosing Chayes, whether the class is large or small, is that since most students will have sustained contact with international legal problems only in a single introductory course, it is far preferable for them to gain some overall perspective on the present and possible future role of the international legal system, even if at the expense of learning a little less substantive law. The treatment of international law in the traditional casebook form is inherently misleading to the uninitiated student whose approach to law has been shaped by the study of domestic legal institutions. He is imbued with the concept of a hierarchical system in which third party adjudication is predominant, in which demands for change can be met through new legislation and in which enforcement machinery is well developed. Only by exposure to the flesh as well as the skeleton of the international legal system can the student begin to comprehend its distinctively decentralized nature and assess for himself the relevance of international law to the solution of problems arising out of relations among nations.

ROBERT D. KAMENSHINE\*

---

12. See Bok, *A Different Way of Looking at the World*, 20 *Harv. Law School Bull.* No. 4, 2 (1969) for an excellent discussion of student criticism of the over use of the case method and lack of relevance of law school courses.

13. Chayes at xix.

14. This was ascertained from informal discussion with students and from a written course evaluation submitted by each student at the end of the semester.

15. The authors indicate that they have required their students to submit brief written assignments, a few students for each problem, so that each student gets an in depth exposure to at least one set of issues. A recent communication from the publisher states that these writing assignments will be made available to those who adopt the book.

\* Associate Professor of Law, Vanderbilt University School of Law.

**Married Today, Single Tomorrow: Marriage Breakup and the Law.** By Kenneth and Irene Donelson. Garden City: Doubleday and Co., Inc. 1969. Pp. xi, 320. \$6.95.

With divorce and remarriage tolerated in almost every segment of society today, and with the resulting liberalization of the divorce laws, the practice of matrimonial law is rapidly becoming a more respected and respectable speciality. However, guidance through the still complex legal road to divorce and dissolution of marriage is only a part of the problem for which clients seek help. They are undergoing a traumatic experience. However, the busy lawyer, often ill qualified to play the role of psychologist, financial advisor and general confidant, hesitates to become too involved in these human relations aspects. The ideal situation, of course, would be for one person to be able to counsel on financial, sociological and emotional problems which accompany marriage breakup or loss of a spouse through death. Perhaps the answer is found in the Donelsons' work.

The book was written to help *two* groups of people:

1. Unhappy and confused wives headed for or going through legal breakup of marriage, or suddenly left alone through death.
2. Their friends and relatives upon whom these women lean.<sup>1</sup>

So thoroughly have the authors covered the subject that a reading of the volume will bring back memories of every case ever handled by the lawyer. The book is divided into three parts: the first, entitled "Emotional Breakup of a Marriage," deals with the troubles which precede the actual disintegration of the marriage and is concerned with the causes of marital dissension and the sources of help which could yet bring peace to the relationship. The second, entitled "Legal Breakup of a Marriage," deals with the various legal, social, emotional and financial aspects of marriage dissolution. Within this section is a list of organizations and individuals whose professional qualifications enable them to assist in particular types of marital difficulties. Here, the client is also informed on how to assist her lawyer in preparing the case. The questions of support, attorneys' fees, and general conduct during the whole ordeal are also covered. Advice is clear-cut and to the point. For example:

If possible you should avoid using your attorney as an emotional leaning post. Some decisions must be made by you alone. Your lawyer can suggest certain steps, but you will have to decide such things as whether to hire a private investigator for your case, whether to go back to work yourself to supplement what your husband pays you, whether to move to cheaper living quarters or to go back home to stay with your parents.<sup>2</sup>

This is good advice and much more impressive for the client to get it from a source other than the lawyer, since if he tells her the same thing she might

---

1. I. Donelson & K. Donelson, *Married Today, Single Tomorrow: Marriage Breakup and the Law* 5 (1969).

2. *Id.* at 140.

feel that he is just trying to make things easier for himself. The section ends with a Post-Divorce Check List<sup>3</sup> relative to business and personal matters.

Part three is entitled "After a Marriage Breaks Up" and is concerned with picking up the pieces after marriage dissolution. It ends with a chapter optimistically called "When You Marry Again."

Hatred and revenge are burning emotions; they leave their imprint on any face, regardless of its original beauty. They also produce inner tensions that contribute to hard facial lines and wrinkled brow. Such tension, in turn, may lead to ulcers and other physical symptoms. Martyrdom, on the other hand, draws the lips and mouth into a tight-set line surrounded by a wan, but dull, look of pseudo-saintly sadness. Tears and insomnia also take their toll of your appearance. None of these things add to your attractiveness as a woman. And that is something to keep in mind, because divorce need not be the end of your life; it could be the beginning of a new and more successful life. Don't let your emotions rob you of that opportunity.<sup>4</sup>

This book is also written with the widow in mind. She may find herself suddenly alone without having had the advantage of time for psychological and economic appraisal of her future life situation. Unfortunately, many widows are woefully unprepared for life without a husband. Chapter XVIII will help them to understand what the attorney is trying to accomplish for them and why he must follow certain legal procedures. It emphasizes, too, the importance of financial advisors for the widow without business experience.

About the authors: Kenneth Donelson is a lawyer. His wife, Irene, has long assisted him as a legal researcher. Together they have written an easy-to-read book that should be in the library of the matrimonial lawyer. Better yet, it should be kept circulating among his clients.<sup>5</sup>

ROSEMARY E. BUCCI\*

**Democracy, Dissent, and Disorder: The Issues and the Law.** By Robert F. Drinan, S.J. New York: The Seabury Press. 1969. Pp. vi, 152. \$4.95.

Dean Drinan's friends will be pleased by his latest contribution to legal thought. He deals not only with a large number of the more pressing legal issues confronting our society, but also with the fundamental notions of morality.<sup>1</sup>

3. *Id.* at 213.

4. *Id.* at 167.

5. Due to the fifty different varieties of state laws covering marriage, divorce and estates, the Donelsons had a gigantic task in generalizing the law to fit situations all over the country. They have done their work well, but it may be wise to anticipate the possibility of confusion where a particular state has different laws or procedures. A preview of the book by the attorney, before circulating it to his client, can easily eliminate this problem.

\* Lecturer in Domestic Relations at Syracuse University College of Law.

1. These notions of morality encompass the impact of morals on law, whether conceived to be outside of "the laws," operating to modify positive law, or whether inherent within "the laws."

These notions are employed as a starting point in a critical analysis of existing legal institutions and our common law traditions. Within this scope many challenging ideas are presented in an attempt to stimulate thinking in order to facilitate the discovery of possible solutions.

The author sets forth the following specific problems, as a framework of inquiry: 1) discriminatory practices against the black community, termed the "Black Revolution," 2) the escalation of crime and juvenile delinquency, 3) the erosion of family stability, 4) the growing student unrest, and 5) a large number of related areas, namely labor and working conditions, housing, the growing poverty level, and the plight of the Third World.

These precise issues contribute to the larger consideration: the decline in confidence toward legal institutions and the continued questioning, often leading to outright rejection, of the previously accepted *American way of life* and its underlying moral standards. The counter reaction is a demand for more stringent law enforcement. One of Father Drinan's main purposes is to expose the fallacies behind the cry for "law and order." Subsequently, specific proposals are advanced to correct the weaknesses of our society. But it is helpful to observe at this point that his presentation of ideas is more important than the solutions offered since many of the recommendations are already known and accepted, as for example, the strengthening of the family and the improvement of the administration of justice.

It must be mentioned that this book is not a piece of research, as might have been expected from a noted author and law school dean, but is rather a statement of the philosophy of the author. That is to say, no preface, bibliography, or table of cases is to be found. Nor have footnotes of any significance been included. The author's purpose is to expose and analyze problems, which in turn, are intended to challenge the thought of readers. This statement is not meant to imply that overtones of scholarship do not emerge; still it is essential for a reader (or reviewer) to properly comprehend the author's intended purpose, so as to consider this work sympathetically, though critically. Because of Drinan's approach, it is easy to select certain passages and specific issues for the purpose of dispute.

The book is divided into two main parts, the first of which, "Current Dissent and Disorder," presents the areas of conflict (or more specifically the problems presented for analysis). The second part, "Law and Morality In a Democracy," analyzes possible solutions. The final five chapters offer several precise recommendations.

The underlying goal of the first part is to refute the advocates of "law and order,"—that is, primarily the ultra-conservative upper middle class who, it is alleged, seek to restore outward tranquility by the employment of more stringent law enforcement measures. At this stage the author attempts to demonstrate that merely attacking an outward manifestation,—the violence—will not produce lasting solutions. In this context the words of John F. Kennedy emerge: " 'those who make peaceful revolution impossible make violent revolution inevitable.' " <sup>2</sup>

---

2. R. Drinan, *Democracy, Dissent, and Disorder: The Issues and the Law 3-4* (1969) [hereinafter cited as Drinan].

While fundamental changes must take place within our moral and legal order, one basic norm should never be lost sight of: "obedience to lawful authority is the first imperative of free men and of a free society."<sup>3</sup> This theme of obedience to positive law is constantly repeated. The reader must recognize that while the author is extremely sympathetic toward the militants in our society, he insists on preserving that society. His aim is the preservation of our social order through peaceful changes. In demonstrating the discrimination shown toward the militants, this reviewer is of the opinion that the author's case is a bit overemphasized. For example, repeated reference is made to discriminatory practices in the armed forces against Negroes until 1947, restrictive housing covenants until 1948, and racially segregated schools until 1954. These illustrations are completely outdated. The point the author is emphasizing is that the law was a tool in enforcing such discrimination. While historically the position is valid, Dean Drinan does not provide insight into *current court actions*. In 1969 and 1970 the federal courts have made significant attempts to eliminate racial inequality. It would have been more helpful if current data were relied upon.

Realistically every informed reader is aware of the factual situation behind current unrest, at least as to the major issues such as the Black Revolution and the Vietnam protests. One of the main shortcomings of the book is its failure to present both sides of these types of controversies. It seems as if only the more extreme, though not typical examples, of minority relationships are relied upon. It would possibly have been more objective if recent improvements had been mentioned, such as the concerted efforts of the federal government against segregation in labor unions, southern states, local school boards, etc. The conclusion that anti-discrimination laws are relatively ineffective seems open to question.<sup>4</sup>

In all fairness to the author, he is functioning in the capacity of an advocate, presenting the strongest case possible, in order to lay a foundation for later recommendations. The approach he uses to show the underlying *Sense of Injustice*<sup>5</sup> is to look at laws, enacted often without the consent or participation, from the vantage point of the recipient,—that is, the minority groups.<sup>6</sup> This technique has the effect of forcing legally trained readers to adopt a different point of departure when reconsidering the plight of minority groups. However, this reviewer is of the opinion that the total effect of the technique is to over-emphasize injustice: "Irish-Americans, for example, are even now still virtually excluded from the top echelons of management in banking and law."<sup>7</sup> (Parenthetically, this reviewer, possessing an Irish name, does wonder about the accuracy of the statement.)<sup>8</sup> Yet, the magnitude of the problem should not be

---

3. Id. at 141.

4. Id. at 53.

5. Id. at 17-25.

6. This perspective seems reminiscent of the late Edmond Cahn's "Consumer Perspective." See E. Cahn, *The Predicament of Democratic Man* 23-32 (1961). See also E. Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (1949).

7. Drinan at 49.

8. Dean Drinan's full statement reads as follows: "Other American minorities suc-



minimized: "The black American is surrounded by problems never encountered by any group, not merely in America but in the whole history of Western culture. No nation in modern European history ever faced a nonwhite African minority as substantial as the Negro race in the United States."<sup>9</sup>

At this point, a proposition is advanced that recurs several times in the concluding chapters: the use of law to change society. Normally, law reflects the existing social order, or the immediately preceding social order. However, because of the magnitude of current dissent and disorder, law must, by itself, help to secure needed reforms.<sup>10</sup>

It is impossible to comment upon all aspects of the book without in effect reproducing the text. Yet several areas must be noted, particularly the third chapter, dealing with student unrest, and the sixth chapter, dealing with aspects of the Vietnam protests. Not only is the content of both chapters closely connected, but a fundamental issue emerges: what recourse is open after established legal and political remedies have proved inadequate? What can an individual or group do? It needs to be stressed that Father Drinan repeatedly restates his premise that all lawful means must have been exhausted. Sheer lawlessness can never be condoned. Nevertheless, by what standard can the present disruption of positive law in the name of Higher Law be measured? What is the moral justification? The most striking illustration of direct action can be seen in the French riots of May and June 1968, for they succeeded in securing needed reforms while, at the same time, destroying the financial stability of the state:

American students can be expected to be impressed for some time to come with the fact that the riots in May and June of 1968 in France were so devastating to the Ministry of Education and to the entire government that the first major change in French higher education since the time of Napoleon took place on February 15, 1969. That change, initiated by the French government through its Minister of Education, Edgar Faure, did not come about because of the hundreds of books which have been written about the bureaucracy in French education. . . . The change—which everyone would have to concede is long overdue—was forced on France by student power and by the threat of more student power. Students in France won a stunning victory—a victory which is certain to intensify student militancy everywhere in the world.<sup>11</sup>

The basic issue remains: can such violence be deemed moral, even if desirable results are obtained? This question is not answered; rather four points of reference are given, for the purpose of future analysis:

- (a) Have all available legal and political procedures been exhausted?
- (b) Has every attempt been made to bring the protestors' moral case to the people cumbered to apathy and indifference under far less oppressive conditions [than the black minority]. Irish-Americans, for example, are even now still virtually excluded from the top echelons of management in banking and law. Italian-Americans are not present in a number of industries and activities and Americans of the Jewish faith have not risen very high in middle or top management of the automotive industry." *Id.*

9. *Id.* at 57.

10. *Id.* at 51.

11. *Id.* at 34.

during and after the time when the ordinary legal and political processes have failed to resolve the problem?

(c) Has every effort been made to follow a path of passive resistance, nonviolent protest, and other forms of action less drastic than that of open defiance of law and authority?

(d) Is the objective to be attained sufficiently significant to justify the dislocations to the public good brought about by the temporary upheavals?<sup>12</sup>

These criteria are intended to function within the larger context of the moral duty to give obedience to the civil law. They are not inconsistent with respect for positive (or enacted) law. Nonetheless, the conclusion offered is that reliance on "law and order," which will make peaceful revolution impossible, can only result in continued disorder.<sup>13</sup>

Rather arbitrarily, this review will not deal at length with the problem of the poor, since the facts are well known. But one section, "The Poor of the World," merits attention.<sup>14</sup> No one can deny the plight of the Third World or the fact that over half of the world's population is hungry. But the approach used is to equate the sovereign states of the world with a family or group of neighbors.<sup>15</sup> It is argued: "The underdeveloped nations are voiceless and powerless . . ."<sup>16</sup> This type of reasoning has already been criticized as contributing to an oversimplification. It is also highly emotional; and, in the present instance, it leads to inaccuracy, since not only are the underdeveloped nations of Africa, Asia and Latin America powerful, but they are certainly the most vocal bloc within regional and international organizations. Indeed, they are often so excessively vocal that their own cause is injured. Within the United Nations they dominate the General Assembly; they have changed the programs of WHO and UNESCO; they constitute a majority of the membership (and even chairmanships) in the majority of U.N. committees and conferences. In the Trusteeship Council the major powers are forced to cooperate and compromise with weaker non-administering states. In fact, the highest official in the World Organization, the Secretary-General, is a national of a developing state. Only in the Security Council are the major powers supreme because of the veto.<sup>17</sup>

---

12. *Id.* at 34-35.

13. "[T]hose advocates of law and order who seek in effect a society where there is a cessation of all attempts by forceful, nonviolent means to achieve an objective have failed to realize that students and other groups, who have lost faith in the efficacy of the ordinary legal and political processes, will continue to seek to have a free society even if for a period it is not an ordered one. Those who prefer an ordered society above all else must pay the price for that preference—a continued and vigilant sensitivity to the claims of the members of any group who feel that the 'peaceful revolution,' which is the American dream for everyone, is not attainable for them." *Id.* at 35.

14. *Id.* at 41-44.

15. *Id.* at 43.

16. *Id.*

17. A similar conclusion is applicable even to the International Labor Organization's decentralization of its operations into regional groupings. A single illustration of the power of the smaller states can be seen in the Second United Nations Conference on the Law of

May it be suggested, the major cause of friction is not "colonialism" (with the exception of Portugal) but the enforced regimes of *apartheid*. The perpetrators of this international crime are not the rich or powerful states.

The reviewer has, perhaps unfairly, selected the weakest portion of the text to demonstrate the havoc that can result from over-generalized analogies. The objective sought by the author is laudable, *i.e.*, greater aid from the United States to developing countries. The motives of the author are beyond question. All men of good will, and enlightened statesmen, recognize that America cannot exist as a rich nation, while a significant portion of the world's population lives in poverty. The precise words of the author are worth repeating: "To think that a world half-hungry can or will continue to coexist with a world fully fed is an illusion. The only question is whether the revolution will be peaceful or violent."<sup>18</sup>

The observation made in connection with student protest is again raised toward dissenters of the Vietnam War. In "Protest After Legal Methods Have Failed,"<sup>19</sup> the issue is whether there is, within our democratic form of government, any additional means left to dissenters: "After all legitimate methods of protest . . . have been exhausted, what do citizens do if they are still convinced that their government is murdering innocent people?"<sup>20</sup> Obviously, a simplified formula—or a definitive answer—cannot be given. A return to "law and order" is rejected.<sup>21</sup> After observing that Vietnam dissenters are "chargeable with the most severe punishments . . . to compel acceptance and to deter dissent,"<sup>22</sup> Father Drinan predicts, and quite properly, that students and war dissenters "will shout from the housetops, employing disorder, disobedience, and dissent if and when necessary. The American ethic not merely gives them this right but, in the light of Nuremberg, imposes this duty."<sup>23</sup> The incapacity of the judicial system to provide meaningful remedies to minority groups is projected to others in need of help. Prisoners, alcoholics and narcotic addicts, the mentally retarded, and the aged are in need of immediate medical and psychiatric help. Prolonged incarceration, although legal, results in continuing injustice. Reforms are sought.

In seeking *Justice* (in the sense that this concept is contained within Natural Law), Dean Drinan employs the interplay of moral and legal elements in order to analyze the growing paradox of how Americans, who cherish personal freedom

---

Treaties, concluded in Vienna on May 23, 1969. The resulting Draft Articles clearly reflect the rising position of the developing nations at the expense of the industrialized states.

18. Drinan at 42.

19. *Id.* at 66-68.

20. *Id.* at 67.

21. May this reviewer add one observation that Father Drinan does not mention in his book. Police brutality is as contrary to the American tradition and is as equally abhorrent in a democracy as is student violence.

22. Drinan at 68.

23. *Id.*

for themselves, can have "such enormous faith in the power of the civil law."<sup>24</sup>

Part Two, "Law and Morality in a Democracy," poses possible solutions to the problems previously raised in the former section. The specific consideration (in the advocacy of Justice) is the impact of moral considerations on law, including public policy. Thus, the section begins with the basic premise: the duty to render obedience to law, as drawn from the teachings of St. Paul, "has had an incalculable effect upon the American mind."<sup>25</sup> It is essential that the author's fundamental premise be recalled, both when examining his sympathetic approach to dissatisfied groups and especially when critically examining recommendations for future action. (Parenthetically, it might have been a bit more helpful to the reader if some of this data concerning the primacy of law had been presented a bit earlier.) The implication of St. Paul's teaching, that even unjust laws of the ruler must be obeyed, is adopted. Yet the limitations placed upon such acceptance are spelled out as follows:

It is understood, of course, that no theory of blind or uncritical obedience to law, right or wrong, is suggested. What is suggested is a philosophy of law or of society which holds that in a democracy made up of divergent peoples and in a society which is religiously and morally pluralistic, obedience to law is a moral imperative until or unless every remedy to change an unjust law has been unsuccessfully attempted. At that point, disorders or disobedience may be justified in a democracy. But democracy by its very nature is a government by the consent of its peoples. And that consent includes a moral pledge by citizens that they will obey all laws and that, furthermore, they will disobey an unjust law only after all efforts at altering the unjust law have come to nought.<sup>26</sup>

The extreme limits of the author's position again emerge when it is stated that Americans "have not merely the right but the duty to disobey an unjust law."<sup>27</sup> Furthermore: "American democracy embraces both the Pauline teaching of obedience to law and the Nuremberg principle that men *must* refuse obedience to an unjust law."<sup>28</sup> In short, no easy solutions are available.

Following consideration of the ever pressing problem of the respect for property rights in comparison with (but not necessarily opposed to) the rights of private persons, the conclusion is reached that the primacy of human life has the highest priority in American law.<sup>29</sup> The validity of this conclusion is particularly apparent to this reviewer who has lived within another common law system for two years. Under English law the protection of property and the "Establishment" is given a much higher priority than here. A comparative approach to the issue of the value of property as opposed to individual human rights reveals one inescapable conclusion: the United States Supreme Court is the main institution in the world today protecting private individuals and groups

---

24. Id. at 79.

25. Id. at 85.

26. Id. at 87.

27. Id. at 88.

28. Id.

29. Id. at 90.

at the expense of vested property interests. Sad to say, because of the book's advocacy, the positive accomplishments of the existing order have not been stressed to a sufficient degree.

In Chapter Nine, the full impact of the author's recommendation emerges. A call is made for a greater "assault on poverty,"<sup>30</sup> demanding more aid to the underprivileged elements. Existing property rights would presumably be modified, although the precise "divesting process" is not spelled out.<sup>31</sup> A bit later in the book this idea is carried even further, when it is argued that present day corporation law must be modified. By decrying the economic crimes of vested interests, the unrealistic solution appears to be "soak the rich." The precise target is the American corporation, on the theory that the corporate entity—as for example the automotive industry in Detroit—serves the stockholders but not the underprivileged inhabitants of that city. As an example, Dean Drinan maintains that these corporations were not able "to correct the social injustices which led to the riots in Detroit."<sup>32</sup> In reexamining the right of "absentee stockholders to be legally entitled to unearned income,"<sup>33</sup> he argues that the American corporation (like the private university) cannot exist as "an island of affluence in a sea of poverty."<sup>34</sup> First, Father Drinan asks: "But can the rules of free competition be allowed to operate without regulation if such a process does little to solve the problem of the poor or ease the confinement of the black to the ghetto?"<sup>35</sup> Hence he concludes, that: "It may well be that an equalization of the impact of law on the poor and on the rich cannot come about until there has been a rather fundamental alteration in the legal structure of the American corporation."<sup>36</sup>

This reviewer does not agree. Socialism does not correct the difficulties of which the author speaks! The human rights guarantees of minority groups and the administration of justice have not advanced to any level approaching the protection given citizens—including the poor—in our country. We must not adopt solutions more disastrous than the evils they seek to correct! A soak the rich campaign has never worked to the benefit of the people in the economic sense, or resulted in equality of law enforcement, or resulted in a greater recognition of human dignity. This reviewer fully agrees with the aims sought, but he cannot accept the economic solutions offered. May it be suggested that Dean Drinan is really dealing with world-wide shortcomings. They are not unique to the United States, aside perhaps from the fact that the size of America and its population tend to magnify specific conditions, *e.g.*, the large

---

30. *Id.* at 91.

31. "The basic principle which must be clarified, therefore, is not the devotion of law and society to the sacredness of human life as such but, rather, the extent to which a higher quality of life for all should be so valued that the vested rights of some to continue to hold their property should be modified." *Id.*

32. *Id.* at 130.

33. *Id.*

34. *Id.* at 131.

35. *Id.* at 130-31.

36. *Id.* at 130.

Negro minority. To illustrate, it would be possible to write a very similar book concerning England, the Netherlands, Eastern Europe, India, or Africa. Compared to these systems, American society is progressing much more satisfactorily in the legal recognition of the individual and the economic uplifting of the entire society. A comparative analysis, coupled with a global approach, will reveal the strengths of our American tradition and constitutional law. While this reviewer disagrees with the author, it is admitted that this type of material<sup>37</sup> will certainly stimulate critical thinking.

The final chapters advance several very challenging recommendations. In order to combat the decline of morality and the growing spread of crime, it is proposed that the public schools devote more attention to the "Teaching of Moral-Legal Values in Public Schools"—to use the title of Chapter Ten. This chapter contains some of the best and most practical suggestions offered. Precisely, the aim is to create courses in law and American legal philosophy in the secondary schools and colleges. Thus, legality and morality would be taught, simultaneously. Religious dogma would be excluded so as to avoid any constitutional difficulty. The potential of this approach is enormous: it has the advantage of returning the fundamental values to American society but in a manner calculated to reach all groups—even the non-religious. In other words, the teaching of fundamental morality has the advantage of avoiding a clash with the non-religious or non-secular elements. Those moral values implicit in our society are consistent with the beliefs of most segments of our people, not excluding the law and order advocates. Accordingly, the words of Justice Jackson are quoted: "nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with the religious influences derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples."<sup>38</sup>

One proposal with which this reviewer agrees is the inclusion of law-appreciation courses in the undergraduate curriculum, on the theory that every educated person should be exposed to the fundamental concepts of justice and morality. In other words, moral values within the law, or "the moral values inseparable from American law should form the basis of the orientation of the teaching of law in the public school."<sup>39</sup> These legal values "have now become a part of public morality and are thereby state-endorsed."<sup>40</sup> The author's message is clear. He has made a major contribution in this portion of the text. Nevertheless, it is well to note the limits of his proposal to teach morality in public schools; no attempt is sought to impose state-oriented morals at the expense of religious beliefs. As demonstrated throughout the book, the limits of recommendations are carefully indicated.

The theme of governmental participation is extended to governmental control in Chapter Eleven, "The Mass Media and Public Morality." Here an

---

37. See, e.g., *id.* at 129-31.

38. *Id.* at 105.

39. *Id.* at 104.

40. *Id.* at 105.

attack is made against vested interests—this time commercial television. While it is easy to describe the weaknesses of the American system of “free enterprise” the solution, a National Foundation for Public Television, is worse than the “evil.” This reviewer is bitterly opposed to governmental control or direction of any news or entertainment media, largely because of his observation of the British system of control which often amounts to censorship. Dean Drinan states: “Clearly the opportunity for the government to influence viewers of television may be greater than similar opportunities in the public school.”<sup>41</sup> While the aim—the promulgation by the government of “*culturally diverse, broadly representative, and morally educational programming on radio and television*”<sup>42</sup>—is laudable, we need only look to societies where such governmental supervision is practiced. This reviewer is not impressed by governmental control in Great Britain under the Socialist government. Such proposals represent a real danger to our first amendment freedoms. It should be remembered that one of the original aims of the American Constitution was to limit the power of the central government.

Chapter Twelve, “Law, Morality and Family Solidarity,” comes to grips with an obvious weakness in our society. Again we are faced with a global problem—the decline of the family. The competence of Father Drinan, as head of the American Bar Association’s Section on Family Law, is well known. His suggestions that a moral consensus be reached and, secondly, that the various state divorce laws be modified to strengthen the family relationship, are meritorious.

The following chapter, dealing with inequality of law enforcement, restates many of the injustices discussed in the first portion of the book. The need to reform the administration of justice, in order to guarantee the fundamental rights of the poor and minority groups, is beyond challenge. Furthermore, dangers are imposed by certain governmental practices, *e.g.*, wiretapping. As is true of several topics raised in the book, an increase in governmental power will result in infringing the rights of citizens.

The book concludes with an especially fine chapter, “The Role of Churches and Synagogues,” calling for action by all religious groups. Concrete proposals are offered. Father Drinan is not concerned with the usual generalizations of “vague religious revivals,” so common today. The author proposes that religious bodies work to change the social order.<sup>43</sup> But, the suggestion that “religious groups must be prepared to surrender, if necessary, their alliance with existing political processes and present-day capitalistic thinking”<sup>44</sup> is difficult to accept. Regrettably, desirable moral and political objectives are weakened by economic overtones. One proposal seems worthy of special mention: “Religious groups must seek to revivify the nation’s faith in traditional moral and political values and processes while at the same time affirmatively developing a theology of

---

41. *Id.* at 114.

42. *Id.* at 116.

43. To achieve this above mentioned objective four specific proposals, sadly too lengthy to reproduce here, are set forth. See *id.* at 139-40.

44. *Id.* at 139.

revolution and of violence."<sup>45</sup> All of these goals must be achieved at the grass roots level: "All religious men and women must realize that there is no other local structure in American society besides the church and the synagogue which can possibly fulfill that roll of mediation and conciliation which is necessary to restrain widespread panic and to develop a new moral consensus on which the nation can form a more just society."<sup>46</sup> Churches and synagogues must assist the majority of the populace to accept rapid change. Concerted church action can do much, the author quite properly maintains, to provide the required leadership.

Not every reader—or for that matter reviewer—will agree with all statements made in the book. On the other hand, they will hopefully be stimulated to reexamine fundamental moral, social, and legal concepts. Indeed, this reviewer was challenged to such an extent that a lengthy commentary was written of a text merely one hundred and fifty-two pages, possibly because he chose to refute those portions with which he disagreed. A great many issues were raised that could not be examined in the space of this review. Nevertheless, may one final criticism be offered? The book is far too expensive to reach a large audience. The author has shown a great deal of courage in writing such a "revolutionary" study, and the publisher has been equally courageous in bringing out the work with high quality binding and printing—more in the nature of a library edition or a collector's item. Consequently, only the affluent upper classes, the target of the text, will be able to purchase the book. Certainly the mothers on welfare, Negroes in slum areas, or for that matter, university students, even at the price five dollars, cannot afford the luxury. This short but excellent study should have been produced in a very small inexpensive edition, even though it would have appeared less prestigious. Perhaps it may still be made available to those persons in need of Dean Drinan's message: the dignity of the human being.

W. PAUL GORMLEY\*

*John Marshall's Defense of McCulloch v. Maryland.* Edited by Gerald Gunther. Stanford: Stanford University Press. 1969. Pp. vi, 214. \$7.50.

In *McCulloch v. Maryland*,<sup>1</sup> John Marshall's Supreme Court decided that Congress could constitutionally charter a bank, and that the State of Maryland could not tax it. Even with the absence of an express constitutional provision that Congress can charter a bank, the Court thought banking to be so related to the powers to tax, to support an army, and to other delegated functions that the power could be implied.

---

45. Id.

46. See id. at 139-40 for the full proposal.

\* Mr. Gormley, a holder of five postgraduate degrees, is presently a Leverhulme Visiting Fellow at the Faculty of Law, 1969-70, and Simon Research Fellow, 1970-71, University of Manchester, England.

1. 17 U.S. (4 Wheat.) 316 (1819).



Today, this holding would not arouse even our right wing citizens. But in 1819, the decision drew immediate editorial condemnation from a covey of aristocrats who controlled Virginia's political machinery. It was not the survival of the national bank that vexed the Virginians. Rather it was the opinion's pointed pronouncements that Congress' power came from the people, not from the states, and that the clause permitting Congress to make all laws "necessary and proper" for carrying out its delegated powers may itself be a grant of power instead of a rigid restriction on congressional action. Deciding against the strict constructionists, Marshall made it quite clear that Congress has considerable latitude in determining what is "necessary and proper."

In splitting the power pie between Congress and the states, *McCulloch* did indeed give the edge to federal functions. As viewed by nineteenth century Virginians, this was an intolerable intrusion into states' rights. The Virginians, still smarting from the Supreme Court's conclusion that federal courts had the final word on state interpretations of federal laws, had hoped that the "necessary and proper" clause would restrict the national government to the performance of just those functions specifically authorized by the Constitution, with a grudging allowance for whatever incidental acts are absolutely indispensable to performing those delegated duties. No one would expect the outraged Virginians to sit in gentlemanly silence. Writing in the influential *Richmond Enquirer*, the politicians predicted an imposition of federal power which would wipe out the last claim of state sovereignty. An unrestrained Congress would, they cried, actually go so far as to build roads and canals. Sketching the scenario for slippery slope salesmen of this century, they declared that the decision would foist federal universities and churches upon the nation, resulting, I suppose, in the unhealthy education and eternal damnation of our souls.

Aroused by the attack, Marshall picked out a pseudonym and penned a reply to be printed in the *Philadelphia Union*. Unhappily, accurate printing was not the *Union's* strong suit, and Marshall's message was badly garbled. Undaunted, and goaded by a second volley from Virginia, the Chief Justice selected another pseudonym and angled anew to get a good press and a sober typesetter. This time, the *Alexandria Gazette* printed his essays and, fortunately, set the type right.

Ever the voice of reason and moderation, Marshall denied that the decision damaged the concept of delegated power or unreasonably enlarged congressional authority. In soothing terms, Marshall pictured a practically impotent court, pointing out that it has only such power as the reasoning in its opinions can garner. But even a powerless court has to do its duty—*i.e.*, to decide those cases that come before it. This duty includes deciding those difficult disputes dealing with distribution of governmental power. Congress likewise has to carry out the functions delegated to it by the Constitution. To do its duty, Congress has to have the power to perform the necessary steps along the way. To strain every congressional act through a restrictive "necessary and proper" clause and to strike down anything which will not stand as the one indispensable way to reach an authorized aim would render Congress incapable of acting at all. Clearly, any governmental goal can be accomplished in several ways. Because

no single method can be called "indispensable," Congress must be allowed some latitude in picking which one to adopt.

Marshall made a distinction between allowing Congress to have latitude in performing authorized functions and the proposition that an entirely new list of federal functions could be written into the Constitution through the "necessary and proper" clause. The latter interpretation of *McCulloch* was not what Marshall intended, according to his essays. He even went so far as to indicate that the clause could be left out without affecting the power picture.

Gerald Gunther has collected the clippings from this newspaper battle and published them in *John Marshall's Defense of McCulloch v. Maryland*. Gunther's personal contributions are a sprightly introduction and the revelation that it was indeed Marshall who wrote the full set of replies to the Virginians. He also helpfully ungarbled the *Union* essay for easier reading. Gunther's editorial assessment is that, given Marshall's explanation, the *McCulloch* decision is not in itself authority for today's federal involvement in fields ranging from farm and factory control to civil rights.

I am not certain where Gunther thinks this revelation is supposed to leave us. Unveiling Marshall's explanation is interesting enough historically, but it is not enough in my mind to turn the entire notion of federal power around. Like it or not, we have arrived at the twentieth century with a strong set of expectations concerning the legitimacy and scope of federal power. To what extent these expectations are based upon scholarly analysis of *McCulloch* is difficult to say. It is my guess that the present balance is the result of political compromise and the necessities of the times, and that citing *McCulloch* for the expansion of federal power is simply playing the law game—the rules of which require citation of some precedent. Gunther would ask us to stop mouthing *McCulloch* and address ourselves directly to the question of how much power Congress needs. This is an attractive idea, but it is not how the law game is played. Within their system of carefully preserved myth, the law players address the issue of power allocation about as directly as possible. In the background of every case dealing with distribution of governmental power, the issue is there. Unstated and perhaps even unargued, it is certainly not unknown to or unconsidered by the people who sit on the Court. As they decided case by case that federal power can be extended into new arenas, their citation of *McCulloch* has probably been mostly makeweight. Admittedly, it may be necessary makeweight so long as lawyers, judges and law schools perpetuate the myth that law is determined and controlled by precedent. However, honesty is likely to be disfunctional in a game where "let's pretend" is the rule.

Although the Court has substantially abandoned the power allocation arena, the battle is still being fought by able combatants. In every congressional session, the division of responsibility between national and local governments is debated and resolved by elected representatives. Sometimes the pressure against national action is so powerful that it prevents appropriate congressional response to problems which are clearly nationwide in scope. The fact that Congress has power to act in almost every legislative area does not mean that the power is abused.

John Marshall wrote for an audience long since dead. Whether he meant this or that in *McCulloch* seems less important in today's world than whether we are more likely to choke on automobile exhaust and industrial waste with or without federal legislation providing environmental protection. Likewise, the "states' rights" to keep Blacks from buying into white suburbs is not really an appealing argument for this century (and should not have been for the last). If the expansionist interpretation of *McCulloch* has provided a handy error for reaching practical results, it may be best not to foul up the system by making too much of Marshall's musings.

JOHN MIXON\*

**How To Use Financial Statements: A Handbook for Lawyers.** By Irving Kellogg. New York: McGraw-Hill Book Co. 1969. Pp. vii, 505. \$19.50.

In 1969, the shares of conglomerate corporations lost value even more drastically than the general market. One small conglomerate stock, however, is notable because of its almost total loss of value during 1969. After trading at a high of more than twenty-four dollars a share during the last quarter of 1968 and the first quarter of 1969, trading was suspended in the stock of Commonwealth United in 1969.<sup>1</sup> Trading has since been resumed, and the stock is selling at about two dollars a share.

The spectacular rise of the stock to twenty-four dollars was due to a number of factors, one being that the president of the company was predicting earnings of about one dollar a share in 1968. When the 1968 annual report finally came out in the spring of 1969, it confirmed the optimistic prediction of the president, showing net earnings in 1968 of \$10,370,366 or ninety-eight cents per share. Included in computing the net earnings were stated revenues of \$22,758,474 from "real estate." No footnote to the certified income statement suggested that any of this real estate revenue was unusual or questionable.

Under date of June 24, 1969, Commonwealth United issued a proxy statement containing the same statement of income previously included in its annual report.<sup>2</sup> The expanded information in the proxy statement cast serious doubt on the stated earnings for 1968. Commonwealth sold certain real estate properties at an aggregate sales price of \$13,282,500 (including a \$5,450,000 sale made on December 31, 1968 of certain unimproved land in Hawaii) which properties were acquired in 1968 at an aggregate cost of \$8,115,839 of which \$2,487,583 is attributable to the unimproved land in Hawaii. Net income per share arising from these real estate sales was \$.49.<sup>3</sup> If the reference to the more detailed

---

\* Professor, University of Houston College of Law.

1. Commonwealth United Corp., Proxy Statement, Special Meeting of Stockholders, Dec. 29, 1969, at 17 (proxy statement mailed with covering letter dated Dec. 2, 1969).

2. Commonwealth United Corp., Proxy Statement, Annual Meeting of Stockholders, Aug. 4, 1969.

3. *Id.* at 19.

description<sup>4</sup> is followed, one discovers that the sale "of certain unimproved land in Hawaii" indeed merited the special mention it received. The land in question was purchased on December 31, 1968, for \$1,656,800.<sup>5</sup> The sellers to Commonwealth were essentially the same persons from whom the company purchased several million dollars worth of stock on the same December 31, 1968. The real estate was "sold on December 31, 1968, for \$5,450,000 to a partnership composed of Messrs. Kleiner, Bell and Shapiro (controlling stockholders of Kleiner, Bell & Co., Incorporated, financial consultant to Commonwealth) and Richard A. Freling."<sup>6</sup> Almost all of the purchase price in this purported sale "was originally secured by a mortgage on the property only, but by *subsequent agreement* . . . its payment was personally guaranteed by (some of the purchasers) to the extent of any deficiency thereon after Commonwealth's sale of the property."<sup>7</sup> It was further disclosed that Commonwealth remained obligated for the cost of improving the property for subdivision development. The recorded gain on this one sale was \$2,963,200, or close to thirty percent of the total reported earnings of the corporation for 1968.

Thus we see included as income, without special designation or footnote, a gain which was doubtful because (1) the allocation of the original purchase price of the stock and land between the two items was suspect; (2) the sale was made to the company's financial advisors; (3) the consideration for the sale was the land which itself was sold; and (4) the seller had not finished his obligations with respect to bringing the land to the final state contemplated by the sales contract, that is, subdividing. As to the last point, both accountants and lawyers question whether a transaction is completed when the seller remains obligated to do something to the property being sold.<sup>8</sup>

The foregoing tale is intended to illustrate a point frequently made by Irving Kellogg in his book *How to Use Financial Statements, i.e.*, financial statements cannot be taken at the face value, even when prepared and certified by certified public accountants. That book should be very helpful to lawyers, and perhaps to others, in providing in a simple, concise form good collections of questions to ask and matters to pursue to determine whether a financial statement is reliable. Moreover, especially in the last four chapters, there are many helpful hints as to how to spot suspicious figures which should merit further checking. The last three chapters contain case studies of common legal situations where financial statements must be analyzed and financial data must be referred to or incorporated into legal documents. The explanation of the defects and possible ambiguities or false data contained in the illustrative financial statements proves to be an effective means of demonstrating the techniques of financial analysis.

Mr. Kellogg comes close to asking each lawyer to become an accountant. His

---

4. Id. at 34-35.

5. The purchase of the unimproved land in Hawaii was subject to an \$80,000 mortgage.

6. Commonwealth United Corp., Proxy Statement, Annual Meeting of Stockholders, Aug. 4, 1969, at 34 (emphasis added).

7. Id. at 35.

8. See Briloff, Castles of Sand, *Barron's*, Feb. 2, 1970, at 3.

check lists for internal controls and auditing procedures are numerous and somewhat detailed. Perhaps most lawyers should conclude from these lists that the answer lies in hiring their own accountant. It is not that any individual suggestion is too complicated; Mr. Kellogg is easily understandable. It is just that the cumulative weight of the great number of matters which must be checked to assure the accuracy of financial statements is somewhat overwhelming. On the other hand, the detailed listing of the numerous necessary procedures would not be overwhelming if used selectively. Questioning of an accountant as to his use of these procedures in particular areas may help in determining whether he is the accountant to hire. The same questions also could be helpful in cross-examination of an accountant on particular matters.

For a true novice in accounting, the basic elements of a balance sheet and an income statement are explained and the nature of accounting principles and their frequent flexibility suggested. However, when it comes to the rules governing the presentation of financial data, that is, what are the "generally accepted accounting principles," the book is not wholly satisfactory. Many matters are oversimplified, probably out of a desire to make the book readable. Complicated matters such as pooling of interests are not treated. Most importantly, the rules as stated are not always accurate. For example, the installment method of reporting gain is stated as the usual accounting method, although it is rejected by the Accounting Principles Board of the American Institute of Public Accountants (A.P.B.).<sup>9</sup> Another similar example of failure to tell the whole story deserves extended treatment. For many years the debate has raged as to whether certain extraordinary items of gain or loss may properly be excluded from the income statement and carried directly to retained earnings on the balance sheet. The view on this question presented by Mr. Kellogg is that formerly promulgated by the A.P.B.<sup>10</sup> This older view was that items which "are material in relation to the net income of the company and are clearly not identifiable with or do not result from the typical or usual business operations of the period . . . may be excluded when their inclusion would impair the significance of the net income so that misleading inferences might be drawn."<sup>11</sup> Although the question of the authoritative weight of pronouncements of the A.P.B. is beyond the scope of Mr. Kellogg's book and of this review, it is certain that its pronouncements do have significant weight.<sup>12</sup> In December, 1966, the A.P.B. issued its Opinion No. 9, abandoning the flexible older view and requiring many more

---

9. Kellogg at 268. Compare *id.* at 234-35 and Accounting Principles Board Opinion No. 10, ¶ 12, *Journal of Accountancy*, Feb. 1970, at 66, 68-69 [hereinafter cited as A.P.B. Opinion.]

10. Kellogg at 262.

11. *Id.* at 262-63.

12. The lawyer seeking an answer to the question of what are generally accepted accounting principles will undoubtedly feel frustrated by the position of the governing Council of the Institute of C.P.A.'s found in its Special Bulletin of Oct. 1964 (reprinted in *Journal of Accountancy*, Nov. 1964, at 12). The Bulletin stated in part:

1. "Generally accepted accounting principles" are those principles which have substantial authoritative support.

2. Opinions of the Accounting Principles Board constitute "substantial authoritative support."

items to be included in the income statement regardless of the possible misleading inferences. Under the new view only certain types of items of gain or loss specifically related to a prior year may by-pass the income statement.<sup>13</sup> Of course, extraordinary or non-recurring items are still to be segregated to permit the careful reader of the income statement to assess their relevance. Perhaps the older view is still a "generally accepted" method of presentation. But Mr. Kellogg's simplified approach, here as elsewhere in the book, could mislead the reader.

The relatively rare inadequacies in discussing what are the proper accounting rules do not impair the value of the book as an introduction to accounting and as a source for questions to ask to determine accuracy. If the lawyer wants to go beyond merely understanding the figures and assessing their accuracy and approach the question of whether they are presented in accord with generally accepted accounting principles, he will undoubtedly consult with an accountant familiar with the most recent theories and opinions as to what is acceptable accounting. He may also wish to consult more extensive treatises. In all events, he should apply his own training to look for substance rather than form in deciding whether the financial statements present a true picture for the purpose at hand and whether they have been prepared in accord with generally accepted accounting principles. Thus, the lawyer might ask concerning the reporting of the gain on the sale of the Hawaiian land by Commonwealth United whether the transaction was reliable evidence of the future profitability of the company and whether the manner in which it was presented was an unacceptable showing of assets at appraised values rather than cost values,<sup>14</sup> rather than a proper application of the usual rule that gain is recognized when title passes.<sup>15</sup>

HAL M. SMITH\*

**International Telecommunication Control.** By Delbert D. Smith. Leyden: A.W. Sijhoff. 1969. Pp. xvi, 231. \$8.11 (approx.).

"Beginning in 1972, millions of villagers in India will be able, through television broadcasts from orbiting satellite, to see shows on community sets about planting and cultivating crops, about the proper use of pesticides and about birth-control practices.

....

The spacecraft would be designed to beam a more powerful and more highly

---

3. "Substantial authoritative support" can exist for accounting principles that differ from Opinions of the Accounting Principles Board. For a recent comment on the problem, see Letter from Stanley Marcus to Journal of Accountancy, Feb. 1970, at 25. As to the recent failure of the Institute to elevate the standing of the A.P.B. Opinions, see Journal of Accountancy, Feb. 1970, at 7, 29.

13. A.P.B. Opinion No. 9, ¶ 23, Journal of Accountancy, Feb. 1967, at 55, 58.

14. Kellogg at 184.

15. Id. at 268. For one view on the question, see S.E.C. Accounting Series Release No. 95, Dec. 28, 1962, 28 Fed. Reg. 276 (1963).

\* Professor of Law, University of Maryland School of Law.

focused television signal than is transmitted by present communication satellites.

In this way it should be possible for \$500 receiving stations in Indian villages to pick up the signal and amplify it for regular television sets in community centers."<sup>1</sup>

Will Pakistan, or other states which may lie within the cone of the signal, have any recourse if they object to the program content? When technology produces a still greater signal strength, and receivers capable of direct reception of satellite broadcasts, what will be the rights of a state which is the unintended recipient of the unwelcome broadcasting of a state whose deliberate object is unwelcome, perhaps even subversive, broadcasts? Incipient broadcasts from space dramatize and accelerate the dilemma posed by radio broadcasts such as those of Voice of America, and of Radio Luxembourg. Dr. Delbert D. Smith focuses on the problem of such unwelcome broadcasts.<sup>2</sup> In the course of his analysis, he presents a competent summary of the range of international problems arising from broadcasting. He seeks to place transnational broadcasting within a broad context of existing doctrines of international law, recent practices, and organizational structures which have been created to deal with those and related problems. Throughout his development, Dr. Smith provides the reader with valuable insights into the technology which has given rise to the issues law has been called upon to meet. Finally, he offers certain proposals, normative and structural, for dealing with unwelcome broadcasts and related questions.

In his initial review of general principles of international law, Dr. Smith relies on the theory of territorial sovereignty over superjacent airspace as the basis for a claimed right to exclude unwelcome broadcasts. Jamming is thus seen as a means of implementing this claimed right. This traditional view is contrasted with the developing norm of a free flow of ideas and opinions, as exemplified by the *Universal Declaration of Human Rights*,<sup>3</sup> the *European Convention for the Protection of Human Rights*,<sup>4</sup> and the U.N. *International Covenant on Civil and Political Rights*.<sup>5</sup> The author points to the fallacious

1. N.Y. Times, Sept. 23, 1969, at 1, cols. 2-3, at 12, col. 1.

2. The author generally uses the term "telecommunication," which he defines, for purposes of this book, as "broadcasting services, by which are meant telecommunication [in the broader sense] services designed for reception by the general public, irrespective of whether the transmission is of sound or images and is accomplished by radio, optical, or other electromagnetic systems." D. Smith, *International Telecommunication Control 1* (1969) [hereinafter cited as Smith]. The phrase "unwelcome broadcasts" is the reviewer's.

3. Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." G.A. Res. 217 [III], U.N. Doc. A/810 at 71, 74-75 (1948).

4. Article 10 (1): "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." Nov. 4, 1950, art. 10 (1), 213 U.N.T.S. 221, 230.

5. Article 19: "(1) Everyone shall have the right to hold opinions without interference.

foundation of the theory of airspace sovereignty—a totally nonexistent “disturbance” of the air by the “radio waves”—but makes it clear that legal theory has neither inhibited deliberate external broadcasts, nor deterred their jamming.

The creative use of traditional legal doctrine to resolve modern problems is most evident in Dr. Smith's discussion of “pirate” radio stations.<sup>6</sup> Since such stations may either be unlicensed, located within the territory of no state (*i.e.*, the high seas), or may be licensed by and located on the territory of a state adjacent to the desired market, no single control theory will be adequate for the receiving state that wishes to eliminate, or at least minimize, the impact of their broadcasts. Here Dr. Smith demonstrates an impressive ability to build persuasive legal theories by drawing upon and blending legal principles from a variety of areas, including: the customary and conventional law of the high seas, contiguous zones and the continental shelf; the objective territoriality and legal vacuum theories of jurisdiction; and the “genuine link” test for nationality of ships (and Mr. Nottebohm).<sup>7</sup> In considering the different possible locations of the transmitter, he points up the importance of precise factual analysis and provides, almost as an aside, a wealth of citations to precedents, treaties, and other sources of law in each of the traditional areas utilized. And Dr. Smith demonstrates how theory has been implemented in suppressing pirate broadcasters, touching on the experience of Holland,<sup>8</sup> Norway, Denmark, Sweden and Finland,<sup>9</sup> and considering in detail Great Britain's 1967 legislation.<sup>10</sup> Both the practices of the pirate broadcasters and the legal responses are extensively documented. Even readers with no particular interest in broadcasting will find significance in the fact that Danish authorities seized a pirate broadcasting ship of Guatemalan registration and treated it as if it had no nationality, deeming Guatemala a mere flag of convenience,<sup>11</sup> and in the fact that the Netherlands extended her criminal jurisdiction to fixed structures erected on her continental shelf beyond her territorial waters in order to suppress a broadcaster there.<sup>12</sup> It is almost anticlimactic to learn that Britain

---

2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Annex to G.A. Res. 2200 [XXI], 21 U.N. GAOR Supp. 16, Agenda Item No. 62 at 52, 55 U.N. Doc. A/6316 (1966) reprinted 61 Am. J. Int'l L. 877 (1967).

6. “Pirate” stations, as used here, are privately owned and operated commercial broadcasters, who earn advertising revenues by directing popular broadcasts into an area which would otherwise be served only by a government monopoly or quasi-monopoly. Smith at 39.

7. See The Nottebohm Case (Liechtenstein v. Guatemala), Judgment of April 6, 1955, [1955] I.C.J. 4, 23, in which, *inter alia*, the Court referred to the need for a “genuine connection” between a state and its supposed national.

8. See Smith at 82-83.

9. For a discussion of these so-called Nordic Acts, see *id.* at 81-82.

10. Marine &c., Broadcasting (Offences) Act, 1967, effective Aug. 15, 1967. Smith at 81-96.

11. *Id.* at 82.

12. *Id.* at 82-83; for a partial text of the Dutch legislation, see *id.* at 82 n.54.



deals with such broadcasters primarily by cutting off their supplies, manpower and maintenance, and by cutting off their sources of advertising revenues. In each case, the control is effectuated by the entirely conventional exercise of criminal jurisdiction over activities within the territory and over British nationals.

But while the problem of pirate broadcasters was not too difficult to resolve, Dr. Smith is less sanguine concerning the possible means for controlling broadcasts transmitted by a foreign state: "It is difficult to see what direct control measures can be taken by a country wishing to eliminate the transmissions of an external service short of diplomatic action and in an extreme case, jamming."<sup>13</sup> This lack of effective control measure has, of course, the greatest implications when direct broadcast satellites are considered. The potential for such broadcasts, coupled with the probability of technological breakthroughs which will sharply reduce the cost and size of television receivers, lends urgency to the author's subsequent suggestions for the development of new control techniques. But even while pointing out the present lack of such measures, the author contributes a rich factual background to assist the reader in understanding the issue and evaluating possible solutions: he surveys the growth and scope of such broadcasts and by way of example, treats one external service<sup>14</sup> in considerable detail. He also presents a review of information now known concerning the size of the audience of these broadcasts and their effectiveness, and suggests the need for considerable additional research for the guidance of policy makers in transmitting states.

Dr. Smith pays particular attention to the international regulatory and cooperative bodies that have developed in the effort to resolve telecommunications problems. Here, too, he is less than optimistic, for example, in his appraisal of the credibility and effectiveness of International Telecommunications Union regulation. (ITU regulations appear to have been ineffective in dealing with pirate broadcasters, although its recommendations<sup>15</sup> and an agreement concluded within the Council of Europe<sup>16</sup> encouraged the national legislation previously mentioned.) The author discusses the growth of regional international broadcasting networks and program exchange services. In particular, he considers the European Broadcasting Union and its "Eurovision" service,<sup>17</sup> and the East European equivalent, ORIT<sup>18</sup> and "Intervision."<sup>19</sup> He finds significant progress in dissemination of news and educational programs, and in achieving international cooperation on copyright protection and related matters. But his optimistic note is at least questionable when one considers that even Western Europe has been unable to standardize its television systems.<sup>20</sup> A full

---

13. *Id.* at 108.

14. Voice of America's service to Egypt. *Id.* at 106-10.

15. *Id.* at 74.

16. *Id.* at 78-81.

17. *Id.* at 124-27.

18. International Radio and Television Organization.

19. Smith at 127-28.

20. *Id.* at 125.

chapter is devoted to satellite telecommunication, with a review of the Comsat/INTELSAT<sup>21</sup> structure, and of proposals for the definitive INTELSAT arrangements. Dr. Smith is particularly concerned with the role of the ITU in the regulation of outer space telecommunications; he reviews its activities to date, and suggests structural and other revisions which might make ITU more effective.

In his concluding chapter, the author presents his personal appraisal of the basic problem, and proposals for its resolution. First, he suggests that the sole basis for objecting to the receipt of foreign broadcasts should be *harmful effects* on a legitimate interest of the receiving state; and he urges that objective criteria be developed for determining the existence of such harmful effects. As a mode of implementing that policy, he further proposes creation of an "International Broadcasting Commission" within the framework of the ITU or the UN to develop those criteria, license telecommunications, and settle disputes concerning the presence of harmful effects. This proposal and the criteria to be applied in determining what constitute harmful effects are developed at some length.

It is unfortunate that Dr. Smith chose to begin this work with an extended discussion of traditional doctrines of international law<sup>22</sup> which, though theoretically applicable by analogy to broadcasting, are clearly inadequate for a resolution of today's problems, much less those which will arise under tomorrow's technology. This Dr. Smith himself recognizes when, subsequently, he refers to "a new set of norms and conditions to which the development of the appropriate legal concepts must conform,"<sup>23</sup> and when he says that "[t]his new set of circumstances calls for policy decisions to be made by State governments in terms of the scope and content of external programming and in consideration of the significance of telecommunication within the total policy structure."<sup>24</sup> Despite his call for fresh, policy-oriented approaches and his frequent use of the language of policy, one cannot help feeling that Dr. Smith is more at home when he is discussing traditional doctrines such as the regime of the high seas and the nationality of ships, and when he is analyzing the structure of an international organization. In particular, his proposal for an International Broadcasting Commission is unconvincing in the light of his own discussion of the external broadcasting services of the great powers: he failed to persuade

---

21 "Comsat," the United States' Communications Satellite Corporation, which acts, *inter alia*, as manager for "INTELSAT," the system organized under the Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System (Aug. 20, 1964, [1964] 15 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26), and the Special Agreement thereunder (Aug. 20, 1964, [1964] 15 U.S.T. 1745, T.I.A.S. No. 5646, 514 U.N.T.S. 48).

22. Compare this, for example, with A. Haley, *Space Law and Government* (1963), where the chapter on "Space Communications" begins with a detailed exposition of the technical aspects of a radio system. Dr. Smith has scattered his exposition of technology through his text.

23. Smith at 99.

24. *Id.*

this reader, at least, that the state interest in promoting "world order and stability"<sup>25</sup> is sufficient to outweigh those state interests which have generated the flood of external broadcasts now crowding the airwaves. Neither is it clear that interest in stability and order is likely, in the near future, to outweigh the desire to retain almost unrestricted state sovereignty; yet that sovereignty has produced extensive failure to comply even with today's minimal obligations for frequency registration and control.<sup>26</sup> His proposals, in short, seem more the product of technically informed idealism than the product of an appraisal of the state conduct and interests he has so ably set forth.

*International Telecommunication Control* will find utility and acceptance as a reference work, as a source of information on broadcast practices and basic technology, and as a thought-provoking invitation to seek solutions for problems which will fast be upon us.

DAVID J. HALPERIN\*

**Supreme Court Practice (4th ed.).** By Robert L. Stern and Eugene Gressman. Washington, D.C.: The Bureau of National Affairs, Inc. 1969. Pp. xliii, 908. \$17.50.

All too often practice books are bleak assemblages, more resembling cook-books than scholarly guides. But Stern and Gressman's *Supreme Court Practice* is no mere collection of recipes. It is a veritable *Larousse Gastronomique*. It is now in its fourth edition, and while its earlier editions have often been reviewed before, it merits notice again not only for the additions which have been made to it, but also to expose the breadth of this excellent book to a new generation of lawyers who have come to look to the Supreme Court for broad leadership in law reform, and who will consequently need a guide.

The latest edition of Stern and Gressman was necessitated largely by the 1967 Supreme Court Rules, which have been integrated into the rewritten text. Besides the textual changes, there is an entirely new chapter on the single appendix rule, perhaps the biggest addition made by the 1967 Rules. Under the new practice, the parties contribute to a single joint appendix rather than filing separate, often repetitive, appendices. There is also a new chapter on "In Forma Pauperis Proceedings," which have increased in recent years to constitute more than fifty percent of the cases filed in the Supreme Court.<sup>1</sup> These changes alone make the new edition worthwhile; yet it is important to note

---

25. *Id.* at 187.

26. Dr. Smith points out broad failure to comply with I.T.U. frequency controls. *E.g.*, *id.* at 30, 177. For examples of breaches of I.T.U. frequency assignments in space communications, resulting in actual interference with assigned stations, see Haley, *supra* note 22, at 170-71.

\* Professor of Law, University of Maine School of Law.

1. R. Stern & E. Gressman, *Supreme Court Practice* 363 (4th ed. 1969).

that they have taken away none of the delightful thoroughness of the earlier editions.

Simply stated, this is a complete guide to practice before the Supreme Court. As a reference book of some magnitude, it was not intended to be read straight through. Yet because of the organization and clear writing style, it is not painful to do so. With some selectivity,<sup>2</sup> a few hours' reading will provide an outstanding short course in the Supreme Court, its jurisdiction, and practice. But it is more than that. It contains check lists for certiorari, appeals, and cases accepted for argument. It has a full complement of forms. It tells one what to wear and how to address the Court. It helps one through a rush lunch on the ground floor of the Supreme Court building and tells how to arrange special seating for friends or a spouse to watch the argument. It has floor plans of the building on the inside covers with a legend that includes the men's rooms. It even advises counsel how to leave an appeal or petition for certiorari with the building guard, should one be improvident enough to arrive after 5:00 p.m. on the last day for filing.

Some of these tidbits can be of cardinal importance. Equally important is the discussion of the law which is thorough and reliable. A common approach of some other practice books is to present a restatement of the Supreme Court Rules.<sup>3</sup> Upon occasion this is insufficient. An example is the advisability of moving for leave to file a brief *amicus curiae* prior to granting certiorari or noting probable jurisdiction. Leave from the Court is required to file briefs *amici* at this point unless all parties consent. Rule 42 (1) states that "Such motions are not favored." Stern and Gressman indicate that this warning is misleading, and suggest that it should not deter a potential *amicus* from making such a motion should the parties refuse to give consent to the filing of a brief.<sup>4</sup> Moreover, they point out that "[w]hen there is doubt, as there usually is, that a petition will be granted, statements by *amici* which show that the case is generally important can be of significant aid to the petitioner."<sup>5</sup> Indeed, they may understate the case. So widespread is the practice of submitting *amici* briefs with appeals and petitions for certiorari that counsel seeking review should consider seeking out an *amicus* on the chance that his absence might be felt.

In other areas as well they prove to be a more useful guide to the Court than the Rules of the Court itself. Supreme Court Rule 19, which purports

---

2. One wishing to prepare himself generally before he has a case could profit from reading Chapter 1, "Introduction to the Supreme Court;" Chapter 2, "Jurisdiction to Review Decisions of Federal Courts;" Chapter 3, "Jurisdiction to Review Decisions of State Courts;" Chapter 4, "Factors Motivating the Exercise of Jurisdiction;" and Chapter 5, "The Manner in Which the Court Determines to Take Jurisdiction." The list constitutes the first 238 pages. This is not to suggest that the remainder of the book is formalism which can be dispensed with. Far from it. But it can wait until a case comes and one needs to consult specific sections.

3. See, e.g., H. Levy, *How to Handle an Appeal* 1201-35 (1968).

4. R. Stern & E. Gressman, *supra* note 1, at 320.

5. *Id.* at 319 (emphasis omitted).

to state the factors which the Court takes into account in granting or denying a petition for certiorari, is an insufficient tool from which to estimate whether the Court will take a case. Chapter Four, "Factors Motivating the Exercise of Jurisdiction," is a good discussion of this difficult area, and one would be wise to review it before drafting a petition or an appeal. The authors discuss, for example, the line of Federal Employers Liability Act cases which demonstrate the Court's lack of consistency in applying the criteria for review.<sup>6</sup> And, perhaps others besides occasional litigators in federal courts need to be reminded that the Supreme Court frequently reviews federal jurisdiction, practice, and procedure cases. Some of the most useful information is in Chapter Five, "The Manner in Which the Court Determines to Take Jurisdiction." The inner workings of the Court are essential to understanding the outward process. This chapter provides solid facts in an area where misinformation and supposition abound in the most sophisticated circles.

In addition to factual information and good legal writing, the book offers practical suggestions, which, for the most part, are excellent. The advice to keep petitions and appeals short, to make briefs simple and understandable, and to cite a few important cases rather than creating a string of numbers is all worth following.<sup>7</sup> Lawyers are prone to ignore these precepts anyway, but when they write for the Supreme Court, previously latent pedantry often seems to emerge. Occasionally, however, one may disagree with their recommendations. The authors flatly assert, for example, that the statement of the case in a brief should not be argumentative.<sup>8</sup> Certainly they are correct that one should be scrupulously honest in stating the facts of a case to any appellate court. And, one should not leave out harmful facts in the naive thought that they will be thus overlooked. But a real advocate should not lose a chance to make a subtle argument. The statement of facts should not be an exception. The statement of the case should put the facts so that they are not only accurate and understandable, but also supportive of one's position. Too strong a statement will offend the reader. Given a choice between alienating the Court and utter neutrality, one should err to the side of neutrality. But sterility should not be necessary.

One of their most useful suggestions is to argue reason and principle rather than the niceties of *stare decisis*, both in the brief and in oral argument.<sup>9</sup> The value of this was attested to most eloquently in a recent discussion of the Court under Chief Justice Earl Warren:

Increasingly often . . . lawyers at the bar found that arguments based upon precedent, accepted legal doctrine, and long range institutional concepts concerning the proper role of the judiciary and the distribution of power in a federal system

---

6. *Id.* at 174-77.

7. All this sounds a bit prosaic, but it is not. Section 6.41, for example, is devoted entirely to advising counsel to keep the petition for certiorari short, recommending an appropriate range of pages and indicating the importance the Court attaches to the matter. *Id.* at 307-08.

8. *Id.* at 468.

9. *Id.* at 472, 500.

founded upon Chief Justice Warren's persistent questions, "Is that fair?" or "Is that what America stands for?" Such questions were profoundly disturbing to those engrossed by the intellectual and institutional side of the law, its history, and sheer professional expertise. No one could successfully argue in simple elemental terms that a poor man charged with crime should not have as much chance to have a lawyer at the preliminary hearing as one who was rich, or that cows and trees should have as much voting power as people.<sup>10</sup>

Whether this advice will continue to be timely is a matter for somewhat disheartening speculation. The Supreme Court's leadership in law reform has indeed contributed to the rising expectations of minorities and the poor, and consequently may have been a cause of the pervasive polarity our country is now experiencing. However, frustrating those expectations by withdrawing from the role of leadership would not seem well calculated to ease that polarity. One would hope, therefore, that the very existence of the Court will cause its members to continue to fulfill their historic function. The Supreme Court, like other courts, does not act independently of the world around it. Despite its immense power to fashion its own docket, its actions take direction from the cases brought to it. Not the least of the factors which will forge the course of the Court in the days to come will be the lawyers and the way they present their cases.

JAMES W. McELHANEY\*

---

10. Cox, Chief Justice Earl Warren, 83 Harv. L. Rev. 1, 2 (1969).

\* Associate Professor of Law, University of Maryland School of Law.