

## BOOK REVIEWS

DUE TO CIRCUMSTANCES BEYOND OUR CONTROL. By FRED W. FRIENDLY. New York: Random House, 1967. Pp. 325. \$6.95.

*Roscoe L. Barrow †*

Fred Friendly's *Due to Circumstances Beyond Our Control* is both a creative television journalist's commentary on the lack of responsibility of network managers in serving the communications function of broadcasting and a sensitive tribute to the late Edward R. Murrow, with whom Friendly was associated in producing the outstanding example of broadcasting journalism, "See It Now." The setting is Friendly's tenure as President of CBS News and the events leading to his resignation from that position. That resignation was characterized by one journal as "a tempest in a TV pot." Actually, it was a self-immolative protest against the tidal wave of commercialism which had inundated broadcasting's communications function.

Friendly's appreciation of the social service potential of broadcasting journalism is enhanced by the impact on public opinion of the "See It Now" documentaries relating to McCarthyism. Friendly's book would be highly meritorious if it did no more than remind us of the spectre of fear which hovered over the shoulders of a free people during the McCarthy era and of how these courageous documentaries helped to dispel fear and restore reason. Loyalty and security were rated among the highest societal values, and the blacklist became a common guide in the broadcasting industry. Leaders in government, not even excepting President Eisenhower, became targets of the "pink" smear and many officials tailored their decision-making to the necessity of maintaining a safe margin against attacks on their loyalty. In this atmosphere, it required great courage to uncloak McCarthy in a television documentary. The response of Murrow and Friendly to this crisis may have been broadcasting's finest hour. As stated in the Freedom House Award to Murrow, "Free men were heartened by his courage in exposing those who would divide us by exploiting our fears."

The immediate events prompting Friendly's resignation as President of CBS News were the transfer of authority to make news

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judgments from the highest to an intermediate echelon of the management of the CBS network and a judgment by this lower-level official that important testimony on the Vietnam war should not be broadcast live. Friendly deemed it of vital importance that news judgments be made at the highest echelon of management and he evaluated the Vietnam war issue as among the most important of our time. An understanding of the significance of his resignation requires an understanding of the importance of the level on which news judgments are made and the timeliness of the testimony on Vietnam.

Since a network is operated for profit, news must compete with commercial entertainment programs for exhibition over the network. When a decision is made to broadcast a special news event, regularly scheduled commercial programming is displaced. This entails substantial loss of revenue both to the network and to its affiliated stations. Thus, unless an earth-shaking event is involved, the network must weigh the economic factor against the public need. A network's sales department is primarily interested in profit and secondarily in news; a network's news department is primarily interested in news and secondarily in profit. Moreover, advertisers and their agencies complain about preemption of their time by special news events. Disagreement between the sales and news departments on news judgments is therefore to be expected. Throughout the Murrow-Friendly period at CBS, differences on news judgments were settled in conference with President Stanton and Chairman Paley. Friendly accepted the presidency of CBS News with the understanding that the news organization would be autonomous and that Friendly would report only to President Stanton and Chairman Paley. However, during the controversy over live coverage of testimony on the Vietnam war, CBS created a new position, a "Group Vice-President" who had supervision of all broadcast operations. Henceforth, conflicts between the sales and news departments regarding broadcasts of special news events would be resolved at this level and Stanton and Paley would not participate in the decisions.

It is doubtful that a substantial difference in news judgments would result from vesting in an executive immediately below the president of the network the function of deciding whether regularly scheduled entertainment should be displaced by special news events. Appreciation of the differing societal values represented by mass-appeal entertainment and news and public affairs programming suggests that the decision as to whether regular entertainment time should be preempted by news and public affairs programming should be made by the news department itself. If disagreements between the news and sales departments are to be resolved at a higher executive level, corporate policy presumably would be followed and the decisions would be the same regardless of whether they were made by the highest or

second highest officer of the network. If the responsible official has a strong background in news and public affairs programming, sounder news judgments might be expected. At the time of Friendly's resignation, the position of Group Vice-President had existed for only a short time and the potential impact of this new position on news judgments was not clear. Vesting news judgments in the intermediate position probably represented a judgment by the President and Chairman of CBS that corporate policy and the line of judgment previously followed by the top echelon of management would be executed by the Group Vice-President.

The context of the decision that significant testimony on the Vietnam war should not be broadcast live is as follows. In early February 1966, CBS made several broadcasts relating to Vietnam. Included was live coverage of the testimony of Administrator Bell and General Gavin in hearings on Vietnam and of the return of President Johnson from a conference with General Ky. At this point in the hearings on Vietnam, George Kennan, former Ambassador to Russia and the major exponent of the diplomacy of containment, was scheduled to testify. Escalation or deescalation of the Vietnam war hung in the balance. Friendly felt that journalism was failing to communicate to the people the complexities of the Vietnam war and that Kennan's testimony would be most helpful to the public and to President Johnson in deciding whether to escalate the war. However, in making the news judgment whether to carry the Kennan testimony live, the network looked ahead to the forthcoming testimony by General Taylor and Secretary Rusk, anticipating that CBS News would request live coverage of this testimony. Additionally, the NBC network broadcast the Kennan testimony live and edited versions could have been included by CBS in its regular news broadcasts. The preempting of soap operas and game shows by the Kennan testimony would have resulted in substantial loss of revenue by CBS and its affiliates. For these reasons, the Group Vice-President vetoed live broadcast of the Kennan testimony.

A refusal to broadcast live Congressional hearings is not per se an unsound news judgment. In the round, extensive Congressional hearings are dull. For each minute of significant testimony, much time is spent on inconsequential matters. If the testimony is not interesting and significant, there is quick loss of audience. In some instances, the best result may be obtained by cutting in and out of hearings when the reporter on the scene senses that important testimony is to be presented. In other instances, edited versions of Congressional hearings, with appropriate comments, may serve best. It is the importance of the hearings and of the specific testimony which determines the form which the broadcast should take. Friendly deemed the Vietnam hearings to be of the highest importance and Kennan's testimony to

be crucial. Clearly, Friendly's judgment as to the importance of hearings on the escalation or deescalation of the Vietnam war was sound. The next Presidential election will probably turn on precisely that issue. Whether the Kennan testimony was a crucial part of the hearings is not as clear. However, the head of the news department of a network is in a better position to make that judgment than any other executive in the network organization.

Friendly relates in his book a number of news decisions involving unhappiness on the part of advertisers and network officials. From these experiences, Friendly concluded that the Group Vice-President's decision on the Kennan testimony evidenced the future pattern for news judgments. The factual basis for such a conclusion would have been more evident if Friendly had included annual data on time devoted by CBS and other networks to news and public affairs programming during the years that he was associated with CBS. Some think that such data would show an increase in the time devoted by CBS to news and public affairs programming and a favorable comparison with the time devoted to such programming by other networks.

Friendly, in the tradition of Murrow's journalism, appreciated that television is today the most persistent force in shaping the minds of the people and may determine ultimately what kind of people we are. Sensitive to his responsibility as a journalist to fulfill the social need for information on the great issues of our time, and lacking the desired support of his superiors at CBS, Friendly resigned as a matter of conscience. No doubt he hoped that, through his example, network managers might be prompted to give a greater role in making news judgments to broadcasting's Fourth Estate. There was considerable public reaction to Friendly's resignation. And the resignation had some immediate impact: CBS carried a live broadcast of the testimony of General Taylor and Secretary Rusk on Vietnam. However, these broadcasts reduced the clamor surrounding Friendly's resignation and the incident may soon be forgotten. With the return to business as usual, it may be anticipated that the economic factor will again be given the greater weight in news judgments.<sup>1</sup>

It was as NBC was broadcasting live the testimony of Kennan on Vietnam and CBS was broadcasting a fifth rerun of "I Love Lucy" followed by a seventh rerun of "The Real McCoys" that Friendly's thoughts began to run to *Due To Circumstances Beyond Our Control*.

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<sup>1</sup> Recently, Secretary of State Dean Rusk testified before the Senate Foreign Relations Committee in public hearings on the Vietnam war—his first public testimony before the committee in nearly two years. N.B.C. broadcast the hearings; C.B.S. did not. C.B.S. justified its decision on the ground that duplication of N.B.C.'s coverage would have served no useful function. See *NEWSWEEK*, March 25, 1968, at 97. But "[i]f you take yourself seriously as a transmitter of news, you run the damn hearings anyway—that is, if there is a 'you' who is capable of feeling seriously about such matters, and not just a piece of machinery gulping down profit-and-loss statements." *THE NEW YORKER*, March 30, 1968, at 127.

The title suggests that the circumstances which lead to broadcasts of entertainment appealing to the lowest common denominator, and to judgments to exclude live broadcasts of significant news events, are beyond the control of society. Thus, an epilogue entitled "The Beginning: Circumstances Within Our Control" treats only the concept of a non-commercial public service network. At various points in the book Friendly expresses admiration for President Stanton and Chairman Paley and excuses their part in the circumstances leading to his resignation. Friendly believes that the position of Group Vice-President was created because Stanton and Paley found it unpleasant to debate or to deny a request by CBS News to broadcast a special news event. Since CBS stock is sold to the public and since the price of shares fluctuates with the ratings, the managers must favor mass-appeal entertainment. Even Group Vice-President Schneider is not deemed a villain but only a cog in a machine which has run wild.

To excuse those whose actions, in Friendly's view, gave him no realistic alternative to resigning his position of important journalistic service reveals the gentle side of Friendly's character. However, the theme that television's failure to fulfill social needs is an inevitable product of the system and that network managers are not at fault is of questionable soundness. If the theme were sound, news judgments would be the same whether the decisions were made by the top or intermediate echelons of network management. And in that event, the reasons given by Friendly to explain his resignation would not justify his action.

Any system is an instrument designed to facilitate the achievement of prescribed goals. The network's primary goal is to serve as an effective marketing instrument. Network managers, on behalf of mass-circulation-minded advertisers and advertising agencies, provide programming which fulfills advertising needs. Far from running wild, the network system is under control and operating efficiently. However, the hand on the network switch has a moral responsibility to direct the network system so as to fulfill social needs: networks are the primary program source for broadcasters, and broadcasters are trustees of publicly-owned airways, licensed to serve the public interest. The failure of the networks to fulfill social needs stems from the goals of the networks, which are set by the network managers. They, and not the system, are responsible for the character of the program service.

It is of great importance, as Friendly suggests, that there be established a non-commercial, public service network. This must not, however, become the occasion for even further relaxation of the public-interest standard applied to commercial broadcasting stations. Increased emphasis, in network programming, on the "animal" end of the emotional scale will lead our people further on the road from the civilized to the primitive. To assure that commercial stations serve

the public interest, the networks should be regulated directly and the public-interest standard applied to them.<sup>2</sup> In short, the primary goal of the networks should be changed by law from the marketing function to the communications function.

Friendly's book does not treat the potential impact on television programming of the all-channel receiver, the development of UHF, subscription television, CATV, and broadcasting via satellite. Hence, these developments are not appropriate topics for discussion in this review. Suffice it to say that each of them will contribute new problems but will not solve the problem of the influence of television's marketing function on the character of television programming.

Friendly, our most sophisticated television journalist, has apparently concluded that the power of the network structure is so great that commercial television cannot be controlled and that only a non-commercial, public service television system is an available alternative. There is much evidence to support this position. Like most industry-oriented regulatory agencies, the FCC tends to view broadcasting problems through the eyes of the industry more than through the eyes of the public. The broadcasting industry mounts a strong lobby in the Congress, many members of which appreciate the importance at election time of holding the goodwill of the media. Recent exercise by the President of his power of appointment has reflected a judgment to leave commercial broadcasting as it is for the present. Yet, Friendly's resignation, as a conscientious protest against the subordination of communications to advertising in network decision-making, had significant temporary impact. If others who are concerned that a free society be informed on the critical problems of our time were willing to make a tenth of the sacrifice that Friendly did, balanced program service in television<sup>3</sup> might be achieved.

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<sup>2</sup> A bill providing for the regulation of networks in the public interest was introduced in the Congress in 1961 and at that time had FCC approval. Later the FCC suggested that consideration of the bill be delayed and no action by the Congress has been taken. See S. 2400, 87th Cong., 1st Sess. (1961) and Comments of the FCC on H.R. 11340, 86th Cong., 1st Sess. (1960), both reproduced in H.R. REP. No. 281, 88th Cong., 1st Sess. 184-86, 176-84 (1961).

<sup>3</sup> For an analysis of proposals for attaining balanced program service in commercial television, see Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633 (1966).

CONTRACTING FOR ATOMS. BY HAROLD ORLANS. Washington, D. C.: The Brookings Institution, 1966. Pp. xvii, 242. \$6.00.

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*Contracting for Atoms* is a political—as distinguished from a legal—study of the Atomic Energy Commission's contracting for research and development. According to the foreword, "This study is concerned with public policy issues posed by the Atomic Energy Commission's contracting with private organizations for research and development and for the management of government-owned nuclear plants and laboratories." (P. vii.)

The author divides his study into three parts. The first, constituting about sixty percent of the volume, deals with contract policies and practices. The remaining two parts, setting out the *dramatis personae* (a political view of the principal parties) and detailing the author's conclusions, pose more interesting general public policy issues: how the federal government should promote nuclear research and its civilian applications without undue restrictions, without interference with the higher-priority requirements of military applications, and without aiding and abetting a technologically-based private monopoly.

The Atomic Energy Commission (AEC), created by the Atomic Energy Act of 1946, inherited from the Army a nuclear enterprise designed to meet wartime exigencies, and which emphasized security and urgency above all else. The AEC fell heir to an operation exclusively directed towards military purposes, where industrial participation had been limited to a few large corporations, where security prevented the flow of technical participation to other potential participants, and where contract procedures were few and informal. The Act, however, also was intended to strengthen free competition and private enterprise.

The result was what Orlans terms "technology by contract." Most of the research and operating expertise was *outside* the government in a few industries and universities. Even as late as 1964 over half of the contract dollars and manpower were allocated to seven industrial and university contractors. Orlans concedes that this concentration may have been necessary during World War II and may have contributed to the substantial success in the development of atomic energy for military purposes. But he questions whether such concentration may have impeded the development of civilian nuclear technology—especially central-station electrical power.

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Finally recognizing the difficulties of trying to encourage civilian application from a very restricted private industrial base, the AEC, beginning in 1963, made some modest attempts to encourage broader participation. This was done by deliberately changing contractors and by replacing single prime contractors with multiple contractors through segmenting development and production tasks. Even so, those contractors that first became involved in the weapons-development process had the built-in advantages of experience and knowledge obtained under the protective cloak of a tight security system that has been relaxed only slightly to permit more extensive civilian application.

The AEC still seems wedded to the practice of contracting for its research, development and operations. One could reasonably raise the question as to whether or not the AEC should establish some top-quality government-operated and manned laboratories, if only as a quality control and regulatory measure. The AEC also continues to look to industry for the operation of its production plants and development laboratories while contracting with universities for basic and applied research. Is this a dangerous and unnatural split between research and operations? Although Orlans does not discuss this specific point, it may partly account for complaints that progress in the industrial application of atomic energy has been slow, and that university researchers show little interest in research that may have practical value. Of course, a principal factor has been the lower funding priority allocated to industrial application compared to either basic research or weapons development.

Part Two describes the character and influence of the five principal groups which have had a hand in American nuclear policy: the Atomic Energy Commission itself, the Joint Committee on Atomic Energy, the Department of Defense, scientists, and industry.

The Atomic Energy Act of 1946 created both the Commission and the Joint Committee on Atomic Energy in the Congress. Over the years the Joint Committee has taken advantage of its special legislative responsibility to become *the* most powerful force in the determination of American nuclear policy. Orlans characterizes the Joint Committee as aggressive and risk-taking, especially in pushing new military applications such as the hydrogen bomb and the naval reactor program. The committee's influence has extended to such detailed considerations as specific contract awards. Indeed, Orlans reports contractor complaints to the effect that major contract changes must first be checked out with the committee staff before the AEC can implement them.

Many people have questioned whether the commission form of administration still has any utility. Certainly, from the viewpoint of the President, atomic energy matters could be controlled more easily and with less congressional "interference" were the Commission to be

replaced by a single administrator. Moreover, doing away with the Commission would make it easier to fix responsibility which at present, as Orlans reports, is so dispersed that outsiders can rarely find the particular administrative official or commissioner behind an administration action.

The primary influence of the Department of Defense has been exerted through the initiation of military requirements for atomic weapons. Some observers believe that the practice of permitting the military to levy requirements without having to "pay" for them through their own budget has encouraged the military to be extravagant in stating their "needs" and has prevented the AEC from allocating more funds to civilian technology. In joint endeavors, such as the aircraft nuclear reactor program carried on with the Air Force, Orlans characterizes the AEC as being somewhat naïve in failing to keep in touch with the "realities" of the technological and operational context in which a nuclear technology is supposed to contribute. As a result, he believes, the AEC gets left holding the bag—financially and politically—when these projects fail.

Orlans suggests that the principal influence of the nuclear scientists has been in American nuclear weapons policy with respect to weapons choice and strategy.<sup>1</sup> The AEC's General Advisory Committee, composed of atomic scientists and engineers, had a significant influence on AEC policy until 1952 when there was a substantial falling-out among members over the development of the H-bomb and the subsequent investigation of and denial of a security clearance to the late Dr. J. Robert Oppenheimer. These same scientists have also been influential in Defense Department research and development policy. Every Director of Defense Research and Engineering since 1958 has been taken from among the "high priests" who were formerly engaged in the contract atomic weapons laboratories. Industrial influence has been reflected primarily in the AEC's avowed policy since 1963 of permitting broader participation in AEC contracts and wider distribution of atomic energy information.

Orlans also raises two issues which need further study and resolution. The first concerns the AEC's future role in high-energy physics research. As more of this research becomes less obviously oriented toward military application and partakes more of the nature usually considered appropriate for support by the National Science Foundation, Orlans questions whether it should be moved to the NSF. There is little likelihood, however, that the National Science Foundation will pick up the principal responsibility for the support of high-energy research if only because the current level of AEC support for high-energy physics approximates the total NSF budget.

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<sup>1</sup>For a full discussion, see R. GILPIN, *AMERICAN SCIENTISTS AND NUCLEAR WEAPONS POLICY* (1962).

Political realities—especially in the House Appropriations Committee—being what they are, such a change is impossible without the backing of most of the top scientific policy advisors. With the “high priesthood” of nuclear scientists well entrenched throughout the scientific policy advisory mechanism in the federal government, this type of change does not seem to be even remotely possible.

The second issue relates to the future of the AEC and its laboratories more generally. Orlans asks whether the AEC has outlived its purpose by largely accomplishing its original mission to provide modern nuclear weapons and the necessary base for civilian industrial application of nuclear energy. Although a good argument might be made for the distribution of AEC functions among the Department of Defense, the National Aeronautics and Space Administration, the Department of Commerce, the National Science Foundation, and the Federal Power Commission, the burden of increased expenditures placed on those agencies acquiring AEC functions probably would not be welcomed. Moreover, if one were to seriously consider dismantling the AEC, one would have to obtain the support of the Joint Committee on Atomic Energy, which is not likely to put itself out of business.

Orlans' study is a contribution to better understanding of the forces and the broad issues of public policy involved in the AEC's contracting for research and development. However, as Orlans has said, the last two parts of the book were written retrospectively, while the first part was meant to fit into a larger study of political and management aspects of federal research and development contracting and contract administration generally. Because of this the book lacks the continuity that would make it more useful and that would have been achieved if the general political considerations raised in Parts Two and Three had been woven into a broader discussion of the contract policies and practices presented in Part One.

CASES AND MATERIALS ON OWNERSHIP AND DEVELOPMENT OF LAND. BY JAN KRASNOWIECKI. Brooklyn: Foundation Press, 1965. Pp. xxix, 846. \$11.50.

*Charles J. Meyers* †

For those who know Professor Krasnowiecki's other work, this casebook will be a disappointment. Two years' experience in the classroom with the book has left me with the view that it is conventional in conception and routine, when not faulty in execution. Some parts are to be excepted from this harsh appraisal, but the good does not overcome the bad.

The subject matter of the book, by and large, is the staple fare of first year property: a smattering of the historical development of property law (20 pages including a case applying the Rule in Shelley's Case), adverse possession, possessory freehold estates, landlord and tenant, concurrent ownership, gifts, elementary future interests, real covenants, equitable servitudes, land use controls, easements and a little vendor and purchaser. Some less familiar material appears in the body of the book and in the appendices: remedies for the recovery of land, water rights, urban renewal and eminent domain, advanced zoning problems, condominiums and cooperatives, and fair housing.

The exclusions from the book are a good deal more interesting than the inclusions. The whole subject of conveyancing—form, execution and delivery of deeds, legal descriptions and even recordation—is virtually ignored. This is an audacious move. Professor Leach probably expressed a common opinion about the recording acts in his dissenting preface to the Casner and Leach casebook when he said:

The recording material is, to my mind, the important item.

. . . It is the core of our modern land system. . . .

. . . .

I want my students to meet the recording cases—and all the real property doctrine with which those cases deal—at the earliest practicable time. . . . It seems to me important that the framework of student thinking should be the registry of deeds.<sup>1</sup>

In more innocent days I shared these views, but I no longer think they are valid, even assuming they were when set down in 1949. Today the plain fact is that in most urban centers, and in large parts of the outlands as well, title work is done by title insurance companies. When lawyers get involved, and they rarely do unless the transaction

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<sup>1</sup>A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY xi-xii (1st stand. ed. 1950).

is a substantial commercial deal, the title problems are rarely those taught in the conventional chapter on recording: scope of search, wild deeds, bona fide purchase and the rule of shelter. The questions are much more likely to involve undischarged liens, unprobated wills, heirship, invalid tax sales and the like. About the only purpose I can see in a detailed examination of the recording acts and the operation of the state-maintained registry of deeds is as an object lesson to the profession: adopt such onerous rules of search as those of *Woods v. Garnett*,<sup>2</sup> *Tefft v. Munson*,<sup>3</sup> and *Finley v. Glenn*;<sup>4</sup> establish such a creaky mechanism for searching title as grantee-grantor and grantor-grantee indexes (often lacking even brief descriptions of the property); neglect to provide the customer with protection against mistakes—and someone will come along with a better mousetrap. If this lesson is worth teaching, and I'm not sure it is, it can be taught in far fewer pages of very time-consuming cases than appear in *Casner and Leach* (125 pages) and other orthodox casebooks. So I salute Professor Krasnowiecki for seeing the obvious (which is so often overlooked) and for doing something about it. If he had been like most of us, he would have retained this obsolete material and justified himself by the Latin argument that it's good for the mind. Instead he threw it out.

I doubt, however, that the need to prune the recording act materials should lead to the extirpation of the whole subject of conveyancing. Some notion of the form and purpose of a deed, of the difficulties that can arise in drafting and interpreting legal descriptions, of the effect of reservations and exceptions, and of the pitfalls of the family transaction where papa hands over a deed to take effect on his death (or worse, doesn't hand it over)—all of which can be treated in 20 to 30 pages with a few principal cases and a number of problems—are topics worth knowing about if the time cost is modest. The omission of this material by Professor Krasnowiecki is odd, for he does have a brief treatment of contracts for the sale of land. But this comes in the last chapter of the book proper and seems unrelated to anything on either side of it. One gets the uncomfortable impression that Professor Krasnowiecki had once decided to leave out both vendor and purchaser *and* conveyancing but at the last moment tacked on a little vendor and purchaser.

Given an editor with the boldness to delete the recording materials, we might have hoped for the deletion of elementary future interests as well. But here we are disappointed. About 40 pages are devoted to this archaic (and arcane) material. While this may seem like a modest allocation, I would guess that it is a very slow 40 pages indeed. (I did not teach this material in *Krasnowiecki*, for reasons that will appear, but I have taught the same stuff in other casebooks

<sup>2</sup> 72 Miss. 78, 16 So. 390 (1894).

<sup>3</sup> 57 N.Y. 97 (1874).

<sup>4</sup> 303 Pa. 131, 154 A. 299 (1931).

and have always found it slow going.) The hoary common-law rules are set out in abundance, with examples: the destructibility of contingent remainders, conveyances to uses, the Statute of Uses, future interests and conveyancing under the Statute of Uses (the latter an unworthy exception to the elimination of the subject of conveyancing), executory interests, classification of remainders, the Rule in Shelley's case (again!) and the Doctrine of the Worthier Title.

In my view this material should not be taught in the first year. If the purpose is to teach legal history, it is a misbegotten effort, for students cannot look at five centuries of history in five or ten hours and be expected to see anything. Moreover, to study 40 pages (or 140 pages) of feudal land law as legal history is worse than an innocent masquerade, for it is to study legal change without reference to the social, economic, and political causes of the change. The Latin argument simply won't do here. If, on the other hand, the purpose is to lay a foundation for advanced courses in Trusts and Future Interests, the material, so far as it is relevant to such courses, is far better taught there—as editors of casebooks on the subject recognize, for they all repeat coverage of topics having contemporary significance, such as classification of remainders. In surveying Professor Krasnowiecki's concept of a first-year property course, we find, then, some innovation in cutting back of obsolescent material, but a failure to wield the shears boldly enough to get it all.

By way of additions, Professor Krasnowiecki has included topics of current interest and concern: planned unit development, condominiums and cooperatives, and fair housing. Regrettably, his treatment of the last two subjects exhibits the helter-skelter organization and slipshod execution that characterize much of the book. For instance, Appendix F, on Fair Housing, begins with *Shelley v. Kraemer*,<sup>5</sup> with "Kraemer" misspelled both in the caption of the case and in the editor's footnote to the caption. Then follows a note on *Barrows v. Jackson*,<sup>6</sup> the only other Supreme Court opinion cited. The questions following the principal case and the note raise interesting problems of the rationale of *Shelley*, but they fall short of probing the essence of that troublesome case. They inquire into the power of the landlord to terminate a leasehold that is assigned to a Negro in violation of a standard (nondiscriminatory) covenant against assignment or subletting, into the termination by notice of a periodic tenancy when there has been a transfer to a Negro, and into the use of a possibility of reverter to avoid *Shelley v. Kraemer*. The opportunity to take a hard look at *Shelley* was missed, however, by relegating it to an appendix and by using *Charlotte Park and Recreation Commission v. Barringer*<sup>7</sup> earlier (at page 141) to illustrate the consequences of classifying in-

<sup>5</sup> 334 U.S. 1 (1948).

<sup>6</sup> 346 U.S. 249 (1953).

<sup>7</sup> 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956).

terests as possibilities of reverter or rights of re-entry. In *Barringer*, donor gave a park to the city so long as Negroes were excluded from it. Negroes thereafter claimed the right to use the park, precipitating litigation in which the donor asserted that the property would revert to him under the special limitation if Negroes were admitted to the premises. The donor won, but for the wrong reason. A plausible ground for holding for the donor is that *Shelley v. Kraemer* still permits state action to enforce an individual's discriminatory desire not to give land to the public for racially integrated parks. Regardless of how this contention might fare in the Supreme Court, consideration of it adds depth to the discussion of *Shelley*. Professor Krasnowiecki's questions, on the other hand, submerge the student in problems of proof of the landlord's discriminatory conduct, when the matter of principal concern at this point is one not of proof but of policy—to what extent the state can lend its support to an individual's desire to practice racial discrimination.

Of course when the class reaches the Fair Housing Appendix one can go back and redo the *Barringer* case, but the subsequent discussion will necessarily upset most of what was said before. From the students' standpoint, this is the old shell game with a vengeance. Or, one can take up the Fair Housing Appendix when *Barringer* is first encountered, but this is a strange slice of meat to sandwich between the fee simple determinable and the fee simple upon condition subsequent.

The remainder of the Fair Housing Appendix consists of a reprint of the Pennsylvania Human Relations Act and six questions about it, together with a question on the constitutionality of fair-housing statutes which apply to government-assisted housing but not to other housing. In my opinion this is an inadequate treatment of the subject. Rather than reprint verbatim one statute, it would be far better to take up the problems faced by a draftsman of fair housing legislation through the examination of various statutory approaches to the problem. These problems include the types of housing accommodations to be covered, the persons to be covered (for example, real estate brokers? bankers?), enforcement procedures and judicial review. Even more important is some discussion of the experience of the states with fair housing legislation—why, in short, hasn't it worked.

Perhaps the comments above do not justify my broad indictment of the workmanship in the book. I am concerned about fair housing and this concern may prompt me to expect more in the book than either the editor or the typical user thinks is desirable. I believe, however, that the evidence about to be adduced will, at the least, establish that the galleys were not proofread (a serious default for a lawyer) and will make a prima facie case that the overall workmanship is sloppy.

Typographical errors abound. Some are serious enough to require correction in advance of class so that the reading will be compre-

hensible.<sup>8</sup> Others are sources of confusion,<sup>9</sup> and some are merely annoying.<sup>10</sup> The examples given in the footnotes are illustrative, not exhaustive.

Some of the cases were poor choices, and others were poorly edited. Why include two long cases, aggregating 15 pages, on the duty of an occupying cotenant to account to cotenants out of possession?<sup>11</sup> Similarly, the case of *Picconi v. Carlin*<sup>12</sup> adds almost nothing to what has already been considered in *Cohen v. Simpson Real Estate Corp.*,<sup>13</sup> *Highway Holding Co. v. Yara Eng'r Corp.*,<sup>14</sup> and *Klein v. Dove*,<sup>15</sup>—all of which deal with the creation of private and public easements when a purchaser buys by reference to a plat, and with the modes of extinguishing such private rights. The case of *King v. Firm*<sup>16</sup> is too long, the facts too complex and the opinion insufficiently instructive to justify its use to make the simple point that duties arising under a lease are independent of other obligations of the parties to one another. The opinion in *Murray v. Trustees of the Lane Seminary*<sup>17</sup> is so abominable that no first year student should be encouraged to know that workmanship of such quality is produced by the courts.

Other instances of bad judgment or carelessness in editing include undue attention to the peculiarities of Pennsylvania procedure in zoning cases, a complex subject having little general application,<sup>18</sup> and the omission in the zoning chapter of the problem of nonconforming uses and their elimination through amortization. A small but vexing gaffe appears on page 444. Here in a footnote Professor Krasnowiecki has cited seven cases that follow the rule of the principal case, three of which are from New York, two from the Appellate Division (dating back to the 1920's) and one from the Supreme Court, which, it must be remembered, is just a trial court. Three more cases are cited in the footnote—another from the New York Supreme Court, which the student is directed to "compare, however," with the earlier New York Supreme Court case, and two from California. The latter appear parenthetically and confusingly in the middle of the string and apparently are cited because a student case note writer in the *Hastings Law Journal* cited them as *not* following the rule of the principal case,

<sup>8</sup> See pp. 36, 221, 247, 342.

<sup>9</sup> See pp. 66 (reference to the *Allen* case in the notes apparently intended to be a reference to the principal case, *Allot*); 71 (reference to *Mullen v. Mullen* in the notes intended to refer to *Mellen v. Mellen*, cited in principal case); 160 (*cause* should be *clause*); 161 (*case* should be *lease*); 403 (date wrong and word omitted); 471 (*right of duty* for *right of re-entry*).

<sup>10</sup> See pp. 339 (*illusory* for *illusory*); 531 (*euphamism* for *euphemism*).

<sup>11</sup> The two cases, reprinted pp. 276-90, are *McKnight v. Basilides*, 19 Wash. 2d 391, 143 P.2d 307 (1943), and *Cohen v. Cohen*, 157 Ohio St. 503, 106 N.E.2d 77 (1952).

<sup>12</sup> 40 N.J. Super. 393, 123 A.2d 87 (Super. Ct. L. Div. 1956) (p. 598).

<sup>13</sup> 385 Pa. 352, 123 A.2d 715 (1956) (p. 569).

<sup>14</sup> 22 N.J. 119, 123 A.2d 511 (1956) (cited in note, p. 572).

<sup>15</sup> 205 Md. 285, 107 A.2d 82 (1954) (p. 573).

<sup>16</sup> 3 Utah 2d 419, 285 P.2d 1114 (1955) (p. 200).

<sup>17</sup> 1 Ohio Op. 2d 236, 140 N.E.2d 577 (C.P. 1956) (p. 467).

<sup>18</sup> See pp. 502, 512, 524-26.

a citation which Professor Krasnowiecki thinks is wrong. What is a student—or a teacher, for that matter—to make of all this? Should he see if the two New York Supreme Court cases are in disagreement, though distinguishable? Should he read the *Hastings Law Journal* case note to see if the student writer really did take the position attributed to him, and if so, should the diligent student then read the cases themselves to see who is right—Professor Krasnowiecki or the case note writer? Does anybody care? What seemingly happened is that Professor Krasnowiecki, with scissors, paste and only the slightest revision, transferred his work in footnote 14 on page 312 of *The Homes Association Handbook*<sup>19</sup> to his casebook. There is little excuse for string citation footnotes in casebooks under any circumstances, but none whatever for such a footnote taken from a handbook whose purpose is to “serve as a practical guide to those actively involved in neighborhood planning, development, and administration.”<sup>20</sup> Presumably such people find helpful a complete rundown of the authorities; students do not.

Lastly in this catalogue of editing errors, I ought to mention lapses of syntax and style. Compare the formality of the prose on page 402<sup>21</sup> with the informality—not to say exuberance—of that on pages 446<sup>22</sup> and 604.<sup>23</sup> Consider also the grammar on page 489.<sup>24</sup>

Occasionally, Professor Krasnowiecki states propositions that he may truly mean to assert but that seem rather to be an unintended by-product of stylistic ornamentation. Thus, he says: “The opinion in *Spencer’s Case* (or what we have of it through its faithful reporter) did not expand on the meaning of these requirements [of ‘privity’ and ‘touching and concerning’].” (P. 397.) Is Professor Krasnowiecki bestowing an accolade on Lord Coke in general, is he praising Coke’s report of *Spencer’s Case* in particular or is he aware of—and making an ironic comment on—the dispute over the accuracy of Coke’s report?<sup>25</sup>

Finally, misstatements of fact (or law, if you will) are uncomfortably numerous. Page 1: Professor Krasnowiecki divides the history of land law into two periods: 1066-1699 and 1700 to the present. Of the second period he says: “A careful study of this period

<sup>19</sup> Urban Land Institute, *The Homes Association Handbook* (Technical Bulletin 50, 1964).

<sup>20</sup> *Id.* at vi.

<sup>21</sup> “As you proceed through the following materials, keep this [foregoing model] fact situation in mind and relate the materials to it. It is hoped that you will find it an interesting exercise.”

<sup>22</sup> “There is surely some sense to this view. What? Should this view be applied to every substantial modification made by the common grantor or developer regardless of other factors?”

<sup>23</sup> At page 604, Professor Krasnowiecki muses in the first person singular about his selection of cases and their location in the book.

<sup>24</sup> “Moreover, zoning regulations took as their focal point the individual lot. Since, after all, it was the individual lot owner’s choice that had to be controlled.”

<sup>25</sup> See *Purvis v. Shuman*, 373 Ill. 286, 112 N.E. 679 (1916).

must surely yield the conclusion that the law relating to land has shown about as much mobility as its subject matter. Thus it happens that a good portion of our modern land law goes back directly to the early institutions without any refreshing development in between." What about the Rule Against Perpetuities which was still in its crib in 1699? Equitable servitudes which date from 1848? Public land use planning—zoning and subdivision control—which originated in the 20th century? Page 8: "Before 1540 no one could make a will of his fee or his seignory." A reliable authority states that a principal purpose of conveying land to uses before the Statute of Uses was to enable the *cestui que use* to make a will.<sup>26</sup> Page 19: "But in feudal times, under the doctrine of primogeniture, a man could have only one heir—his eldest child." What if the eldest child was a female with younger brothers? What if there were no children but a brother survived the decedent?<sup>27</sup> Page 194: in a note to *Hermitage Co. v. Levine*<sup>28</sup> Professor Krasnowiecki inquires: "If there is some doubt whether the landlord may establish his damages immediately rather than wait to the end of the term, what provision would you insert in the lease on behalf of the landlord?" Then follow two California Civil Code sections on liquidated damages and the citation of a Ninth Circuit case dating from 1934, holding that these sections invalidate a lease clause measuring landlord's damages by the difference between the rent reserved for the balance of the term and the fair rental value of the premises for such period.<sup>29</sup> Professor Krasnowiecki continues: "This view of the California law has been confirmed by the California court in *Ricker v. Rombough* . . ." (italics mine), citing a decision of the Appellate Department of the Superior Court of Alameda County,<sup>30</sup> the precedential value of which in California is about the same as that of the Supreme Court, Special Term, Oneida County, in New York. Moreover, as Professor Krasnowiecki recognizes parenthetically, the issue before the court is the validity of a rent acceleration clause, the language relating to loss-of-bargain-damages being dictum. The plain fact is that, since 1937, California has had a statute authorizing the landlord to recover loss-of-bargain damages if he provides for such remedy in the lease.<sup>31</sup>

Everybody makes mistakes. But this book has too many of them—and too few compensating advantages—to qualify for classroom use, at least in its present form. There is, I think, the nucleus of a satisfactory book here. Chapters 15, 16, and 18, on real covenants, equitable servitudes and easements, are good. The method of these chapters, which is to teach the conventional law by reference to modern

<sup>26</sup> 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 412, 436-37 (3d ed. 1945).

<sup>27</sup> For the medieval law of inheritance, see 3 *id.* at 171-85 (3d ed. 1923).

<sup>28</sup> 248 N.Y. 333, 162 N.E. 97 (1928).

<sup>29</sup> *Moore v. Investment Properties Corp.*, 71 F.2d 711 (9th Cir. 1934).

<sup>30</sup> *Ricker v. Rombough*, 120 Cal. App. 2d 912, 261 P.2d 328 (1953).

<sup>31</sup> CAL. CIV. CODE § 3308 (West 1954). The error is repeated on page 198.

problems (for example, planned unit development), should be extended to other chapters. To illustrate what might be done, much of the law of concurrent estates could be taught by reference to condominiums. Landlord and tenant might be examined through materials on shopping center leases, and some elementary income tax law could be introduced at this point. Another aspect of landlord and tenant—condition of the premises and constructive eviction—could be examined in a provocative and profitable way by reference to the problems of slum tenements. The recent government report on tenants' rights<sup>32</sup> would be a good point of departure. Real property taxation might well be looked into at this point. A revision of the book aimed at teaching property from this perspective, eliminating the errors in the present edition and employing better (and better edited) cases would make a contribution to the field.

The teaching of first year property law has come a long way since I first studied it from *Fraser*<sup>33</sup> in 1946 and first taught it from *Casner and Leach* in 1949.<sup>34</sup> This book benefits from the progress that has been made and adds a measure to it. But much more must be done if the course is to become responsive to the needs of contemporary society. And in the process of reform and revision, greater care must be taken than is apparent in this book to preserve the old-fashioned virtues of accuracy, clarity and precision.

CASES AND MATERIALS ON OWNERSHIP AND DEVELOPMENT OF LAND. BY JAN KRASNOWIECKI. Brooklyn: Foundation Press, 1965. Pp. xxix, 846. \$11.50.

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This review, written from a student's perspective, is intended largely as a response to the preceding review by Professor Meyers.<sup>1</sup> It does not endeavor to compare Professor Krasnowiecki's book with other available property law casebooks or to measure it against any notions of "ideal" property materials. Rather, it will attempt to indicate the utility of Professor Krasnowiecki's book in a first year property course.

At the outset, it must be noted that Professor Meyers' review does not recognize the central theme propounded by Professor Kras-

<sup>32</sup> TENANTS' RIGHTS: LEGAL TOOLS FOR BETTER HOUSING (U.S. Govt. Printing Office, 1967).

<sup>33</sup> I. E. FRASER, CASES AND READINGS ON PROPERTY (2d ed. 1941).

<sup>34</sup> A. CASNER & W. LEACH, CASES ON PROPERTY (rev. temp. ed. 1948).

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<sup>1</sup> Meyers, Book Review, 116 U. PA. L. REV. 742 (1968) [hereinafter cited as Meyers].

nowiecki's book. The casebook's recurrent focus on the remedies and procedures available to real property owners brings into sharp relief the difficulties inherent in applying ancient property concepts to modern land-use problems.<sup>2</sup> Thus, what Professor Meyers characterizes as "the staple fare of first year property"<sup>3</sup> becomes significant at two levels. Not only does Professor Krasnowiecki respond to the functional need to teach the "rules" necessary to the student's property law learning, but his case selection also gives insight into the fundamental difficulties he sees with contemporary land law.

The early chapters clearly evince the casebook's two structural levels. The first chapter, "The Ghost of Feudalism," introduces the ancient heritage with which the student must contend.<sup>4</sup> The inclusion of *Bishop v. Williams*,<sup>5</sup> involving the Rule in Shelley's Case, allows an important point to be made early in the game: even though the Rule has been abolished in most jurisdictions, its demise is prospective and its influence and practical importance may linger.<sup>6</sup>

The relevance of this learning extends beyond the Rule itself.<sup>7</sup> In chapter two, Professor Krasnowiecki frames his approach by observing that "one cannot speak confidently of ownership or of other interests in property until one has examined the remedies available for their protection."<sup>8</sup> Therefore, the materials focus upon the remedies and procedures for defending title and draw the line between traditional actions at law (ejectment) and equity (quiet title), placing both in historical context. *Allott*<sup>9</sup> thus gives perspective to an analysis of the quiet title remedy by causing the student to consider that little practical protection is provided a property owner if the courts will remove only written clouds on title, since potential buyers may be as easily frightened by oral claims. Further, *Allott* and its extensive notes focus attention on the broader need for an expanded reformation remedy to ensure that apparent "rights" receive judicial protection. Finally, Professor

<sup>2</sup> "Knowledge of the remedies, of course, is fundamental to effective practice in any field of law." (P. 21.)

<sup>3</sup> Meyers, at 742.

<sup>4</sup> It is Professor Krasnowiecki's position that "a good portion of our modern land law goes back directly to the early institutions without any refreshing development in between." (P. 1.)

Professor Meyers' criticism, Meyers, at 747-48, is hard to explain in light of Professor Krasnowiecki's use of "a good portion," a term which clearly envisions exceptions.

<sup>5</sup> 221 Ark. 617, 255 S.W.2d 171 (1953). (P. 14.)

<sup>6</sup> This is the thrust of the questions directed at property's "chain of title" which Professor Krasnowiecki poses in notes 2 and 4 at page 17.

<sup>7</sup> Professor Krasnowiecki writes: "A critical approach to modern property law must begin with an understanding of its original function. . . . The Rule in Shelley's Case . . . serves as a good example of [feudal property] law's unreasoned survival into the present century." (P. 21.)

<sup>8</sup> (P. 21.) Professor Krasnowiecki provocatively reverses the Latin maxim to read "Ubi remedium, ibi jus." (P. 22). The casebook's approach thus integrates the "innovative" view that increasing public regulation yields a "diminishing fee." Compare P. 21 n.3 with C. BERGER, LAND OWNERSHIP AND LAND USE 1-32, 32 nn.2-4 (1968).

<sup>9</sup> *Allott v. American Strawboard Co.*, 237 Ill. 55, 86 N.E. 685 (1908). (P. 60.)

Krasnowiecki indicates how modern statutory procedures fusing law and equity may create uncomfortable bedfellows which further complicate title defenses.<sup>10</sup>

The chapter on adverse possession develops this analysis, permitting evaluation of the judge-made "rules" designed to implement the underlying policies of statutes of limitations.<sup>11</sup> *Goen v. Sansbury*<sup>12</sup> sets out the basic case law and the cases which follow present important variants. For example, one who purchases from an adverse possessor may take apparent "rights" in property which later prove to be contingent upon the adverse possessor's mental state during the time the latter was in possession.<sup>13</sup> The *Day*<sup>14</sup> case discloses again the importance of the remedy (here, quiet title) in making viable the "right" established by the adverse possessor.

The learning of these early chapters provides a thread which runs throughout the book, giving important insights in different contexts. For example, *University Gardens*<sup>15</sup> may be used to challenge the appropriateness of requiring a bond for a temporary injunction enforcing a restrictive covenant. *University Gardens* also compels one to question whether a plaintiff's failure to seek a temporary restraining order should be relevant to the granting of a permanent injunction.<sup>16</sup> The need for effective remedies to protect property "interests" also is apparent in the eminent domain standing cases.<sup>17</sup> In these cases, Professor Krasnowiecki sees judicial confusion of rights and remedies, especially in light of the courts' willingness to allow challenges based on treatment of adjoining property in the zoning area.<sup>18</sup> As to zoning itself, the point is made that procedural difficulties and delays effectively may limit as much as does the substantive law the "rights" of property owners.<sup>19</sup> Once the importance of procedural considerations is appreciated, Professor Meyers' criticism that the casebook pays "undue attention to the peculiarities of Pennsylvania procedure in zoning cases, a complex subject having little general application"<sup>20</sup> is seen to be unjustified. Rather, the very complexity of the Pennsylvania pro-

<sup>10</sup> See *White v. Young*, 409 Pa. 562, 186 A.2d 919 (1963). (P. 80.)

<sup>11</sup> (P. 90.)

<sup>12</sup> 219 Md. 289, 149 A.2d 17 (1959). (P. 91.)

<sup>13</sup> See *Predham v. Holfester*, 32 N.J. Super. 419, 108 A.2d 458 (1954). (P. 95.)

*Predham* profitably can be compared with *Vlachos v. Witherow*, 3 Pa. D. & C.2d 698 (C.P. Wash. County 1952), *aff'd per curiam*, 383 Pa. 174, 118 A.2d 174 (1955), (P. 102.), where the "mental element" test seems necessary to protect a grantee.

<sup>14</sup> *Day v. Proprietors of Swan Point Cemetery*, 51 R.I. 213, 153 A. 312 (1931). (P. 115.)

<sup>15</sup> *University Gardens Property Owners Ass'n v. Schultz*, 71 N.Y.S.2d 810 (Sup. Ct.), *modified per curiam*, 272 App. Div. 949, 71 N.Y.S.2d 814 (1947). (Pp. 448, 451.)

<sup>16</sup> This is the thrust of notes 1-3. (Pp. 451-52.)

<sup>17</sup> E.g., *Harrison-Halsted Community Group v. Housing & Home Finance Agency*, 310 F.2d 99 (7th Cir. 1962). (P. 651.)

<sup>18</sup> Professor Krasnowiecki raises this point in note 1 at page 656.

<sup>19</sup> See the rule enunciated in *Florentine v. Town of Darien*, 142 Conn. 415, 115 A.2d 328 (1955) (P. 506.), and the history of the extensive litigation summarized in "Further Note on Procedural Problems." (Pp. 524-26.)

<sup>20</sup> Meyers, at 746.

cedure is representative,<sup>21</sup> and helps demonstrate the importance of Professor Krasnowiecki's concern with procedure.

The zoning chapter deserves more attention than Professor Meyers has given it. Professor Krasnowiecki rejects an historical approach—the zoning “power,” including a discussion of *Euclid*,<sup>22</sup> is given brief textual treatment.<sup>23</sup> Instead, he concentrates on the functional relationship of zoning to planning for contemporary land use. The material emphasizes the dynamic aspects of a zoning mechanism which responds favorably to requested changes in the planned zones.<sup>24</sup> The *Eves* case<sup>25</sup> provides a starting point for discussion of the extremely complex problems of prediction and flexibility and of the need for control of arbitrary action, all of which are inherent in the planning aspect of zoning theory.

The foregoing examples indicate that Professor Krasnowiecki's entire book (not merely the chapters on real covenants, equitable servitudes and easements)<sup>26</sup> develops an overview of property law which forces the student to focus on both the difficulties which the conventional rules cause in contemporary situations, and the need for effective remedial procedures to prevent property interests from being emasculated by delay and metaphysical concentration on “rights.”

This is not to say that the book is perfect. The material on future interests is too limited to serve any real purpose and is best left for advanced courses.<sup>27</sup> The alternative—to include considerably more material on future interests, which could be studied in depth at the expense of “modern” materials—is a much less desirable solution. Despite these limitations, however, many of Professor Meyers' criticisms seem rather extreme, and, at times, mistaken or misguided.<sup>28</sup>

<sup>21</sup> *Florentine*, *supra* note 19, is a Connecticut case.

<sup>22</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>23</sup> (Pp. 479-82.)

<sup>24</sup> The textual treatment of the zoning-planning relationship, which introduces the zoning cases, raises the problem of incentive which flexibly designed zoning can solve. (Pp. 487-92.)

<sup>25</sup> *Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960). (P. 492.)

<sup>26</sup> Meyers, at 748.

<sup>27</sup> Professor Krasnowiecki omits chapter XIV in his own first year course. In light of the immediate disclaimer of any intention to teach legal history, see p. 1, Professor Meyers' supposition that such a purpose might underlie chapter XIV, Meyers, at 744, is an unwarranted straw man. A similarly apologetic disclaimer prefaces that chapter as well. (P. 354.)

<sup>28</sup> This is aside from Professor Meyers' rather surprisingly extensive discussion of typographical errors, printer's mistakes, and hasty galley reading, all of which were at least in part due to a tight publication schedule which aimed at having the book ready in time for the start of first year classes. Some of Professor Meyers' corrections are of questionable validity, see note 4 *supra*. Others are not entirely fair. For example, contrary to Professor Meyers' suggestion, Meyers, at 748, the assertion that legal interests in land were generally not devisable prior to 1540 has often been made, see, e.g., P. MECHEM, CASES AND MATERIALS ON FUTURE INTERESTS 231 (1958); C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 174 (1962), and is not disproved by, nor inconsistent with, the concomitant practice of conveying land to uses in order to enable the *cestui que use* to will his equitable interest. Rather, “[t]he purpose of such conveyances frequently was to enable the landowners to deal with their lands in a manner not countenanced by the common law or to evade the liabilities incident to legal ownership.” *Id.* Thus, the fact

Professor Meyers' critique of the book's treatment of *Shelley v. Kraemer*<sup>29</sup> is hard to support. *Shelley* involves complex constitutional issues which a first year student, viewing them out of the context of more severe constitutional analysis, is unlikely to grasp. Its treatment in a property course would seem optional at best. In any event, this hardly seems the place for in-depth constitutional study. The question which Professor Meyers considers one "of policy—to what extent the state *can* lend its support to an individual's desire to practice racial discrimination"<sup>30</sup>—is not in the first instance a question of policy at all. It is one of constitutional law.

Moreover, the questions which Professor Krasnowiecki poses after *Shelley*<sup>31</sup> are not merely evidentiary, as Professor Meyers suggests, but rather are consistent with the theory that underlies the entire course as Professor Krasnowiecki sees it. These problems force the student to focus on the extent to which the right which the Court guarantees in *Shelley* and in *Barrows*<sup>32</sup> can be implemented. Resolution of these questions appropriately must be in terms of property interests, not constitutional rights. It is essential to note that similar analysis can be elicited by comparing the obviously technical basis for the decision in *Barringer*<sup>33</sup> with the case which follows it, *Capitol Federal Savings & Loan Ass'n v. Smith*,<sup>34</sup> which implements *Shelley* and *Barrows* by quieting the title of Negro plaintiffs who were conveyed property despite a discriminatory covenant to which their predecessors in title had agreed. *Smith* hardly seems constitutionally compelled; an argument could even be made that *Shelley*, which holds the covenant itself constitutionally valid, dictates the opposite result. Rather, *Smith* represents a pragmatic property-law implementation of the right which *Shelley* guarantees at the constitutional level, and it is this type of

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remains that "[p]rior to 1540 the feudal system of land tenures was held to forbid wills of land, save by special custom in certain localities, though this prohibition was to a certain extent evaded in equity by uses." P. MEHEM & T. ATKINSON, *CASES AND MATERIALS ON WILLS AND ADMINISTRATION* 138 n.1 (5th ed. 1961). See also 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 326-30 (2d ed. 1952), which is cited by Professor Krasnowiecki at page 8 n.13 in support of his textual assertion. Indeed, Professor Meyers' criticism is particularly difficult to understand since the fact that "the use could do duty as a will" is explicitly recognized by Professor Krasnowiecki at page 357 of his book.

Moreover, should not Professor Krasnowiecki's shorthand description of primogeniture on page 19, Meyers, at 748, be read in light of the more complete definition which precedes it on page 8? Is it not clear that the "the California court" mentioned on page 194, Meyers, at 748, is a lower court, since the citation to "Cal. App. 2d Supp." immediately follows the case name? Would it be harmful for a student to solve the problem presented by the "string citation" at page 444?

None of the above make Professor Krasnowiecki's work a better book; but if they detract at all from its value as a teaching tool, it is hardly to the extent which Professor Meyers' emphasis would indicate.

<sup>29</sup> 334 U.S. 1 (1948). (P. 821.)

<sup>30</sup> Meyers, at 745 (emphasis added).

<sup>31</sup> (Pp. 832-33.)

<sup>32</sup> *Barrows v. Jackson*, 346 U.S. 249 (1953). (P. 831.)

<sup>33</sup> 242 N.C. 311, 88 S.E. 2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

<sup>34</sup> 136 Colo. 265, 316 P.2d 252 (1957). (P. 145.)

judicial reaction which Professor Krasnowiecki feels should permeate property law.<sup>35</sup>

Although his interest in fair housing is valid, Professor Meyers' proposals for the inclusion of tax materials<sup>36</sup> is extremely dubious, unless law faculties accept the suggestion that basic income tax be taught in the first year.<sup>37</sup> Attempting to teach "just a little tax," before students are in any way equipped to deal with the complexities of the Internal Revenue Code, seems futile at best.<sup>38</sup>

Professor Meyers' criticisms of case selection are also questionable. Inclusion of *Picconi v. Carlin*<sup>39</sup> seems justifiable simply as an illustration of estoppel in a context relevant to the modern development. Further, it helps highlight the inadequacy of the rule relied upon in the *Cohen* case.<sup>40</sup> As to *Murray v. Trustees of Lane Seminary*,<sup>41</sup> it is difficult to take seriously Professor Meyers' statement that "no first year student should be encouraged to know that workmanship of such quality is produced by the courts."<sup>42</sup> Are the sensibilities of students so easily offended? And where would casebook editors be were it not for poorly decided cases?

In sum, Professor Meyers has failed to evaluate the book in light of Professor Krasnowiecki's overriding purpose in preparing it. Certainly property law could be taught from a perspective other than Professor Krasnowiecki's, but that question is not discussed. Further, many of Professor Meyers' criticisms seem to be of questionable validity and deal with mere technicalities, practically none of which are relevant to the utility of the book as a pedagogical device. The fact is that Professor Krasnowiecki's book provides an excellent basis for a course that causes the student both to learn and to rethink the rules and policies of modern property law.

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<sup>35</sup> In any event, it seems relatively unimportant *where* in the book *Shelley* is placed. Turning to the appendix is hardly a great burden for students if the teacher feels that *Shelley* should be read before *Barringer*.

<sup>36</sup> Meyers, at 749.

<sup>37</sup> See Chommie, Book Review, 116 U. Pa. L. Rev. 358, 368-69 (1967).

<sup>38</sup> Professor Krasnowiecki has chosen to teach tax materials in an advanced course, which students may take after or concurrently with the course in basic income tax.

<sup>39</sup> 40 N.J. Super. 393, 123 A.2d 87 (L. Div. 1956). (P. 598.)

<sup>40</sup> *Cohen v. Simpson Real Estate Corp.*, 385 Pa. 352, 123 A.2d 715 (1956). (P. 569.)

<sup>41</sup> 140 N.E.2d 577 (C.P. Ohio 1956). (P. 467.)

<sup>42</sup> Meyers, at 746.