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Book Reviews

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BOOK REVIEWS

THE SUPREME COURT: LAW AND DISCRETION. Ed. by Wallace Mendelson.[1] Indianapolis and New York: The Bobbs-Merrill Company, Inc. 1967. Pp. xvii, 509. $4.25.

The Supreme Court of the United States seldom disappoints its followers by producing a dull term, and never by producing an unimportant one. The October 1967 Term was no exception. The Court issued a number of major opinions which will spark critical comment for some time to come. Contemporary criticism of the Court, however, goes far beyond analysis of individual opinions. More each day critics decry the Court's interpretation of its role in our political society. In one sense this attack culminated during the 1967 Term with the congressional attempt, in the Omnibus Crime Control and Safe Streets Act of 1968,[2] to strike hard at the jugular of the Court's existence as an institution — its jurisdictional power under article III of the Constitution to review cases or controversies. Except for the limited grant of original jurisdiction, the power to review is granted to the Court by congressional enactment. If the legislators who led the fight against the Court in this session had tasted complete victory, the Court would have been curtailed severely in many areas. That the effort failed on the floor of Congress[3] should be small solace to the Court's supporters, for, in unambiguous terms, the Court is in deep trouble with the American people.[4] Whether justified or not, a significant portion of the press has encouraged the lay citizenry in its belief that many of the evils in this country, particularly crime and violence, are traceable directly to the current Court majority's "coddling" of the criminal. This year's political campaign has brought such criticism to the fore, since the temptation to siphon votes by reducing complex problems such as the existence of crime to a matter of slogan rather than constructive proposal has proven irresistible to one of the two major candidates. Indeed, certain members of the academic community with a claim to a deeper understanding of the role of the Court have joined in the increasing criticism,[5] and it seems certain that the Court's role as "whipping boy" is solidly assured for the near future.

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1 Professor Mendelson is a professor of government at the University of Texas. His previous publications include THE CONSTITUTION AND THE SUPREME COURT; JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT; and FELIX FRANKFURTER: THE JUDGE. He also served as editor in chief of the 1961 REPORT, UNITED STATES COMMISSION ON CIVIL RIGHTS. Mr. Mendelson earned his Ph.D. at the University of Wisconsin and an LL.D. from Harvard.

2 Pub. L. No. 90-351 (June 19, 1968).

3 No one can seriously argue that the legislative attempt to overrule the constitutional decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *United States v. Wade*, 388 U.S. 218 (1967), can survive constitutional scrutiny.

4 Exceeding in extremity the congressional attempt to limit jurisdiction, Senator Russell B. Long of Louisiana "would go further than President Franklin D. Roosevelt tried to go toward packing the Supreme Court . . . . Senator Long has suggested that if the Court should upset the crime bill the Justices be denied life tenure by a constitutional amendment. He would make the Supreme Court a sort of semi-judicial appendage to Congress." The Washington Post, June 11, 1968, at A16, col. 1.

5 Professor Philip B. Kurland of the University of Chicago has helped to fan the flames with an argument that "the Court should decide less and explain more," published in the Sunday bible of sophisticated citizens. THE NEW YORK TIMES MAGAZINE, June 9, 1968, at 34.

Under these circumstances the more written about the work of the Court the better, and there is little doubt that more will be written. The Court generates its own heat. Last Term saw some 3,000 cases on the Court's docket and over 100 signed opinions, each one grist for the commentator's mill. Opportunities for scholarly analysis are virtually limitless. It is my hope that some portion of the inevitable critical effort will be aimed at reaching the interested non-lawyers in our society who are being subjected to much of the bombast published about the Court in the daily news media. Lawyers differ as to the merits of the Court's decisions, but few lawyers press this professional disagreement to a general attack on the institution itself. The understanding they have of the Court and its work can and should be communicated to a public which shares the attorney's interest but not his education and experience. This is not to demean the contributions of the legal scholar; his work is essential, both to the Court and to the practitioner. But if at least part of his effort can be directed toward informing and, hopefully, educating the public, I think he will be rendering the Court an even greater service.

Professor Mendelson's book is that of a scholar, and it is an interesting contribution to a fascinating series.[6] Although it is meat only for the lawyer, its topic is particularly appropriate in light of the current criticism leveled against the Court. Its theme is judicial "activism" versus judicial "anti-activism," or the proper role of "law" and "discretion" in the process of judicial decision-making. The particular pertinence of this theme derives from the fact that much of the flak exploding around the Court is directed at a supposed excess of "discretion" — and at an absence of "law" — in many of its recent decisions. Debate on the merits of such criticism may be prolonged and heated, but no one can argue that the criticism is not real and sharp. Mendelson, a leading exponent of the anti-activist school,[7] does not analyze recent opinions, nor does he attempt to typecast each of the contemporary members of the Court. Rather he has collected primary sources which are representative of each school, in the form of both Court opinions and off-the-bench statements from several Justices, and he presents these as expositions of the activist and anti-activist philosophies.

The work is divided into a short Prologue, three Parts, and an Epilogue. Part One is in the form of an essay by Mendelson defining in his own terms the struggle between judicial activists, purportedly those judges who are willing to decide cases by reference to a minimum of law and a maximum of their own self-informed discretion, and judicial anti-activists, purportedly those who refuse

6 "This book is one of a series [American Heritage Series] of which the aim is to provide the essential primary sources of the American experience, especially of American thought . . . . Some volumes will illuminate the thought of significant individuals, such as James Madison or Louis Brandeis; some will deal with movements, such as those of the anti-federalists or the Populists; others will be organized around special themes, such as Puritan political thought, or American Catholic thought on social questions." THE SUPREME COURT: LAW AND DISCRETION x-xi (W. Mendelson ed. 1967) [hereinafter cited as MENDELSON].

7 The Foreword to Professor Mendelson's book was written by Leonard W. Levy and Alfred Young, the general editors of the American Heritage Series. They note: "Despite brief genuflection in the direction of Justice Black, Mendelson's spirited advocacy of Frankfurter's position flavors his introduction and headnotes. Readers will have a target worthy of their mettle if they disagree with Mendelson." MENDELSON x. It is, of course, open to question whether a spirited advocate is the best choice to collate and edit primary sources in a series dedicated to the presentation of unadulterated history.

to decide by reference to anything but "the law" and easily ascertained public policy as opposed to their own individual social philosophy. Not surprisingly, Mr. Justice Frankfurter is cast as the leading exponent of the rule of "law." "Discretion" is presented through the views of Mr. Justice Field's "old economic activism" and Mr. Justice Black's "libertarian activism" and "new economic activism."[8]

Part Two, entitled "Views From the Bench," is the major portion of the work. Mendelson subdivides this part into five sections: (1) The Classic Era — Natural Law and Vested Interests (1789-1865); (2) The Beginning of Laissez-Faire Activism (1865-1888); (3) The Triumph of Laissez-Faire Activism (1888-1936); (4) Libertarian Activism (1937-?) — The Meaning of the Fourteenth Amendment; and (5) The New Economic Activism (1937-?). Representative opinions are chosen to illustrate the judicial philosophy prevalent in each period. Although his choices are quite satisfactory, Mendelson appends short, critical comments as a prefix or suffix to almost every opinion, and his personal preferences are glaring. Most of his comments seem designed solely to poke fun or criticism at the activist position by way of rhetorical question or snide statement. I found them to be of limited scholarship, of little interest, often in bad taste and, in fact, downright irritating and distracting.

Part Three is entitled "Off-the-Bench Views." The activist position is expounded therein in a dialogue between Mr. Justice Black and Professor Edmund Cahn concerning the Justice's views on the correct historical interpretation of the Bill of Rights. A comment by Sidney Hook, a distinguished philosopher and no friend of Mr. Justice Black, follows. Anti-activism is then explained in a selection from the writings of Mr. Justice Frankfurter, followed by a critical comment authored by Professor Walton Hamilton, an activist. Needless to say, the editor would have the reader conclude that Mr. Justice Frankfurter carries the day.

I don't fault Mendelson's choice of sources; in fact, the exposition of competing views through the medium of primary source material is healthy and refreshing. I do, however, often find myself in disagreement with the editor's personal views. If there is any one criticism to be leveled against Mendelson, it is that he makes too simple and obvious the choice between the activist and the anti-activist positions. While paying lip service to the suggestion that "the difference between judicial activism and judicial restraint is a matter of degree or tendency,"[9] too often he appears to suggest that the anti-activist is equipped to find the accepted community sentiment which he substitutes for his own discretion as a decisional guide while the activist, for some unstated reason, is unable to do so. Further, I read him as suggesting that often the activist is perfectly content to ignore precedent — the "law" if you will — and to look only within himself for answers to difficult questions. Differences in decisional method between activists and anti-activists are not so easily polarized.

8 Mendelson does emphasize that all of the book's material was collected before Justice Black's opinion in *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (dissenting opinion), which some commentators suggest marks a turning point in his "activist" theory. MENDELSON 469 n.83.

9 MENDELSON 39.

To suggest that the anti-activist is the more blessed because he is able by his own merits to discern with perfect assurance the state of the law as to any particular question at any particular time is to underestimate the difficulty of the questions which reach the Supreme Court, and to ignore the actual process of decision employed by anti-activists. Consider this statement:

> In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty. . . ."[10]

This is the language of Mr. Justice Harlan and I for one have trouble accepting "basic values 'implicit in the concept of ordered liberty' " as a workable maxim for a strict anti-activist. It makes one wonder whether it is not at all possible that the self-proclaimed anti-activist goes through much the same process of choice and decision as does the activist, but simply reaches a different result.

I think there is actual danger in the anti-activist position advocated by Mendelson. Driven to its logical conclusion, it requires near complete deference to the will of the majority to the exclusion of reasonable goals and claims of right advanced by the minority. A result which protects the aspirations of the minority against the will of the majority is "activist" because the Justice who reaches it ignores the accepted community sentiment in favor of his own "discretionary" social philosophy. Mendelson says this in the course of analyzing a statement by Mr. Justice Frankfurter: "What he meant, of course, is that the more the Court restrains itself, the greater are the freedom and responsibility of the people to govern themselves."[11] He might have added "and the more complete the power of the majority to define the rights and duties of the minority." I seriously question whether such a brand of anti-activism is viable in today's society. I'll stand at any opportunity under a banner proclaiming the solemn duty of the legislature and the executive, both state and federal, to respond to the cry for social change. Certainly this is the preferable alternative. Reality, however, commands recognition of the political fact that many problems are not considered, let alone resolved, by those institutions. Sooner or later, and today it seems to be sooner rather than later, injustices not resolved at the federal or state legislative and executive levels find their way into the courts through the medium of the concrete legal dispute, and it seems to me the unshirkable obligation of the Supreme Court to consider and to decide socially important cases properly presented to it. Anti-activism as espoused by Mendelson would have the Court ignore the social problems brought to it whenever possible, by routine reference to majority public sentiment and presumably by a liberal use of the discretionary denial of certiorari. To stand against the social dictates of the majority is to substitute personal discretion for the discretion of the community. If it must come down to a choice between activism and the opposing

10 Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (concurring opinion), *quoted in* MENDELSON 385.

11 MENDELSON 7.

course advocated by Mendelson, I stand with Dana Bullen of the Washington Star in defense of the Court's record:

> The court, if it reacts to anything, probably reacts to what might be called the facts of contemporary life.
>
> It is a fact, for example, that Negroes have been discriminated against. Suspected Communists likewise have been denied fair procedures in some cases.
>
> Crime suspects have been denied the benefit of the guarantees of the Constitution — although less frequently today than in former years.
>
> Policemen face too many dangers.
>
> And the court's approach to all of these fields has been the same — to interpret a living Constitution without partiality in the context of contemporary needs.[12]

My differences with the editor's philosophy work no impairment on the value of his book. Collections of primary source material are always valuable and all too rare. Professor Mendelson has made a definite contribution to legal scholarship in this collection, and I await the completion of the American Heritage Series.

*Francis M. Gregory, Jr.**

ABOVE THE LAW. By James Boyd. New York: The New American Library, Inc. 1968. Pp. viii, 337. $5.95.

Above the Law is the story of Senator Thomas Dodd's tribulations, as related by his former protege and Administrative Assistant, James Boyd. The book is true to its title — it exposes persons who consider themselves "above the law." It fulfills its promise even more dramatically, portraying conduct that, in addition to being above the law, is morally about as revolting and sordid as any chapter in congressional history. Although many of us thought we knew the enormity of the transgressions and where the blame lay, the book leads at least this reviewer to a surprise conclusion that challenges prejudices formed from having read the public accounts. In order to spare the fortunate persons who have not yet happened upon Boyd's book both the waste of money in purchasing it and the physical revulsion that goes with reading it, I shall try to summarize its content and its thrust.

While still a young man, the author was taken under Thomas Dodd's wing. He thrived under Dodd's patronage and guidance for 12 years, ultimately becoming the $23,000 a year head of the Senator's office staff. He had an unbounding admiration — as he describes it — for Dodd's fight against Nazism as a Nuremberg prosecutor and for his opposition to Communism in the halls of Congress. He relates how Dodd championed the poor, exposed labor racketeering, sponsored early gun control legislation, and exercised an independence of thought and action rarely encountered on the Washington scene. Boyd por-

12 The [Washington] Evening Star, June 14, 1968, at A-12, col. 5.

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trays Dodd as a devoted husband and father, a deeply religious person, and a doer of good deeds.

Such a man would hardly deserve censure or political eradication. But the author's image of Dodd abruptly changed in the last two years of their association. Boyd states that the transmogrification took place when he made shocking discoveries about Dodd's affairs, such as the Senator's receipt of certain campaign donations in cash rather than by check, which per se proved that they could not be "legitimate."[1] However, a reading of the author's own words suggests a less impersonal motive for his hatred of Dodd. Boyd was married and was the father of several small children. Enter into the Dodd office a secretary named Mrs. Marjorie Carpenter, and the forces of nature took over. The affection between the author and the heroine is not denied, or, in his words, "disguised." Despite the author's assurance that he and Marjorie behaved discreetly,[2] the ensuing complications were aggravated when the staff lived in a house in Connecticut with the Dodd family. Mrs. Dodd, herself the mother of six children, complained about the state of affairs,[3] and, in Boyd's opinion, it was the pressure of her unreasonable nagging on the subject that undoubtedly produced a chemical change in the Senator and turned the author into public enemy number one.

The disenchantment was manifested by Senator Dodd's decision to have one of his associates other than the author keep the books. This limitation on the scope of Boyd's nosiness was immediately circumvented when Boyd and his paramour established an espionage system within the office, and attempted to construct a second set of books from tidbits of information extracted from other staff members.

The hatred of Dodd by the two festered. They decided to destroy him. Ultimately, the Senator fired Marjorie, had Boyd work away from the office, and changed the office locks. Undaunted, they entered the Senate Office Building on a weekend and removed thousands of papers from Dodd's files.[4] These were rushed to a secret headquarters where Opal Ginn, secretary to Jack Anderson of the Drew Pearson office, was waiting to help photostat them.[5] There followed a year and a half during which the former employees' vigilante group (now numbering four) demanded Dodd's punishment. Due largely to mistakes in judgment by his advisers and a poorly planned and executed defense, Dodd's censure was assured. Still this was not enough for our hero who, along with the other three ex-employees, attacked the Senate Ethics Committee and demanded more hearings and more censure counts.[6]

Boyd does have one point. He states that the Ethics Committee carefully narrowed the issue to specifics of what occurred in Connecticut so that no exact analogy could be drawn between what Dodd did and what many other legislators did, still do, and never have considered improper. The one count on

1 J. Boyd, Above the Law 69 (1968).
2 *Id.* at 83.
3 *Id.*
4 *Id.* at 118-26.
5 *Id.* at 125.
6 *Id.* at 233-35.

which Dodd was censured concerned his use of monies raised at testimonial dinners for personal expenses. The lack of a written or oral delineation of the euphemistic distinction between using these monies for phone bills and household expenses rather than for campaign buttons and posters makes this one censure count rather meaningless.

Through it all, Dodd emerges as a man who grew up without money, spent a lifetime in public service rather than money-making pursuits, and still has no money. Does what the Club did to Dodd mean that the enormous expense of high public office now makes it prohibitive for self-made men of modest means to seek such office? Does it mean that we will be ruled henceforth only by happy millionaires? And have our moral standards shrunk to the point that we glorify the reprehensible tactics of someone like Boyd and help him to profit commercially through books and articles for his almost inhuman conduct? On the other hand, maybe we should hope compassionately that he did make a profit on the project, because he might find difficulty in obtaining other employment. Most people who keep files could just be closed-minded enough not to want Boyd as their custodian.

*Roy M. Cohn**

THE LAW OF SOVIET TERRITORIAL WATERS: A CASE STUDY OF MARITIME LEGISLATION AND PRACTICE. By William E. Butler.[1] New York: Frederick A. Praeger, Inc. 1967. Pp. xvi, 192. $15.00.

THE LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES. Edited by Lewis M. Alexander.[2] Columbus: Ohio State University Press. 1967. Pp. xii, 321. $12.50.

The Law of Soviet Territorial Waters and *The Law of the Sea* raise the great unresolved problem facing any further exploitation of ocean resources by the world community, namely unilateral extension of national sovereignty to larger portions of the formerly free "high seas" and their natural resources. This problem stems from the desire of littoral states to exercise the maximum degree of absolute sovereignty over adjoining waters at the expense of others. The difficult phase of this urge is that such claims arise from legitimate, even indispensable, needs,[3] rather than from mere caprice. Though it cannot be

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1 Mr. Butler is a member of the District of Columbia Bar, and serves as Research Assistant at the Washington Center for Foreign Policy Research of the Johns Hopkins School of Advanced International Studies.

2 The editor, a member of the executive committee of the Law of the Sea Institute, is a Professor of Geography at the University of Rhode Island. Twenty-five experts from law, marine science, government, and political science presented the papers which comprise this volume at the Law of the Institute Conference held at Kingston, Rhode Island, in February, 1965. Selections which should be read in their entirety include those by Myres McDougal, Richard Baxter, William T. Burke, and Giulio Pontecorvo.

3 For example, Iceland seeks special treatment under international law because it is exclusively a "coastline state." It argues, with considerable persuasiveness, that its very existence as a nation is at stake because of its dependence on sea resources, especially fish life.

denied that minor powers — especially new nations — are overly sensitive toward any encroachment on their newly won sovereignty, the inescapable fact remains that the resources found in offshore regions are indispensable to these developing nations.

According to international law, the high seas, covering seventy percent of the earth's surface, are not subject to infringement by any state, but are free and open to legitimate use by all nations. However, a clash develops between those major sea powers, led by the United States, who desire maximum freedom of movement for their large merchant and naval fleets, and those governments, led by the Soviet Union, who are primarily concerned with protecting their own offshore regions. While the Soviet Union is one exponent of larger territorial seas, its position can by no means be classed as unreasonable or inconsistent with traditional international law. Of course, the basic norm of socialist legal theory is that, where inconsistency does appear, the rights of the sovereign state prevail over the corpus of international law, which functions merely to regulate the conduct of states in their relations with each other. This basic philosophical orientation, sadly not explained in either book, causes a permanent East-West split in marine law.[4]

The major differences in these positions are found in those considerations deemed to be dominant. The Soviet Union, as demonstrated by its legislation and primarily by its basic Boundary Act of 1960,[5] has been guided by notions of defense, which dictate that foreign shipping be kept away from the Soviet orbit. In spite of the fact that freedom of innocent passage is "guaranteed," the whole thrust of czarist and Soviet legislation, culminating with the 1960 Act, has been to advance the exercise of national sovereignty at the expense of foreign fishing and merchant fleets. Similarly, the Soviets insist on their absolute right to prohibit any intrusion by warships from other states. Of course, these more extreme considerations are frequently modified in those instances where Soviet goals are furthered, usually in terms of increased foreign trade. Thus, foreign shipping is presently being encouraged to use the Northwest Passage in the Arctic region, notwithstanding the fact that these internal waters are legitimately subject to municipal legislation.[6]

Thus, an unresolvable problem is presented unless special treatment is given to Iceland by the world community. Similar claims are advanced by the Philippines and Indonesia because of their large internal seas and by Latin American and African states largely dependent on the food resources found in offshore regions. They feel that their problems must be recognized by any global legal order. *See generally* THE LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES 85 (1967) [hereinafter referred to as LAW OF THE SEA].

4 Within the past ten years alone, two great Geneva Conferences on the law of the sea have been unable to resolve this basic clash between national interests and the interests of the world community. Gormley, *The Unilateral Extension of Territorial Waters: The Failure of the United Nations to Protect Freedom of the Seas,* 43 U. DET. L.J. 695 (1966).

5 Statute on the Protection of the State Boundary of the Union of Soviet Socialist Republics, August 5, 1960. *Vedomosti SSSR,* (1960), no. 34, item 324, reprinted as *Appendix 10* in W. BUTLER, THE LAW OF SOVIET TERRITORIAL WATERS: A CASE STUDY OF MARITIME LEGISLATION AND PRACTICE 111-25 (1967) [hereinafter referred to as SOVIET TERRITORIAL WATERS]. For another example of the U.S.S.R.'s defense-oriented legislation, see Rules for Visits By Foreign Warships to Territorial Waters and Ports of the U.S.S.R., adopted June 6, 1960, reprinted as *Appendix 11* in SOVIET TERRITORIAL WATERS 126-32. *See also* SOVIET TERRITORIAL WATERS 27-34, 73, for a discussion of Soviet enforcement of its twelve-mile limit.

6 *Id.* at 35-53. For a discussion of the Northern Sea Route, see *id.* at 81-82. In addition, the U.S.S.R. relies heavily on the argument of "historic bay doctrines" or "historical practice",

The disquieting factor is that the United States, the traditional advocate of freedom on the high seas, has led the rest of the world in appropriating the oceans for itself. The most significant assertion of such authority came in the 1945 Truman Proclamation,[7] which created the first great continental shelf as a legal norm. This unilateral action by an American President led the way for the recognition of exclusive exploitation of the sea bottom as a codified norm of international law by the Geneva Convention in 1958.[8] In another assertion, our Senate passed a bill on June 15, 1966 to establish a contiguous fishing zone measuring nine miles beyond the territorial sea[9] — an action breaking with the traditional three-mile limit. Typical United States concern over increasing encroachment of our offshore regions by fishing fleets from other nations, especially Russia, was expressed by Senator Claiborne Pell of Rhode Island, who felt that 1966 was "a good time to be setting the twelve-mile limit before they do move in and establish a [*sic*] historic fishery."[10]

Although they lead different blocs of states, the United States and the Soviet Union do have similar interests, namely the conserving of their natural resources while guaranteeing the maximum freedom of movement for their own high seas fishing fleets and naval forces.[11] This dilemma cannot be logically resolved, because both governments — in fact all states — support inconsistent legal positions. The most extreme example of this inconsistency is found in the series of Soviet closed seas.[12] The Soviet Union has closed to all foreign shipping, including the right of innocent navigation, large bodies of water, *e.g.*, the White Sea which historically has constituted an international fishing ground, and the Sea of Azov. Further, it has attempted to limit the Caspian Sea, the Baltic Sea, the Black Sea and even the Sea of Japan to exclusive control by the few adjacent littoral states. According to Soviet theory, these areas should not be governed by international law, but exclusively by regional treaties. At the same time, the Soviet Union refuses to recognize similar practices in other parts of the globe — a legally inconsistent position. Obviously, such conceptually fragmented practices create chaos and confusion in the developing corpus of international maritime law.

Despite political, military and ideological implications, the most immediate

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as set forth in the *Anglo-Norwegian Fisheries Case (Norway v. Great Britain)*, [1951] I.C.J. 116.

7 Presidential Proclamation 2667, 3 C.F.R. 67 (1943-48 Comp.). Furthermore, this jurisdiction over the continental shelf has since been extended so as to include living resources and marine life. *See* Prohibition of Foreign Fishing Vessels in the Territorial Waters of the United States, 16 U.S.C. §§ 1081-85 (1964).

8 Convention on the Continental Shelf, signed at Geneva, Sept. 15, 1958, [1964] Part 1, U.S.T. 471, T.I.A.S. No. 5578, reprinted in 52 AM. J. INT'L L. 858 (1958).

9 S. 2218, 89th Cong., 2d Sess. (1966).

10 LAW OF THE SEA viii.

11 So we are torn here. On the one hand, we ought to keep the limit as narrow as possible for the commerce of the seas, and, on the other hand we want to extend it from the viewpoint of fisheries resources. It seems to me that we are trying to get the best of both worlds when we say that there should be a longer fisheries limit than there is a territorial one. But this is natural because it is in line with our own interests. I would think, too, that the Soviet Union, which is developing a strong Navy and also has its own fishing industry to consider, would not feel too different from us in this view. *Id.* at x.

12 See SOVIET TERRITORIAL WATERS 1-10, 59-90.

considerations are the preservation of fishing grounds and the more efficient extraction of mineral resources from continental shelves. At the present time, all nations are competing for the choice areas, with the result that the poorer nations are losing their fair share, and particularly their legal right to fish on the formerly open high seas. This dilemma is evident in the local, in fact provincial, outlook of Senator Pell from Rhode Island, who is overly conscious of the New England fishing industry.[13] This reviewer is not, however, prepared to question the wisdom of the Senator, or of some other contributors to *The Law of the Sea* who, because of their peculiar specialties, must necessarily view the total law of the sea from one vantage point.[14]

The expropriation of the seas becomes very apparent as one reads through these two excellent books. As all nations compete, instead of cooperating through normal diplomatic channels or within the framework of the United Nations, the real issue — the maximum yield of food and mineral resources that can be extracted for the benefit of the entire world community — becomes obscured.[15] In the case of fixed resources on continental shelves, some sharing of available supplies was contemplated by speakers at the Law of the Sea Institute Conference. When the Institute proposed sharing these resources with poorer states, it trod upon the most sensitive phase of national sovereignty. The enlightened motives of these experts are to be commended; nevertheless, some guarantees — indeed a favored status — must be accorded coastal states, in the manner prescribed by classic international law. In brief, some modification of existing vested interests seems desirable, but a revolutionary change in world law could be harmful to the nations of the world. On the positive side, it should be stressed that *only five percent of ocean resources are presently being used!*[16] Aside from a few choice species of fish, mammals, and crustaceans, plus oil and gas, these vast resources remain untouched; therefore, diminishing land supplies can be augmented by ocean resources in order to meet the needs of poor and hungry populations while at the same time affording a favored status to the coastal states.

Taking the broader perspective, however, Professor Myres McDougal clearly perceived the "common interest of mankind."[17] In fact, of the twenty-four participants at the Law of the Sea Institute Conference, only Professor McDougal dealt with the total maritime conflict in relation to the larger body of develop-

13 Pell, *Preface*, LAW OF THE SEA vii-ix. "Although the twelve mile limit will not solve all the problems of foreign interference currently facing our fishermen and those of other nations, it is a fair, necessary, and beneficial step in the right direction." *Id.* at ix.

14 *E.g.*, Friedheim, *Factor Analysis as a Tool in Studying the Law of the Sea, id.* at 47; Sullivan, *International Regulation of Communications for Oceanographic Equipment, id.* at 195; Hortig, *Jurisdictional, Administrative, and Technical Problems Related to the Establishment of California Coastal and Offshore Boundaries, id.* at 230.

15 In this instance, "maximum yield" is defined as the total amount of yield possible, as for example the optimum harvest of fish, without diminishing the species.

16 Chapman, *Fishery Resources in Offshore Waters* in LAW OF THE SEA 87, 103.

17 McDougal, *International Law and the Law of the Sea,* in LAW OF THE SEA 3. Professor McDougal maintains:

> Unhappily, I find myself in disagreement with some of the points Senator Pell has just made. I am not at all sure that it is either in the interest of this country or in the common interest of mankind that this country should claim a twelve mile contiguous zone for fisheries. *Id.*

ing policy-oriented international law.[18] As he viewed it, "the very function of the law of the sea is to protect and secure the common interests of the peoples of the world. . . . This is indeed the function of law in any community, national or international."[19] The nature and role of international maritime law should have been the primary consideration of the Conference. Regrettably, too many speakers rehashed the East-West split at the 1958 and 1960 Geneva conferences instead of advancing new insights. What Professor McDougal termed the "realization of basic community goals in the future"[20] should have been explored in much greater detail as a basis for future action.

The inductive method used by the other speakers at the Conference is, nonetheless, worthy of consideration, since an examination of specific difficulties can help to clarify the very complicated global issue — the maximum utilization of all resources by all peoples while protecting the *legitimate interests* of all coastal states. Philosophically, no serious disagreement arises concerning these objectives. Even the Soviet Union would be in agreement, for it would be incorrect to assume that the Soviets are unaware of the necessity of international travel and intercourse among states.[21] However, an objective analysis of legal practice and legislation reveals one truth: the more that nations extend control over adjacent seas, the more mankind suffers, because ultimate compromise becomes much more difficult to achieve.

The Law of the Sea presents a series of intellectual challenges, for proposals are offered to the effect that the United Nations must resolve the problem by creating a new world law,[22] presumably by means of treaty or by the establishment of a specialized United Nations agency patterned perhaps after the International Maritime Consultative Organization. While such schemes are worthy of "university disputation," they have no present chance for adoption, except in a few specialized areas such as fishing regulation.[23] Perhaps it will be possible to gradually extend such phases of prior successful cooperation as the safety of life at sea, iceberg surveillance, prevention of pollution, conservation of fisheries and the protection of whales into a complete global structure which permits maximum enjoyment of all seas and oceans. In one respect, all participants at the Conference were in essential agreement: traditional international law must be modified in terms of (1) new scientific discoveries, (2) the practical needs of the world's exploding and hungry populations, and most importantly, (3) the natural biological laws of reproduction of living resources. Although no revolutionary corpus of world law is in sight, everyone appeared dissatisfied with classic international law. Thus, plans looking toward an eventual

18 Other speakers do, however, approach this position, especially as they seek to set up international machinery within the United Nations framework. *See, e.g.*, Burke, *Law and the New Technologies, id.* at 204; Eichelberger & Christy, *Comments on International Control of the Sea's Resources, id.* at 299.

19 McDougal, *supra* note 17, at 3.

20 *Id.* at 4.

21 *See generally* SOVIET TERRITORIAL WATERS 35-39.

22 *E.g.*, Reiff, Johnson, Goldie, Mero & Melamid, *A Symposium on the Geneva Conventions and the Need For Future Modifications*, in LAW OF THE SEA 265, 297-98; Eichelberger & Christy, *id.* at 299.

23 Chapman, *supra* note 16, at 87.

"world rule of law," capable of replacing the unilateral assertions of national control, must be given sympathetic consideration.

On the other hand, the value of existing law should not be overlooked. Admittedly, it is easy to criticize the existing order of the oceans based on the Rhodian-Roman law, which in the opinion of this reviewer still governs the high seas.[24] Realistically, there is a clash between the socialist law of the Soviet Union and Graeco-Roman oriented international law, a distinction not brought out in the case study set forth in *The Law of Soviet Territorial Waters* which is devoted to examining positive law. Thus, a basic difference becomes apparent between national maritime laws and the international law of the high seas. Under the Roman law doctrine of freedom of the seas, all areas were free for legitimate use by all peoples.[25] This necessary element of legitimacy as it exists in contemporary law has been completely overlooked in both books. Aside from downgrading contemporary law, the real point has been slighted; the goals sought can still be realized within the context of existing law, a body of jurisprudence indeed undergoing change, though not as rapidly as desired.

The main questions posed in both books — such as exhaustion of certain species of fish, pollution by oil drilling, exercise of exclusive jurisdiction over territorial seas several hundred miles in breadth, extermination of whales and other marine life, and unfriendly acts in territorial waters — are in reality violations of the legitimate use concept. But since these books do not present the fundamental theory and jurisprudence underlying existing maritime law (or even Soviet socialist legislation), the reader must necessarily supply this essential background. Accordingly, this reviewer is rather cool toward the practicality of the schemes offered, particularly the transfer of these issues to the United Nations. In simple terms, if the members of the United Nations cannot resolve their own differences, the world organization cannot be expected to provide final answers. Such "buck passing" is unrealistic and bypasses the obligation of sovereign states to conduct their foreign relations in a spirit of "honor and responsibility."[26] Nonetheless, the United Nations still has a significant role to play in preserving the resources of the seas.[27] Even though a third Geneva Conference would unquestionably be "an unmitigated disaster,"[28] the United Nations must continue to work toward eventual settlement. A third major conference will only result in a consolidation of rigid positions; there is absolutely no possibility of securing agreement to any compromise plan by two thirds of those states comprising the United Nations. Thereafter, such failure to set forth an international standard would be interpreted by some governments as

24 *See* Gormley, *The Development of the Rhodian-Roman Maritime Law to 1681, With Special Emphasis on the Problem of Collision*, 3 INTER-AMERICAN L. REV. 317 (1961).

25 *Cf.* Gormley, *The Development and Subsequent Influence of the Roman Legal Norm of "Freedom of the Seas,"* 40 U. DET. L.J. 561, 594-95 (1963), and sources cited therein.

26 This theme, developed by Professor William W. Bishop in his 1965 Hague Academy Lectures, is advanced here as a prerequisite to effective international cooperation.

27 Gormley, *supra* note 4, at 727-30.

28 McDougal, *supra* note 17, at 3. It should be noted that many able scholars are still advocating the convening of a third Geneva Conference in order to assure a universal approach rather than a series of bilateral treaties, *E.g.*, Svarlien, *The Territorial Sea: A Quest for Uniformity*, 15 U. FLA. L. REV. 333 (1962); Gormley, *supra* note 4, at 729 n.95.

license to take additional unilateral actions on the theory that the high seas are *res nullius,* rather than *res communes.*

Despite this bleak criticism, the *Law of the Sea*'s best insight is that new legal solutions, based on science and natural law, are needed. A sincere attempt is made therein to offer practical suggestions as a basis for future study, research, diplomacy, and lawmaking negotiations. The speakers at the Conference recognized the fallacy underlying American and Soviet legislation — a nine mile contiguous zone for fishing or an exclusive territorial sea of twelve miles as codified in the Soviet Law of 1960[29] will not protect local fishing interests. Furthermore, even a two or three hundred mile territorial sea or exclusive fishing zone will not protect living resources nor assure maximum yield to the littoral state!

Previously, this reviewer has taken the position that the real danger to continued freedom of the seas is not extensions of up to twelve miles; it is rather the very alarming trend to assert national sovereignty *beyond* twelve miles.[30] Such actions, while clearly not an "international custom, as evidence of a general practice accepted as law" set forth in Article 38(b), Statute of the International Court of Justice, are nonetheless being defended as a correct norm of international law by a few Latin American jurists.[31] These selfish and shortsighted unilateral actions, also found in the Soviet practice of closed seas,[32] completely ignore the needs of the larger world community, particularly the future requirements of underdeveloped nations for food sources. Thus is illustrated the sad fact that the "basic policy criterion of securing and protecting the common interests of all mankind in the shared enjoyment of the oceans is likely to have a hard time in the calculable future."[33]

The next stage in preserving the legitimate use of the high seas is to evolve a public order governing the oceans. Henceforth, such enlightened sea law must exist as a segment of a larger world rule of law.[34] True, science and technology can help reconstruct existing concepts, but these disciplines cannot provide easy solutions. Nevertheless, the unanimity among the two dozen *Law of the Sea* contributors on the position that more money must be expended on

29 See notes 5 and 12 *supra.* In this regard, the Soviets rely on the *Anglo-Norwegian Fisheries Case (Norway v. Great Britain)* [1951] I.C.J. 116.

30 *See* Gormley, *supra* note 4, at 714-15.

31 *E.g.,* Cisneros, *The 200 Mile Limit in the South Pacific: A New Position in International Law with a Human and Juridical Content,* A.B.A. SEC. INT'L & COMP. L. PROC. 56 (1964). *See also Discussion of Herrington, Neblett, Friedheim & Alexander,* LAW OF THE SEA 85, plus the very helpful tables in Alexander, *Offshore Claims of the World, id.* at 71, 72-75.

32 *See* SOVIET TERRITORIAL WATERS 59-90; *accord,* Tunkin, *infra* notes 38 & 39.

33 McDougal, *supra* note 17, at 23. For a more complete statement, see M. McDougal & W. Burke, THE PUBLIC ORDER OF THE OCEANS (1962); McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision,* 19 J. LEGAL ED. 253, 403 (1967) (pts. 1-2).

34 Unfortunately, however, the public order of the oceans is deeply affected by the more comprehensive models of world public order demanded by the effective elites of the world, and we do not today have a single projected world public order — embodying only the values of human dignity or a free society — but rather a number of contending world public orders, all aspiring to be universal, but honoring the values of security, freedom, and abundance in very different degree. The kind of future public order of the oceans we can achieve must of necessity be a function of the outcome of this larger struggle. LAW OF THE SEA 23.

research and study is meritorious. Using the results of the two Geneva Conferences and the work of the International Law Commission,[35] new approaches are being sought, such as the internationalization of ocean resources, perhaps under United Nations' supervision.[36] These plans go considerably beyond, but are not completely incompatible with existing national laws; but any comprehensive plan for global cooperation to preserve living resources and restrict national continental shelves, or to reduce the breadth of excessive territorial seas, must of necessity clash with municipal law.[37] Specifically, the ideological stand of the Soviet Union, recently set forth by Professor G. I. Tunkin, a scholar well known to Western audiences,[38] stems from superiority of power:

> [T]he influence of political and legal ideology on various international legal positions is unequal. Ideology is more relevant to general theoretical problems. Its influence diminishes on concrete questions of international law which do not affect the major interests of states. Several pages later Tunkin referred to the 1958 Geneva Conference on the Law of the Sea as an example of divergent "socialist" and "bourgeois" conceptions of international law. The questions of the breadth of territorial waters, the innocent passage of foreign warships, and the immunity of state merchant vessels from coastal jurisdiction could not be resolved in the final Convention, Tunkin wrote, because of sharp divergencies between the two conceptions of international law; i.e., basic ideological differences.[39]

Of course, the Soviet Union has not violated the Geneva Conventions,[40] but the Russians will never consent to internationalization of any regions presently

35 *See* International L. Comm'n, Report, 11 U.N. GAOR, Supp. 9, U.N. Doc. A/3159 (1956), in connection with International L. Comm'n, Report, 10 U.N. GAOR, Supp. 9, U.N. Doc. A/2934 (1955), reprinted in 50 AM. J. INT'L L. 190 (1956). *See also* Draft Articles on the Regime of the Territorial Sea, 50 AM. J. INT'L L. 221-35 (1956). The reviewer is of the opinion that the International Law Commission's "Regime of the High Seas" provides the legal basis for extensions of territorial seas to twelve miles, since the two Geneva Conferences were unable to resolve the issue of conflicting three and twelve mile territorial belts.

36 *See Discussion,* LAW OF THE SEAS 297; Eichelberger & Christy, *supra* note 16, at 302. The position taken by Eichelberger and Christy that international control would still allow the sovereign state exclusive rights over its continental shelf has considerable merit, for the real conflicts involve those regions *beyond* the outer limits of the shelves.

37 *See* Chapman, *supra* note 16, at 93-105 for an analysis of the inevitable clash between international and municipal fisheries regulations. The plans for international control have considerable merit, although the chances of adoption appear doubtful.

38 *See generally* Tunkin, *The Geneva Conference on the Law of the Sea,* 1958 INTERNATIONAL AFFAIRS 47 (Moscow), cited in Jessup, *The United Nations Conference on the Law of the Sea,* 59 COLUM. L. REV. 234, 237, 246 (1959).

39 SOVIET TERRITORIAL WATERS 92-93, citing Tunkin, *Ideologicheskaia borba i mezhdunarodnoe pravo (Ideological Struggle and International Law)* 17-18 (1967), *id.* at 94 n.4.

40 The Soviet preoccupation with strategic and economic considerations, and to some degree Soviet ideological predispositions, are reflected more in the doctrines of closed seas and historic bays and a tendency to resort to unilateral characterization of the legality of Soviet actions than in the proceedings at Geneva. The twelve-mile rule is apparently regarded as only a first line of defense. To further minimize the influence over and accessibility of other powers to Soviet coasts, Soviet jurists have elaborated the closed sea and historic bay doctrines. The former, in the opinion of most Soviet publicists, applies to six of fourteen seas washing the Soviet Union. The latter applies to the four Arctic Seas. The Caspian and Aral Seas occupy a special status. Thus, only the Barents and Bering Seas are regarded as open seas. SOVIET TERRITORIAL WATERS 93.

The Soviet Union has, however, made some significant reservations to the Conventions. *See* Reservations of the U.S.S.R.: Geneva Convention on Territorial Sea and Contiguous Zone, April 29, 1958, *Vedomosti SSSR* (1964), no. 43, item 472, reprinted as *Appendix* 19 in SOVIET TERRITORIAL WATERS 140.

within their orbit. However, they will cooperate to protect the high seas, especially in the area of conservation.

Accordingly, the duty of lawyers to improve existing international law becomes extremely difficult to fulfill. The basic problems have already been clarified, and they have been restated with greater clarity. Still, a realistic solution capable of adoption by the world community must be sought.[41] These issues are so important to the continued survival of the human race that efforts looking toward a final solution cannot cease, regardless of the fact that required improvement will not be forthcoming in the near future. Fortunately, a significant beginning was made by the Law of the Sea Institute Conference. As summarized by Giulio Pontecorvo of the faculty of the Graduate School of Business, Columbia University:

> The arguments pro and con are, as yet, so primitive that the real contribution of the conference was to establish the debate and to indicate some of the inadequacy of the reasoning on both sides. Before any progress can be made it is clear that criteria for internationalization must be developed. There must be some logical, compelling, and specific reasons for taking action. In all probability local and regional agreement will take precedence over broad ocean-wide compacts. In addition, as the broad confusion over the different implications for meaningful economic exploitation of the fugacious fish resources and the sedentary mineral deposits indicated, a further classification of agreements based on resource definition is also in order.[42]

A comparison of the two books leads to the positive conclusion that they provide different insights into a common problem. On the one hand, *The Law of the Sea* presents the best thinking by two dozen experts. On the other, *The Law of Soviet Territorial Waters* contains valuable data relative to the most important government competing with the United States for control of the oceans. In particular, translated Soviet legislation, decrees, and treaties set forth in appendices constituting over one-half of the latter volume will serve as the primary source for interested American scholars. Consequently, both volumes will be useful to serious researchers and advocates for many years.

*W. Paul Gormley**

41 *Accord,* Pontecorvo, *Reflections on the Meeting of the Law of the Sea Institute,* in LAW OF THE SEA 310, 312-13.

42 *Id.* at 313.

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BOOKS RECEIVED

ANATOMY OF THE LAW. By Lon L. Fuller, Professor of Law, Harvard University. The author analyzes our system of law for the layman. New York: Frederick A. Praeger, Inc. 1968. Pp. v, 122. $4.50.

CASES ON INTERNATIONAL LAW. Edited by Abad Santos, Dean and Professor of Law, College of Law, University of the Philippines. This first edition casebook is intended primarily for classroom use for the basic course in International Law. Dobbs Ferry: Oceana Publications, Inc. 1967. Pp. xxii, 760. $10.00.

CENSORSHIP OF THE MOVIES. By Richard S. Randall, Assistant Professor of Political Science, University of Nebraska. An analysis of the nature and problems of movie censorship in today's mass democratic society. Madison: The University of Wisconsin Press. 1968. Pp. xvi, 280. $7.95.

THE END OF OBSCENITY. By Charles Rembar. A narration of the trials of *Lady Chatterly, Tropic of Cancer* and *Fanny Hill,* which resulted in a redefinition of obscenity, by the lawyer who defended them. New York: Random House, Inc. 1968. Pp. 528. $8.95.

FEDERAL INCOME TAX FUNDAMENTALS. By William E. Dickerson, Professor of Accounting, The Ohio State University and Leo D. Stone, Professor of Business Organizations, The Ohio State University. Intended for use in an introductory course in federal income tax at the college level or for use by business and professional men, this book attempts to provide a general understanding of the federal income tax. Belmont: Wadsworth Publishing Company. 1968. (Price unreported.)

GEORGIA AND STATE RIGHTS. By Ulrich B. Phillips. Originally published in 1902, the author focuses in his history of Georgia on the struggle between state and federal rights and between local and centralized government. Yellow Springs: The Antioch Press. 1968. Pp. xiv, 224. $5.00.

HOW TO SETTLE YOUR OWN INSURANCE CLAIM. By Daniel G. Baldyga. A "do-it-yourself" manual designed to assist the nonlawyer in the settlement of his clear cut legitimate claim and thereby avoid the expense of legal contingency fees. New York: The Macmillan Company. 1968. Pp. xi, 159. $4.95 (paperbound).

IDENTIFICATION & POLICE LINE-UPS. By William E. Ringel, Judge, Criminal Court of the City of New York. An analysis of judicial opinions and principles in the area of identifications and line-ups. Jamaica: Gould Publications. 1968. Pp. x, 211. $5.00 (paperbound).

INTENTION IN LAW AND SOCIETY. By James Marshall. The author examines the divergence between the legal definition of "intent" and true intent. New York: Funk & Wagnalls. 1968. Pp. xv, 237. $5.95.

JURISDICTION & PRACTICE IN FEDERAL COURTS. By Theodore Schussler. A synthesis of the jurisdictional and procedural requirements of the federal court system. Jamaica: Gould Publications. 1967. Pp. iv, 152. $4.50 (paperbound).

LABOR LAW. By Sidney Fox. This book attempts to present the fundamentals of our national labor law in a narrative form. Jamaica: Gould Publications. 1968. Pp. 124. $4.00 (paperbound).

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MERCHANTS OF HEROIN. By Alvin Moscow. An economic and historical study of the workings of the international conspiracy behind the narcotics business. New York: The Dial Press, Inc. 1968. Pp. xvii, 276. $5.95.

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SCHOOL IN THE LEGAL STRUCTURE. By Edward C. Bolmeier, Professor of Education, Duke University. A treatment of the evolution of governmental relationships with public schools. Cincinnati: The W. H. Anderson Company. 1968. Pp. xii, 266. (Price unreported.)

TOWN AND COUNTRY AMERICA. By Giles C. Ekola. An analysis of the problems of and the forces affecting nonmetropolitan, town-and-country areas as told by a small town parish pastor. Saint Louis: Concordia Publishing House. 1967. Pp. 123. $1.25 (paperbound).

The listing of a book in this section does not preclude its being reviewed in a subsequent issue of the LAWYER.

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