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Book Reviews

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BOOK REVIEWS

THE END OF OBSCENITY. By Charles Rembar. New York: Random House. 1968. Pp. 528. $8.95.

Not many war stories by trial lawyers are worth nine dollars, but this one is an exception. It is a sensitive, lucid description of the judicial struggles of two notorious literary ladies (Lady Chatterley and Fanny Hill) and a cryptic rest-room wall (*Tropic of Cancer*). The author is the lawyer who represented the publishers of all three books. But *The End of Obscenity* is more than a set of war stories — which is probably why it's worth nine dollars. It is also the limited autobiography of a provocative and interesting man, and the didactic tour de force of a frustrated school teacher. Anyone can read it, and most people should.

I. A Story of Three Books

A. *Lady Chatterley.* When the first of these cases, a post-office administrative action against *Lady Chatterley's Lover,* came to hearing, the nineteenth century *Hicklin*[1] rule had worked its way through *Butler v. Michigan*[2] and *Roth v. United States*[3] with surprisingly little loss of weight. The Constitution still appeared to permit the suppression of literature which tended "to deprave and corrupt those whose minds are open to such immoral influences."[4] The limitations imposed by *Butler* made an adult population appropriate, and *Roth* required that the book — if a book was at issue — be considered as a whole, whatever that meant.[5]

Mr. Rembar, a former government lawyer engaged (it appears) in copyright work, was employed to represent the publisher. He had never tried a case; he apparently claimed no special expertise on the law of free speech. He set out to demonstrate that the *Roth* "test" protected serious writing from suppression. Some eight years and many courtrooms later, in the Supreme Court of the United States, his generalization became the law. "So far as writers are concerned, there is no longer a law of obscenity."

The idea that social value could be a defense to prosecution — that "well written obscenity" was a contradiction in terms — was a novel and lonely argument in 1959. It rested on an ambiguous piece of dicta from Justice Brennan's *Roth* opinion — "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[6] The statement did not say that literature otherwise within the *Hicklin* test is redeemed by its social importance; at least it didn't say that until Mr. Rembar interpreted it.

The Brennan dicta appeared in an opinion written to affirm convictions under both state and federal obscenity statutes. To get his point out of *Roth*

1 Queen v. Hicklin, (1868) L.R. 3 Q.B. 360. The *Hicklin* court based its test of obscenity upon "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." *Id.* at 371.

2 352 U.S. 380 (1957).

3 354 U.S. 476 (1957).

4 The statement is quoted at C. REMBAR, THE END OF OBSCENITY 20 (1968) [hereinafter referred to as Text].

5 Text 15-26.

6 354 U.S. at 484.

— and to do it in courts required to adhere to the Supreme Court's version of the law — Mr. Rembar had to extract from "an opinion woven largely of dubious history and non sequiturs" one helpful "thread of solid meaning." His reasoning: (1) The Supreme Court says that the justification of obscenity laws is that the material suppressed is "utterly without redeeming social importance." (2) Writing which contains social importance — and, as it came out, Mr. Rembar never insisted that this meant *any* social importance at all[7] — is not within this justification. (3) Therefore socially important literature is protected by the First Amendment.

Mr. Rembar says that he felt "entitled to urge that the [*Roth*] opinion be given a free translation," and he did, and it worked, but not until some of his allies — the American Book Publishers Council, for example — had rejected his argument as not tenable. (The Council's bulletin, as late as 1963, implied that the social-importance test was relevant only as to material which was not otherwise obscene.[8])

Mr. Rembar was astute enough to assemble more protection than social value for Constance Chatterley. He also argued that the "prurient interest" formula instituted in *Roth* meant something other than normal interest — a good point for Constance and Mellors, of course, because their mutual attraction seemed to be biologically (if not socially) normal. (The argument conceded that D. H. Lawrence meant to appeal to normal sexual interest, but that would have been the finding anyway.) Mr. Rembar then combined his tests and contended that only literature falling within *both* categories (*i.e.*, literature which was both without social significance and enticing to abnormal sexual interest) could be suppressed.[9] That set a tough hurdle for the Post Office Department. The hearing officer referred the case to the Postmaster General; Mr. Rembar, whose client could afford no more delay, sought a federal injunction. The Postmaster General announced his decision against the book the day suit was filed, which made a sort of judicial review out of the injunction action. Mr. Rembar won the case in the federal courts — district and circuit.[10] The Solicitor General declined to appeal further; there were no state prosecutions. In comparison with Mr. Rembar's two later adventures, it was an easy win, but his social value test was not prominent in the opinions of the second circuit. The court had taken his invitation to find for the book on the ground that it was not prurient, but even in that holding it is not clear that the court agreed with a distinction between appeal to sexual interest (not prurient) and appeal to something baser (prurient).

B. *Tropic.* The *Tropic of Cancer* cases were state prosecutions; the Post Office and federal prosecutors left the book alone — partly, perhaps, because

7 Text 475:

> I argued that our case did not involve any "scintilla theory of value." . . . My guess was that the Supreme Court, following our law's empirical inclination to deal with one case at a time, would not pause to meditate on how to handle a suppositious work of admittedly meager quality.

8 Text 57-58.

9 He reduces this to a lovely little drawing. Text 126.

10 Grove Press, Inc. v. Christenberry, 175 F.Supp. 488 (S.D.N.Y. 1959), *aff'd* 276 F.2d 433 (2d Cir. 1960). Mr. Rembar also describes and criticizes the Lady Chatterley trial in England. Text 152-60.

of the precedent Mr. Rembar helped to set in *Lady Chatterley*. This situation threatened fifty times fifty prosecutions. It was aggravated when Mr. Rembar's client was forced by business considerations to publish an almost simultaneous paperback edition of Miller's curious novel[11] and to maintain for its wholesale purchasers the customary agreement to defend obscenity suits. Mr. Rembar had to limit his client's vulnerability, to avoid if he could the devastating effect of "censorship by multiplicity of litigation." (Prosecutors, as he points out, profit by this sort of harassment even when they lose every case.)

He worked from the publisher's home office in New York, with a model brief for use in each local prosecution. On the law, Mr. Rembar's *Lady Chatterley* strategy would soon have become mired in Henry Miller's scatology. (Mr. Rembar, still loyal to his principle if not to the book itself, never clearly admits how much Miller's prose revolts him.) He could not make the argument that "prurient interest" referred to base perversion, because Miller's work *did* appeal to base perversion. That was the difference between *Tropic of Cancer* and *Lady Chatterley*. (She may not have been a lady in the American sense, but at least she was healthy.) Mr. Rembar had to rely solely on his social value argument. There was no obscenity, he said, in writing about shameful, morbid things, if only the writer avoided a shameful, morbid means of doing it. The proposition was that worthwhile prose — regardless of what it was about — could not be obscene.

The argument failed in the trial court in Boston; Mr. Rembar took charge of the appeal in the Supreme Judicial Court. His secondary line of attack was based on an idea suggested by Chief Justice Warren's opinion in *Roth*[12] — that the seriousness of the publisher is a factor in deciding obscenity. (Mr. Rembar seems to have sensed the importance of the "pandering" consideration long before the rest of us. He seems to have been unsurprised at the Court's opinion in *Ginzburg v. United States*.[13])

Even assuming that the Supreme Judicial Court would accept the social-value test (which it did), Mr. Rembar had another tactical problem. Unless the case went on to the Federal Supreme Court, the decision would not foreclose local prosecutions in other states — and, as a matter of fact, prosecutions were underway in California, Wisconsin, Indiana, Florida, Pennsylvania, and several other states, at the time he argued *Tropic* in Massachusetts. On the other hand, he did not want to go into the Supreme Court a loser. The ideal result was a Massachusetts opinion in favor of the book, expressly accepting the social-value test, but predicated solely on federal constitutional grounds. That imposing, illusive result is exactly what he got; but in a denouement that must prove something about best laid plans, the Attorney General of Massachusetts declined to

11 He explains that another publishing house put out a paperback edition of *Tropic* based on an old text, as his client's hard-cover edition was published. This forced a paperback version of the new edition much sooner than business considerations would otherwise have required. Text 170.

12 354 U.S. at 494. This was able scholarship and it allowed Mr. Rembar to make a record on his publisher's reputation and seriousness. It later proved crucial when *Fanny Hill* was briefed and argued in the Supreme Court with *Ginzburg v. United States*, 383 U.S. 463 (1966), and *Mishkin v. New York* 383 U.S. 502 (1966).

13 383 U.S. 463 (1966).

appeal.[14] Decisions in other states, against the book, were only theoretically appealable; none was in the posture the Massachusetts case had been. In a three-judge federal injunction action in New Jersey, for example, Mr. Rembar's client lost,[15] but there was every possibility that the Supreme Court, if it took an appeal, would decide the case on a narrow jurisdictional ground. Victories for the book in California and Wisconsin did not go to the Supreme Court, although each gave some support to the social-value theory.[16]

The final Supreme Court ruling on *Tropic* was anticlimactic. The Court, in *Grove Press, Inc. v. Gerstein*[17] reversed conviction per curiam. The lower-court judgment was from an intermediate Florida court in which the federal questions had been eliminated at the pleading stage. The justices of the Supreme Court incorporated their confusing welter of opinions from the French movie case, *Jacobellis v. Ohio*.[18] Social value was recognized in *Jacobellis* by two members of the Court, but two is not a majority of nine. *Gerstein* was bound to disappoint a general like Mr. Rembar. It had not been briefed nor argued; there was no real record before the Court, and "not even an opinion the book could call its own." It was a victory only, not a moral victory.

C. *Fanny Hill.* Fanny was even more vulnerable than *Tropic* had been. Fanny, like Lady Chatterley, was normally (sexually) enticing, and was therefore outside the tradition which vindicated *Ulysses*.[19] ("Judge Woolsey concluded his famous opinion [in *Ulysses*] by disapproving the aphrodisiac and approving the emetic."[20]) On the other hand, Fanny was classical pornography, much more so than *Tropic* had been; anybody who knew about it at all knew that it was a dirty book. Virtually no critic had written about it seriously; it was not regarded as literature, and the most widely circulated edition of it had been bowdlerized in reverse — made more pornographic in language and decorated with risque drawings. (Mr. Rembar's client was not responsible for this edition.)

Fanny's publisher had not agreed to indemnify booksellers, as *Tropic*'s had. Mr. Rembar, who advised the publisher from the first, decided against widespread initial sale. The book (an accurate, unillustrated, hard-cover edition) was marketed in three key states (New York, Massachusetts, New Jersey) and all three prosecuted it; his plan was to defend vigorously on a limited front. Federal authorities did not proceed against the book.

The Massachusetts proceeding was a libel[21] against the book; the New

14 Mr. Rembar gives a characteristically courtly explanation for this, at Text 194-95; it turned on the young Attorney General's preoccupation with a primary contest for the Democratic nomination for the Senate.

15 Grove Press, Inc. v. Calissi, 208 F.Supp. 580 (D.N.J. 1962).

16 Zeitlin v. Arnebergh, 31 Cal. Rptr. 800, 383 P.2d 152 (1963); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963).

17 378 U.S. 577 (1964).

18 378 U.S. 184 (1964); *see also* O'Meara & Shaffer, *Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio*, 40 NOTRE DAME LAWYER 1 (1964).

19 United States v. One Book Called "Ulysses," 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F.2d 705 (2d Cir. 1934). *Commonwealth v. Holmes*, 17 Mass. 336 (1821), had involved an early edition of FANNY, but was not otherwise relevant to the modern case.

20 Text 223.

21 Mr. Rembar points out that the folklore which regards actions against books as more dangerous than actions against people is overly theoretical. He displays a fine appreciation for the human insight that a jail cell is worse than a bonfire.

York and New Jersey cases were criminal prosecutions. Mr. Rembar appealed in Massachusetts and handled the trials in the other states, with the widest possible array of data — reviews, expert testimony, erudite argument with skilled opponents. Largely as a result of the suits, the literary community began to produce opinions on the social value of *Fanny*. (Mr. Rembar calls that "bootstrap justice.") His description of the trials is fascinating, but the trials themselves were probably magnificent. He won in New York and New Jersey but lost in Massachusetts.[22] He took the Massachusetts loss to the Supreme Court, argued it with *Ginzburg* and *Mishkin*, and there finally, definitively, vindicated his social-value theory.[23] It is a tribute to Mr. Rembar's skill that even his opponents, in the last round, accepted the theory. With social value accepted as part of the nation's constitutional law,[24] obscenity had, at least for serious writers, come to an end.[25]

II. Limited Autobiography

There is just enough of a modest variant on the *My Life in Court* theme in this book to make a reviewer wish there were more. Mr. Rembar is a man I would like to know better, and his war stories are stories I would like to hear more about. He manages, in a finally charming way, to let his personality show through here and there; my only criticism is that he hid himself behind his professional self-image as much as he did.

He has been good for his clients in the ultimate way of a wise counsellor. The campaign to establish social value as a constitutional limitation on censorship is a permanent victory for serious book publishers and writers. It cost his two publisher clients an immense amount of time and money, of course, but it proved a better thing for them — and for literature too — than smaller, cheaper victories would have. The book has many tactical examples of this personal concern for an ultimate victory. It is nice to know a lawyer who thinks that way; not all of us do.

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22 Attorney General v. A Book, 345 Mass. 11, 206 N.E.2d 403 (1965); G. P. Putnam's Sons v. Calissi, 50 N.J. 397, 235 A.2d 893 (1967); People v. Fritch, 13 N.Y.2d 119, 192 N.E.2d 713 (1963).

23 *A Book v. Attorney General*, 383 U.S. 413 (1966). Mr. Rembar argued in his Supreme Court brief that good writing, even in the law, was rare enough to deserve constitutional protection; he cited the brief for the Commonwealth of Massachusetts as an example of the rare good legal writing he was talking about.

24 Mr. Rembar counts five justices who accept the social-value test from the variety of essays in the three cases. Six voted to reverse in *Fanny Hill, A Book v. Attorney General*, 383 U.S. 413 (1966). Justices Brennan and Fortas and Chief Justice Warren accepted the test in the Court's principal opinion (by Justice Brennan); Justice Stewart accepted the theory in a separate opinion. Justice Harlan, finally, accepted the test but would have applied it only to federal convictions. Since no other member of the Court accepts Justice Harlan's distinction between state and federal cases, Mr. Rembar feels justified in counting his vote in favor of the test. If counting Justice Harlan is too optimistic, Mr. Rembar believes that Justice Douglas would accept the test. The reader may want to track Mr. Rembar's reasoning, at Text 480-81, and also consult his table at *id.* 513.

25 Text 490:

> Assuming he can produce something not "utterly without" merit, which is equivalent to assuming that he is a writer at all, he and his book will be safe. If he has some talent, and if he is making any effort to use that talent — whatever springs and urges may have put him (or John Cleland) to work — the law will never bother him.

Mr. Rembar is an astute, alert lawyer. Examples of that are sometimes merely meticulous — *e.g.*, the motion he made in the federal district court (in *Lady Chatterley*) to have his client's name appear first in the caption; that assured valuable publicity and brought a laugh from Judge Bryan. Some of the examples are incisive: He was careful to argue from Aquinas for the Catholic members of the New York Court of Appeals, and to talk about the Seven Deadly Sins in Massachusetts. He was willing, in the *Fanny Hill* trial, to let the judge consider isolated passages from the novel, if care was taken to keep the isolated passages from appearing, severed, in the record. He came into each of these cases without having read the books involved and, with the possible exception of *Tropic,* became personally convinced that the principles of free speech ought to extend to them. (His personal opinion of the books, which is not always clear, is irrelevant only in law.) One practical test of his ability as a lawyer is, perhaps, that he manages to attract his clients by first beating them when he represents somebody else. "I believe it was meant to be not a tribute to skill but a description of unremitting truculence," he says of that, but it is a truculence which brings small victories out of apparent defeats. In the *Lady Chatterley* hearing, for instance, Post Office counsel suggested that Constance was a tramp; Mr. Rembar defended the lady's honor; the hearing officer said he thought it made no difference whether Constance was a tramp (which, if the book alone were considered, was of course true). Mr. Rembar finished the dialogue by suggesting that it did make a difference because the assertion by the Post Office demonstrated a tyrannical attitude in favor of sexual purity in literature.

There are times, though, when I wonder if his devotion to the objective is as thorough as he makes it seem. At several interesting points he demonstrates that he was touched by the anxiety of witnesses (poets, critics, and other victims of the law). In one example, he decided not to use a lady witness because, he says, the case did not need her. ("I would not have been considerate of her feelings if we had needed another witness.") Mr. Rembar admits that he watched another nervous witness with concern, but claims that he was solicitous only for the case, not for the witness. I wondered when I read this last if he protested too much. He may have more feeling — I think he does — than he is willing to admit. There is a sort of folklore about the trial bar which says it is bad tactics to care about people. In C. P. Snow's *Conscience of the Rich,* the young barrister who is its central figure decides that he will never succeed as a trial lawyer because he finds the witness before him more interesting than the point he is trying to prove. Mr. Rembar is at great pains to prove that he is not that kind of lawyer. But I wonder why human concern would be such a serious blight on his competence. I attribute Snow's episode to a subtle cynicism about lawyers, but I am tempted to attribute Mr. Rembar's to a distorted self image that is more professional than human. Mr. Rembar is more like Snow's lawyer than he thinks.

Mr. Rembar manages, in any event, to retain a fine sense of objectivity after the cases are over. (That is an important quality in a lawyer; it assures that our profession will work for sound reform in the law rather than for legis-

lation which will benefit regular clients.) He displays a fine sense for the malaise which must descend on the sensitive judge in an obscenity case — nausea born of the impossible burden of being a public flower arranger for hypocritical moral standards, ethical insight, and literary taste. He agrees with Judge Desmond, for example, that the humor in *Tropic* is not very funny.[26] He is careful to defend the honor and objectivity of his fellow lawyers, and of the bench. He recognizes that people like Ginzburg and Mishkin are anti-social, and that the social-value test brings with it a certain at least temporary amount of harm:

> The current uses of the new freedom are not all to the good. There is an acne on our culture. Books enter the best-seller lists distinguished only by the fact that once they would have put their publishers in jail. Advertising plays upon concupiscence in ways that range from foolish to fraudulent. . . . A visitor from outer space who had time to study only our art and entertainment would take back an eccentric view of the reproductive process on earth.
>
> . . . .
>
> But it will pass. It will pass because it is not the freedom itself, but the taboo it displaces, that sets the stage for prurience. . . . The truest definition of pornography requires that the act of reading itself be sinful, or illegal, or authority-defying, or at least sneaky. . . . The long refusal to permit honest treatment of sexual subjects has conditioned a nation of voyeurs.
>
> . . . .
>
> . . . Our black-magic view of sex suffers from illumination, and we must benefit from its discomfiture.[27]

He believes that the oft-heard argument that obscenity is not socially harmful is overworked and inaccurate.[28] The first amendment, he says, assumes that some speech will be harmful; freedom of speech does not need the defense that it is harmless. He also believes there is a difference between the ordinary aesthetic response to art and sexual response to pornography. "It is as though, to create the emotion of fear, a working model of a tiger were brought into the room," he says of pornography. He disagrees, finally, with the tactical posture taken by the American Civil Liberties Union in *Ginzburg*, which attempted to translate the "clear and present danger" test from political cases to literary cases. (His reason for this disagreement is coldly pragmatic, however. "Whatever might be said for or against such a result was, to my mind, irrelevant: the Court was not nearly ready for it.")

Mr. Rembar fields some stimulating ideas that are not confined to his subject or to his law practice. He believes, for example, that just cases should not be settled; I find that idea challenging, particularly since I tell my students (in wills and trusts) that one of the fundamental principles of law practice is to avoid litigation (a lesson I learned from good lawyers in a large law firm). Mr. Rembar admits that the cost of litigation is too great to make practical the

26 *See* APPENDIX.

27 Text, 491-93.

28 He believes, for instance, that Mishkin's produce is proof against the argument that if *Fanny Hill* could not be banned, nothing could; and that *Liaison* would have failed the "patently offensive" test.

use of the courts as vindicators of principle. His answer is to have all lawyers paid by the government.[29]

III. Didactic Tour de Force

Mr. Rembar, like many of the successful lawyers I have known, is a frustrated teacher. He has the careful advocate's passion for explaining his references. He leaves no obscure legalism undefined, no judicial turn unstoned.[30] Sometimes these pedagogical asides are mini-lectures in themselves — his chapter on *Aspects of the Law* is, for example, an exegesis on stare decisis and a useful defense of historic jurisprudence.[31] He gives three or four short chapters to a survey of the legal situation before and after the *Roth* case and they are as lucid in explaining that complex subject as anything you're likely to find in ponderous essays five times as long.

His pithy instruction is more often contained in asides or footnotes.[32] He illustrates dicta in appellate opinions by allusion to the Lord's explanation of rights of inheritance among children — including sons — when the petitioners included only Moses' daughters. He gives useful parenthetical definitions of such things as inter-state rendition (when he relates his defense of Henry Miller in a Brooklyn police court), the hearsay rule,[33] judicial notice ("a judge . . . saying, sometimes rather absently, 'Yes, I know' "), and the protocol which distinguishes "Justice" from "Mr. Justice."

Mr. Rembar puts legalistic pomp to the torch as well as any irreverent academic can. The common "irrelevant, immaterial and incompetent" has its source, he says, "in our deep fondness for trinities and the rhythms of magic." The practice of making exceptions on the trial record "involves the assumption that lawyers are made happy by adverse rulings" and the belief that "what the judge has said somehow gains clarification if the lawyer says 'Exception.' "

Most of his instruction is serious and useful. (I would not again attempt to teach a legal method course without prescribing, and maybe even requiring,

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29 Another instance, and one I would enjoy discussing with Mr. Rembar, is the idea that laws against profanity do not touch the first amendment because "a common use of it is the insult hurled in a charged social situation." Mr. Rembar should have an opportunity to relate that opinion to the streets of Chicago in August, 1968.

30 It is fair to warn the reader that his style warms the reader slowly. In the early pages of the book he strains a bit to be witty and engages in footnote pedagogy that seems mildly condescending — as for instance when he defines "lawyers" and "writers," in the style of the Uniform Commercial Code, in his first chapter.

31 He defends stare decisis in terms of its protection against corruption, its fairness, its orderliness and its practical utility.

32 *See* APPENDIX.

33 A lovely example of this last phenomenon, from the transcript of the *Fanny Hill* trial in Boston, is recounted at Text 329-30 (the witness is Professor John Bullitt of the Harvard English department):

> Q. (by Mr. Rembar): You just mentioned, Mr. Bullitt, two characters who are quite distinct in the book. Is there in general the treatment of character and the development of character in this book that is typical of the novel as a literary form?
> A. Very much so. Perhaps the proper way to start answering your question is to refer to a critical remark made by Henry Fielding in Tom Jones —
> THE COURT: No. You can't bring hearsay in here.
> THE WITNESS: Sorry.

that the students sit for a while at the feet of Professor Rembar.) He is well read and thoughtful and objective enough to merit respect even when he is talking about a subject on which he has been necessarily partisan. The use of the ancient "deodands" concept in Justice Frankfurter's opinion on the New York book-seizure statute,[34] for example, provokes two-and-a-half pages of disquisition which begins in *Exodus* and Aeschines and ends in a personal aside on the doctrine of prior restraint in free-speech cases. Mr. Rembar feels the doctrine is unrealistic.

He has had the time and the good sense to step back from his courtroom battles and to assess them in terms of sound advocacy — always with modesty for his own work, courtesy and respect for his fellow contenders, and admiration for the lonely demands of the judicial office. ("It is just very difficult, in these cases, for the judge to keep his eye, fixed and unwavering, on the law. Fanny Hill is too beguiling, and *Fanny Hill* must suffer the consequences.")[35] He illustrates how it is that a clever advocate leaves testimonial episodes unclear and uses the record in summation — when it is too late for the other side to identify and correct its mistakes. He illustrates the folly in trying cases for the audience. ("[W]hile glibness is an aid to advocacy, the advocate must know, even better than his audience, just how much of his discourse is no more than glib.") He even manages to make fairly plausible his decision to argue extemporaneously in the Supreme Court of the United States — in his first appearance there, by the way.

At times, these didactic adventures take Mr. Rembar into judicial policy. He believes, for instance, that the members of the Supreme Court honestly attempt to agree on their decisions (and even on their opinions, which is something else). But, as he points out, "the only cases that reach the Court today bring close questions with them." This is because predictable judicial results *ought* to come out of the courts of appeal. It is also because the expense of an appeal to Mt. Olympus is too great to be expected of most routine litigants in more modest appellate courts. There are, he concludes, "more split decisions than there used to be," but this "is no indication of flightiness."

He marvels, as all ordinary lawyers must, at the curious decisions of the Solicitor General of the United States. In the *Ginzburg* case, for instance, counsel for the Government were convinced that the Supreme Court would not affirm the five-year prison sentence which had been imposed in the Third Circuit.[36] The Government therefore invited a double decision from the Court, which would have left intact the fine imposed (in effect) on *Liaison* — and would therefore have vindicated the Comstock Law — but would have reversed as to *Eros* and *The Housewife's Handbook on Selective Promiscuity*. "The fines to be paid on *Liaison* may have been paltry in the light of the economics of the whole enterprise, but it is not the Supreme Court's function to enlarge in-

34 Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957).

35 Justice Black noted that he had not read Mishkin's and Ginzburg's publications, as is his custom in obscenity cases. He did not, however, make the customary disclaimer as to *Fanny Hill*. "Fanny does indeed inspire gallantry."

36 See notes 12 and 22 *supra*.

adequate penalties." The Court, as it turned out, proved to be a more zealous prosecutor than the Solicitor General.

*Thomas L. Shaffer**

III
APPENDIX

A Sampler of the Wit and Wisdom of Charles Rembar

(from *The End of Obscenity*)

THE SUPREME COURT OF THE UNITED STATES: "The Court is not a legislature fulfilling the wishes of a current majority. It is a group of lawyers reading a constitution that was meant to give a permanent pledge of certain liberties, regardless of what the current majority would like. While in a measure the Court is responsive to popular attitudes, it is at the core proof against them."

COMPARING THE JUDGES HAND: "Augustus was the cousin of the more famous, but not judicially abler, Learned Hand. The latter, whose opinions contain some of the best prose America has produced, achieved enormous prestige as a judge which might more appropriately have been accorded him as a writer and philosopher of the law. Learned Hand was extraordinarily creative, but he was better at contributing ideas than at choosing between competing ideas presented to him, and the primary function of a judge is to judge."

STARE DECISIS: "[W]e know that last time thought and effort went into the problem, and it seems a good idea to have the benefit of that thought and effort now. The past has banked its wisdom, and it is foolish not to draw on it."

PRECEDENTS OVERRULED: "The congressional anguish (and that of some sections of the American Bar Association, for another respectable example) is not in fact what it is said to be. There is no real mourning for *stare decisis*. There is only a wail of frustration from those who do not like the Bill of Rights, did not really know it was there, and would certainly have voted against it in 1787. The wailing is not for a lost principle, but for distasteful results."

ON CALLING ONE'S OPPOSING COUNSEL "BROTHER": "This somewhat archaic form of reference is still occasionally heard, and I favor it. Lawyers are, of course, brethren at the bar. But if that fraternal notion is rejected by the reader as patently unrealistic, the term remains appropriate: a lawyer may properly call his opponent 'brother' in the sense that Hemingway's Old Man called the fish he killed his brother."

COMMUNITY STANDARDS IN OBSCENITY CASES: "[T]he First Amendment is a cheap thing if all it provides is the assurance that one may say what a current majority is willing to hear."

VICE AMONG THE POOR: "By concentrating on paperbacks, the censors might create a condition in which the one third of the nation that was ill fed,

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* Professor of Law, University of Notre Dame.

ill housed and ill clothed would at the same time have its prurient interest insufficiently appealed to."

WELL WRITTEN OBSCENITY: "It is not plausible that the coexistence of freedom for trash and repression for good writing was a matter of chance. Express or implied, the understanding was that some publications for whose sale the wholesaler might otherwise be prosecuted could safely be sold, if he stayed away from others designated as critical. Famous underground books would always be able to make the critical list. Newer, less celebrated books that were seriously written and seriously received were also vulnerable; nothing infuriates the vigilante so much as the combination of sex and intellect."

HENRY MILLER'S HUMOR AND CLASSROOM WIT: "The comedy in the book is essentially comic relief. The impulse to laugh comes principally from the context in which the jokes are made. The atmosphere is very much like that of the classroom. There is no response to humor so easily induced as that of the cramped and aching students; given the circumstances, almost any change in subject gives pleasure, and a little wit goes a long way."

ADVOCACY: "The litigating lawyer is a mercenary, one of the few remaining examples of the hired combatant. His premise is hostility. . . . The rules observed, the hostility is socially approved, indeed demanded.

"Almost all our occupations are competitive, of course, but in most callings the battle is waged darkly and with guilt. The approved mode is constructive cooperation, and reasonableness toward those with whom one deals. . . . The courtroom lawyer, on the other hand, spends half his time exposing the fallacies of his brother at the bar, an exercise in scorn and damage. If he is cordial, we understand that it is only good manners."

ON THE BENCH: " 'Bench' is an outrageous misnomer; it is an imposing seat of power. 'Throne' would be closer."

ON TELEVISION ADVOCATES: "Contemplating the effect of television courtroom drama on legal style, I have sometimes felt a chill at what must be happening to medical techniques."

OBSCENITY AND SOCIAL HARM: "Jimmy Walker's celebrated remark that he had never heard of a girl who had been seduced by a book [was] a tribute to the impermeable virtue of New York womanhood perhaps, but an insult to literature."

EROS (THE MAGAZINE, NOT THE GOD): "It combined elements of *Playboy, Captain Billy's Whiz Bang,* and *American Heritage,* and suggested the coffee table at least as much as the bed table."

JUSTICE STEWART'S TEST OF OBSCENITY: "a Magic, Automatic Self-Bailing Little Wonder."

ON THE RESULTS OF THE GINZBURG-MISHKIN CASES: "It is quite clear that the doom-sayers were wrong. It is also quite clear that the joy of the Citizens [for Decent Literature] was just whistling in the light."

AFRICA AND LAW: DEVELOPING LEGAL SYSTEMS IN AFRICAN COMMONWEALTH NATIONS. Edited by T. W. Hutchison and others. Madison: The University of Wisconsin Press. 1968. Pp. xviii, 181. $6.50.

One might think, as a first reaction to this book, that there is little room for yet another general work on African law. Already, apart from works by individual authors such as Elias,[1] there is the symposium edited by the Kupers,[2] there are the reports of the 1964 Ibadan conference and the 1966 Addis Ababa seminar on African law, and several other works of a collective nature are soon to be published. Apart from anything else, one might not too seriously reflect, authors will soon run out of suitable titles for such works. This reaction would, however, be unfair. The present collection of essays, originally presented as a special issue of the *Wisconsin Law Review*,[3] will now reach a wider audience. Despite the breadth of its title, it comprises a series of case studies by different authors of the evolving law in various English speaking countries of Africa.

The studies vary greatly in length, originality and aim. Thus the interesting chapter by Dean W. B. Harvey[4] is not concerned so much with the general pattern of legal development in Ghana as with the political and constitutional changes which have directly flowed from the military takeover in February, 1966. As Harvey observes (and this would be true of all the African coups and secessions), the legal system in Ghana has remained much as it was before the takeover, except for the obvious changes that had to be made by the National Liberation Council to remove some of the more oppressive aspects of the Nkrumah regime.[5]

A broader examination of legal development in Ghana is found in S. K. B. Asante's contribution,[6] which is in effect a "review-article" devoted to a critical examination of Professor Harvey's recent book.[7] Asante's basic criticism of that work is, firstly, that a simple explanation of Africa's tangled politico-legal problems is probably misleading.[8] Secondly, the criteria by which Harvey analyzes the legal order in Ghana are, according to Asante, predetermined instead of emerging from the local environment.[9] Asante's essay, however, closes with a paradox:

> In Ghana, a colonial regime imbued with Western individualistic values did not succeed in effecting a radical change in the basically collec-

1 T. O. ELIAS, BRITISH COLONIAL LAW: A COMPARATIVE STUDY OF THE INTERACTION BETWEEN ENGLISH AND LOCAL LAWS IN BRITISH DEPENDENCIES (1962).

2 H. KUPER & L. KUPER, AFRICAN LAW: ADAPTATION AND DEVELOPMENT (1965).

3 *Africa: Legal Aspects of a Developing Society*, 1966 WIS. L. REV. 996.

4 Harvey, *Post-Nkrumah Ghana: The Legal Profile of a Coup*, in AFRICA AND LAW: DEVELOPING LEGAL SYSTEMS IN AFRICAN COMMONWEALTH NATIONS 104 (1968) [hereinafter referred to as AFRICA AND LAW].

5 *Id.* at 116.

6 Asante, *Law and Society in Ghana*, in AFRICA AND LAW 121.

7 W. B. HARVEY, LAW AND SOCIAL CHANGE IN GHANA (1966).

8 Asante, *supra* note 6, at 125. The author points out that:

> In any particular politico-legal situation in Africa, the forces at play may be so complex, so multifarious, so fluid, and so encumbered with expedient makeshifts and compromise as to defy any attractive rationalization in terms of sweeping philosophical postulates. *Id.* at 125-26.

9 Asante makes this observation in the following language:

> Perhaps the most serious shortcoming of the essay on value competition is the

> tivistic attitudes of the Ghanaians. The time lag between formal prescriptions and social acceptance of the value underpinnings of these prescriptions proved an imponderable factor. Likewise, the Nkrumah regime, for all its loud advocacy of Eastern socialist values, hardly changed the solid attitudes instilled by a hundred years of contact with the British.[10]

What remains obscure from Asante's analysis is the connection between these two assertions. Apparently British contact did after all instill certain attitudes and modes of behavior in Ghanaians. Quite what these are, and what have been the respective contributions of British Victorian private enterprise and modern welfare state notions, of traditional African institutions and of the imperatives of the centrally organized, politicized state to the evolution of Ghanaian law, are questions that still await treatment in a full-scale study.

Professor R. B. Seidman's much longer contribution[11] goes some way in answering these questions. Despite the omnibus title, many of the illustrations and arguments in Seidman's essay are derived from Ghana, and some of his generalizations apply imperfectly, if at all, to other parts of the continent.

Broadly, Seidman sees law as going through three stages or phases, each of which corresponds to a different level of economic and political evolution. The basis of legal obligation, he argues, has moved from Status to Contract to Plan. These correspond to the "subsistence pre-capitalist," so-called "capitalist," and so-called "socialist" modes of economic organization. Maine and his celebrated dictum about the movement from Status to Contract[12] is invoked in support of the first part of this analysis; Marxist thinking and categories are extensively relied on for the second part.

The British in Africa, according to Seidman, found society at the subsistence stage, ruled by status and customary law. They imposed the second of the three stages—the nineteenth century private enterprise system and the nineteenth century English law that went with it. Whatever the rights or wrongs, African states, because they are now developing, must now move into the third phase—that of the plan and the sort of administrative law that goes with it.

Every attempt made by a Descartes, a Marx or a Maine to simplify the bewildering complexity of world history and reduce it to tidy simplicity has attractions; but Asante's criticism of Harvey is equally valid when applied to Seidman's more ambitious analysis. The acceptability of Seidman's position depends on the accuracy of a large number of factual assertions, and on the assessment, necessarily more tentative and more colored by the preconceived

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> inadequacy of the criteria used. Instead of delving into the political and legal order of Ghana to discover the peculiarly Ghanaian sources of political and legal determinants, Professor Harvey came to Ghana with the legal philosopher's armory of predetermined value criteria and sought to verify them by reference to local experience. This exercise is unobjectionable in itself, but, by purging these criteria of local content, Professor Harvey is compelled to rely on high-level abstractions that are patently inadequate for unraveling the full depth of Ghanaian value acceptance. *Id.* at 127.

10 *Id.* at 132.

11 Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa,* in AFRICA AND LAW 3.

12 H. MAINE, ANCIENT LAW (10th ed. 1920). "[T]he movement of progressive societies has hitherto been a movement *from Status to Contract.*" Id. at 174.

positions and responses of each analyst, of the benefits and disadvantages of the policies and practices enforced at different points in Africa's history.

Let us begin with Maine's dictum. Citation of this dictum can, of course, prove nothing about African legal evolution. Rather it is the other way around: How far does the content of African customary laws validate or invalidate this dictum in its application to Africa? A philosophical as well as a historical point is involved here. Firstly, it is by no means true that all African legal relationships derived from status obligations. The scope given to voluntary act and the creation of obligations by agreement has been consistently and seriously underestimated. Secondly, one may argue that every particular legal relationship falls within a given class of model legal relationships, the participants in which occupy legal roles, again of a defined class. This is true as much of contract relations as it is of so-called status relations. However, a unique, singular, legal relationship is, under this view, a logical impossibility, since law is characterized by its recognition of generalized classes or types of role and institution.

Seidman's schema demands not only that customary law should in its traditional form be allocated to the status-inspired group of laws, but that it was and remains linked to a subsistence economy. He seems to give too little credit to the capacity of customary law to adapt to new economic conditions. For instance, both in East and West Africa, one is impressed by the way that traditional land laws accommodated the notion of economic agriculture—of crops cultivated for the market rather than for personal consumption. The buildup of the cocoa, ground-nuts, palm oil, cotton and coffee industries would have been impossible without this accommodation.

This emergence of a developed customary land law makes it difficult to accept Seidman's strictures.[13] That author quotes, apparently with approval, a dictum of Clauson to the effect that shifting agriculture inevitably results in "soil-mining."[14] On the contrary, modern agronomic opinion is moving steadily to the view that shifting agriculture is a sensible and effective way of conserving the long-term fertility of the soil. It is only with the cessation of shifting agriculture or the shortening of the period of fallow that the soil is being worked out. Agriculturalists, let us not forget, are equally concerned with the possibility of soil exhaustion in the intensive agriculture of highly developed western countries.

The following comments on Seidman's article are of varying degrees of significance.

(1) The "extended family," says Seidman, loses its *raison d'être* in a cash-based (as opposed to a subsistence-based) economy.[15] This observation illustrates a pervading tendency in Seidman's essay to see human and developmental problems in purely economic terms. The unfortunate results of this theory are that Law's success is measured by the extent to which it promotes economic activity, and the social consequences of any given legal institution tend to be overlooked, or their importance understated. In this instance, the *raison d'être* (or *raisons*) of the complex household system in traditional society extends far beyond the

13 See Seidman, *supra* note 11, at 48-55.
14 *Id.* at 49n.180.
15 *Id.* at 6.

economic. Mutual assistance in legal and social, as well as productive, activities is one reason for this existence, but in truth there is a whole spectrum of religious, psychological and ideological motivations for the growth and retention of the family system. (One might incidentally observe that modern Western and Soviet societies emphasize the basic need for an extended family system, the lack of which today lies at the root of so many social problems, such as care of the aged, protection for infants, custody of the mentally ill.)

(2) Although it is quite true that commercial activity in some areas of Africa was largely extractive, it is not fair to say, as Seidman does, that "[t]he subsistence economy droned on, not significantly improving from year to year and leaving its inhabitants drowned in perpetual penury, disease, and—in terms of modern technology—ignorance."[16] Such a statement displays a certain tendentiousness or black-and-white approach to African history, and ignores entirely the heroic and often unappreciated efforts of agricultural officers, experimental stations, schools, hospitals and clinics to rectify these disabilities. The whole infrastructure of the contemporary African states—roads, railways, schools, administrative machinery, and so on—was built up in colonial times. Undoubtedly, more could have been done—but of how many human enterprises is this not true?

(3) In Professor Seidman's summary discussion of the application of criminal law in British Africa, there are several points which require explanation or correction. English criminal law was being applied in the Gold Coast settlements before the enactment of the Supreme Court Ordinance of 1853. Seidman says: "The Indian Penal Code was introduced in East Africa early in the century [presumably, from the context, the twentieth century]."[17] The Indian Penal Code was in fact introduced into Zanzibar in 1867. In the Uganda Protectorate it was in force by the end of the nineteenth century. In the East Africa Protectorate the Indian Penal Code was introduced in 1897. The Sudanese Penal Code (not *Criminal* Code) was modeled on the Indian Code, not the identical Pakistan Code, which naturally was not in existence at that time. Seidman's statement that "[d]uring the 1930's the colonial office drafted a new criminal code based in large part upon the Queensland Code,"[18] which was then introduced in East and Central Africa, is misleading, since this new code was already in operation in the countries mentioned by 1930. Finally, Seidman objects that the codes and the mores of the peoples subject to them were far apart; but this criticism appears to adopt the *volksgeist* approach to law that Seidman later criticizes the present reviewer for using, and ignores the role of law as command which the legislator can use to establish new patterns of behavior.

(4) "The prevailing political pattern in Africa at independence was a variety of the Westminster model."[19] This statement is true only if restricted to the Commonwealth African states and provided that one recognizes the very large differences between the African constitutions, which are written, have express distribution of powers, entrenchment of fundamental rights and judicial service commissions, and that of the United Kingdom. However, Seidman rightly draws

16 *Id.* at 8.
17 *Id.* at 14n.50.
18 *Id.*
19 *Id.* at 26.

attention to the very few restraints upon the power of the executive in African states, due to the absence of societies and associations, the weakness of trade unions, and the feebleness of the press.[20] He also correctly draws attention to the fact that the judiciary in Africa has sometimes proved a broken reed,[21] although the instances he cites would not seem to be the best ones for the proof of this thesis. In Ghana, the judiciary did well until recent times in its attempts to mitigate some of the more unfortunate and unjust consequences of Nkrumahist legislation, and its efforts led to its eventual removal. In Nigeria the decision in *Adegbenro v. Akintola*[22] does not illustrate, as is maintained by Professor Seidman, the thesis that the African judiciary has been weak in restraining arbitrary actions by the executive, but rather shows the impossibility of relying on extraneous courts in acute political and constitutional controversies. Seidman also draws attention to the prevalence of corruption, which is eating into the body politic.[23] What is saddening to see is that corruption, defined broadly to include not only the misuse of power for financial gain but also any wilful perversion of the proper course of administration of justice for personal motives, is as widespread in the so-called "socialist" states of Africa as it is in those which are frankly private enterprise.

(5) In discussing the adequacy of customary law for the modern needs of African states,[24] Seidman begins with a quotation from an article which I wrote several years ago, in which, *inter alia,* I suggested that the legislator should pay attention to customary law as an expression of the way of life and the ethos of a people.[25] Both one's thought and the legal necessities of Africa can develop, of course, but the criticisms which Seidman makes of this observation are, I respectfully submit, based on a certain lack of perception and on overstatement of what are truly the weaknesses of customary law. Seidman denies that customary law can reflect "the people's own choice of legal system,"[26] arguing that the law must be filtered through the courts and that the judges influence the choice of which laws are recognized and which are not. He further draws attention to the repugnancy clauses, which in the past have disallowed customary law that is "repugnant to justice, equity and good conscience,"[27] to the fact that customary law must not be incompatible with any written law, and to the fact that the judge must take judicial notice of customs already approved in earlier cases. He concludes: "As a result, the law announced by the courts may reflect the ethos of the judges; it reflects only accidentally, if at all, the common consciousness of the tribes."[28]

This analysis assumes that an investigation of the forms and inspirations of customary law must be confined to the rulings of the appellate courts. If an investigator is concerned with discovering how the ordinary people see the justice of any given conflict situation, or the kind of institution that they would like to govern their married life or their exploitation of land, he would not dream of

20 *Id.*
21 *Id.* at 26-27.
22 [1963] A. C. 614 (Nigeria).
23 Seidman, *supra* note 11, at 27.
24 *Id.* at 28-45.
25 Allott, *The Study of African Law,* 1958 SUDAN L.J. REP. 258.
26 *Id.*
27 Seidman, *supra* note 11, at 29.
28 *Id.* at 30.

confining himself to the law reports. In East Africa these reports would contain practically no decisions on customary law, so that the observations of Seidman just cited would certainly not apply there. But even in the coastal areas of West Africa the investigator would look first at the day-to-day practices of the people, and at the judgments of their native and local courts and the decisions made in their extra-judicial arbitrations. This is where the authentic voice of the customary law is most certain to be heard. There are, it is true, inadequacies in the judicial determination of customary law in the appellate courts, and the present reviewer, among others, has drawn attention to judicial perversions of customary law that have been perpetrated in the past; but no one could argue convincingly that appellate court decisions on customary law reflect accidentally, if at all, the customary law as actually observed. The success rate is clearly better than that. Undoubtedly, too, appellate court judges have to make normative choices between rules from time to time; but the researcher wishing to determine how the people really think can easily penetrate behind such choices.

Seidman discusses at the same point the problem of the diversity of customary laws, a problem which presents an obstacle to the legislator who is trying to build a unified national law. One legislative solution in such circumstances is to codify only those principles which seem to be of general acceptance in all the customary laws within the territory, leaving variations of detail in force in each community or region. If one seeks a single exclusive law, however, some violence must inevitably be done to the details of particular legal systems. Admittedly, this violence may be gross, as where matrilineal people are forced to adopt a patrilineal scheme of succession. But to assert that an attempt to synthesize and build on existing customary laws "reflects nobody's *Volksgeist,* except perhaps the compiler's"[29] seems to overstate the case.

Elsewhere, Seidman argues that the reception of English law and the rapid changes which have taken place in customary law in recent times in any event invalidate reliance on the customary law: "To say that the customary law today still embodies the *Volksgeist* — if it ever did — is to rest on a mystical faith, not fact."[30] Here the reviewer must confess his bewilderment. It is precisely the capability of customary law to adapt to new economic situations, and to incorporate ideas originally derived from alien systems, which illustrates and supports the contention that customary law, being a people's law, expresses more clearly their contemporary needs and aspirations. Had customary law remained frozen in its pre-colonial position, then Seidman's dictum might have had some validity.

The truth of the matter seems to be that there is a basic cleavage of philosophical viewpoint between those who wish to work from below and those who wish to work from above — the populist and elitist views of life respectively. In contemporary Africa the elitists and centralists are in control. To them law is what is imposed from above in the pursuit of imperatives beyond the comprehension of the ordinary citizen. In such circumstances, public opinion and the repercussions of new laws on the individual are ignored. As Seidman puts

29 *Id.*
30 *Id.* at 31.

it, one must look outside customary law for the basis of new African legal systems because "customary law simply contains insufficient responses to the demands of development."[31] It goes without saying that customary law in its original form contains no rules to deal with stock exchanges, large-scale industry, labor law and the whole apparatus of the welfare state. No one is arguing that one should draw on customary law in these domains, except in the broadest possible sense of trying to utilize some of the basic principles and postulates to inspire or shape the new governmental and economic institutions. This is what President Nyerere is doing in Tanzania; having come to the conclusion that the basic informing principle of African customary institutions was *ujamaa* — brotherhood, the family feeling — he is trying to build up modern institutions in Tanzania in line with this principle. One cannot really expect customary law to contribute more than that in this field of law and administration. In this area of debate, therefore, one must concur with Seidman, provided that one is prepared to distinguish sharply between this part of the law and those parts where African notions have a more direct and living relevance — marriage, the family, property and contract nexus, succession and family law generally.

(6) In considering the application of commercial law in former British Africa, Seidman observes that: "The problem is especially complicated because one cannot predict beforehand which jurisdiction's common law will be applied in any particular instance."[32] In support of this he mentions the fact that the Ghana Interpretation Act of 1960 allows a court in Ghana to refer to any exposition of the common law by any court exercising jurisdiction in any country. There are two comments that one can offer here. The first is that this rule is uniquely confined to Ghana; in other common law jurisdictions in Africa, the legislation still makes clear that the law of England has been received and is being applied, except in so far as it has been replaced by local legislation. If one looks at the law of contract, for instance, the legislation in Kenya and Uganda makes it quite clear that it is the law of England which has been adopted. Secondly, even in Ghana the practice of the courts has been to treat the law received as that derived from England; reference to other jurisdictions has been limited and mainly by way of illustration or qualification only. In following this practice, the Ghana courts have behaved in no more unpredictable a fashion than those of England, whose judges today are quite prepared to look at Australian, Canadian or American decisions if they find them pertinent. One cannot therefore accept Seidman's conclusion that "the applicable law is extremely hypothetical"[33]; legal experience inside and outside the courts does not support this view. This means that one of the major arguments that Seidman puts forward for the codification of the commercial law goes by the board, or rather, has no greater justification in Africa than it would in England or other jurisdictions where the matter is now under consideration.

(7) Seidman does offer some interesting and valuable comments on the

31 *Id.*
32 *Id.* at 34.
33 *Id.*

public corporations which have been one of the main chosen instruments for implementing public enterprise in tropical Africa. The disadvantages of the public corporation, to which he draws attention, have been more conspicuous than its advantages; the main problems have been those of jobs for the "boys," lack of financial accountability, profitability and ministerial control. He draws attention to the absence of the test of profit-making as a simple standard against which to measure the performance of the manager of a state enterprise.[34] In this connection, one might draw attention to the Ghana Industrial Holding Corporation Decree of 1967, which has been designed to allow the Industrial Holding Corporation to take over and reorganize public enterprises in an efficient and profitable manner. In part, Paragraph 9 of that Decree provides:

> It shall be the duty of the Corporation to conduct its affairs on sound commercial lines, and in particular, so to carry out its functions under this Decree as to ensure that its revenues are sufficient to produce on the fair value of its assets, a reasonable return measured by taking its net operating income as a percentage of the fair value of its fixed assets in operation plus an appropriate allowance for its working capital.

(8) Many of Seidman's comments on constitutional arrangements in the new states are highly pertinent. Constitutions should, he argues, be concerned with the problems of African governments, and not those of England in the nineteenth century.[35] There is the problem of the maintenance of legality, and the problem of providing an alternative for the incumbent government in countries where opposition is viewed as little short of treason. In the perspective of the wave of military coups that have overtaken African countries, one can see that the failure to provide a peaceful way of changing rulers who have fallen short of the expectations of the people inevitably provokes recourse to violence and to the intensification of the social and administrative problems which African countries must face.

As can be seen, Seidman's contribution, even if one does not at all points agree with the underlying philosophy or the presentation of detail, is a stimulating and humanist attempt at a synthetic approach to African law, viewed not as the monopoly instrument of professional lawyers, but as a tool for the creation of a more acceptable social order.

Miss Ann P. Munro contributes an interesting analysis of *Land Law in Kenya*,[36] which is mainly an evaluation of the land consolidation program and of the possibilities for the Kenya government to pursue its avowed aim of "African socialism." There are only two points which warrant elaboration or criticism in Miss Munro's generally very fair and comprehensive survey.

(1) The author refers to "settlers" as having a separate system of courts[37]; this is an unfortunate variation of the legislative language which referred to natives and non-natives or Africans and non-Africans. Although it is true that Africans had a separate system of courts, it is not true that there was also a

34 *Id.* at 41-42.
35 *Id.* at 72.
36 Munro, *Land Law in Kenya*, in AFRICA AND LAW 75.
37 *Id.* at 76.

system for non-Africans; the latter made use of the general-law courts.

(2) One must be very sympathetic to Miss Munro's criticism of those who thought that customary land law was static and incapable of evolution.[38] The most important development in this respect was the evolution of alienable individual interests. Also valuable is her criticism of the conclusions of the 1960 conference on the future of law in Africa, held in London, which rejected customary law as the basis of a modern land tenure system.[39] She comments:

> Implicit in this argument is the view that private ownership is more efficient than customary tenure in attaining the goal of intensive economic development. The cost in terms of the social disorientation of the peasants is ignored. . . .[40]

Apart from some general observations about the role of law as an instrument of political and social change, Miss Munro in an appendix recapitulates the judicial system of Kenya. It is worth noting that the 1967 legislation, the Judicature Act and the Magistrates' Courts Act, has radically altered the existing structure, at least in theory. One may also note that the restatements of customary marriage and succession law in Kenya, referred to by Miss Munro in a further appendix, are due to appear shortly under the imprint of Messrs. Sweet and Maxwell.

The other major contribution to the volume is by Cliff Thompson; his essay is entitled *The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan.*[41] One may doubt the propriety of including a chapter on the Sudan in a volume devoted to the Commonwealth in Africa since the Sudan is not a Commonwealth nation. Further, the structure of the *Sudanese* legal system is entirely different from that which prevailed in the territories under the administration of the British colonial office. English law was not introduced to the Sudan overtly and expressly, but by a sidewind under the general rubric of "justice, equity and good conscience." The important role of Islamic law in that country, and the consequent parallelism in the court system, are also without their equivalents further south. Not only does Thompson very usefully review the formal sources of the law and the materials available for their investigation, but he appends a discussion of the key issues for the future development of law in the Sudan. Among those he mentions are whether the Shari'a and civil court systems should be merged; what part if any customary laws should play in the legal system; the demands of economic development; the influence of Egypt and its legal ideas; and the attempt to build a unified, codified law in the Sudan. Thompson's remarks on these topics are as perceptive and as constructive as might be expected from one who has contributed so much to uncovering the sources and problems of Sudanese law. By way of addendum, one might draw attention to the newly drafted permanent Constitution for the Sudan, which appears to change the legal system in certain funda-

38 *Id.* at 86.
39 *Id.* at 91.
40 *Id.*
41 Thompson, *The Sources of Law in the New Nations of Africa: A Case Study From the Republic of the Sudan,* in AFRICA AND LAW 133.

mental respects. The Constitution states that Sudan is an Islamic country, and the existing division of the judiciary into civil and Islamic sections will be preserved. Any wholesale unification is obviously postponed for the present.

Lastly (and one hopes not too perversely) we come to the *Introduction,* which is contributed by Professor A. Arthur Schiller. Professor Schiller reviews the justification for the expression "African law," and then considers what place, if any, customary law may occupy in the legal systems of Africa. Most usefully, he draws attention to thought and practice in the French-oriented as well as the English-oriented states.

There are a large number of points, both for approval and disagreement, in this meaty and controversial survey. However one may disagree on a detail or an approach here and there, one cannot but welcome this conscientious attempt to examine realistically the framework within which the law is operating in Africa.

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BOOKS RECEIVED

AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS. By Wilfrid E. Rumble, Jr., Assistant Professor of Political Science, Vassar College. After exploring the relationships between the realist school and its influential predecessors, the author treats the distinctive themes of the realist movement. Ithaca: Cornell University Press. 1968. Pp. xiv, 245. $6.75.

COWBOY LITIGATION: CATTLE AND THE INCOME TAX. By Brigadier General Harold L. Oppenheimer and Major James D. Keast. This work presents a general overview of the legal tax aspects of the livestock-ranching business and is intended as an aid for the large-scale ranch owner. Danville: The Interstate Printers & Publishers, Inc. 1968. Pp. 561. $7.95.

THE CRIME OF PUNISHMENT. By Karl Menninger, M.D. The author examines the deficiencies of our penal system and suggests that punitive vengeance should be replaced by scientific assessment, effective rehabilitation and permanent detention if necessary. New York: The Viking Press, Inc. 1968. Pp. xii, 305. $8.95.

DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS. By Robert G. Dixon, Jr., Professor of Law in the National Law Center, George Washington University. The author sets the Supreme Court's "one man-one vote" mandate in its historical and philosophical perspective and suggests that it is as important that there be a representation of interests as there be an equality of voting power. New York: Oxford University Press. 1968. Pp. xviii, 654. $12.50.

THE ECONOMICS OF ANTITRUST: COMPETITION AND MONOPOLY. Edited by Richard E. Low, Assistant Professor of Economics, Graduate School of Rutgers University. An attempt to place various antitrust issues in perspective through essays written by economists and lawyers. Englewood Cliffs: Prentice-Hall, Inc. 1968. Pp. x, 178. $4.95.

EXCERPTS FOR THE EXPERTS DURING TRIAL. By Dale Beal. Excerpts from the author's notebook representing materials presented by trial lawyers at a number of seminars. Kansas City: Attorney's Aids, Inc. 1968. Pp. v, 144. $6.00.

THE HEART AND THE LAW: A PRACTICAL GUIDE TO MEDICOLEGAL CARDIOLOGY. By Elliot L. Sagall, M.D. and Barry C. Reed, LL.B. A medico-legal reference work for those who are concerned with investigating, evaluating and adjudicating legal claims involving cardiac disorders. New York: The Macmillan Company. 1968. Pp. xv, 842. (Price unreported.)

HOW TO AVOID PROBLEMS WITH YOUR WILL. By Robert A. Farmer & Associates. One of the "Know Your Law" series, this work is an attempt to explain those matters of concern to the layman in the writing and execution of a will. New York: Arco Publishing Company, Inc. 1968. Pp. vi, 106. $4.95.

AN INTRODUCTION TO THE LEGAL SYSTEM. By Jay A. Sigler, Associate Professor of Political Science, Rutgers, The State University. Using a cybernetic analogy, the author analyzes the legal system and the problems of legal behavior. Homewood: The Dorsey Press. 1968. Pp. viii, 248. $7.35 (trade price).

LAW AND THE COMMON MAN. By C. H. Rolph, staff writer on *The New Statesman,* London. A selection of essays written by the author over the past twenty years and combined in this book in an attempt to show how the law must reflect life. Springfield: Charles C. Thomas, Publisher. 1968. Pp. xiii, 282. $9.75.

LAW, LIBERTY, AND PSYCHIATRY. By Thomas S. Szasz, M.D., Professor of Psychiatry, State University of New York Upstate Medical Center. An inquiry into the current social and especially legal uses of psychiatry, and a criticism of the theory and practice of "false psychiatric liberalism." New York: Collier Books. 1968. Pp. xii, 281. $2.45 (paperbound).

THE LIMITS OF THE CRIMINAL SANCTION. By Herbert L. Packer, Professor of Law, Stanford University. The author questions whether antisocial behavior can be controlled by imposing punishment on people found guilty of violating rules of conduct called criminal statutes. Stanford: Stanford University Press. 1968. Pp. xi, 385. $8.95.

MOMENT OF MADNESS: THE PEOPLE VS. JACK RUBY. By Elmer Gertz. The author, one of the attorneys for Jack Ruby, focuses principally on the post-trial proceedings in the Ruby case to show that the judicial system is capable of correcting its own errors. New York: Follett Publishing Company. 1968. Pp. xxiii, 564. $6.95.

NEGLIGENCE INVESTIGATIONS. By Harvey G. Stevenson. Intended to serve investigators, adjusters, lawyers and others who work in the field of negligence investigation, this book provides a method of operation in gathering information for a negligence case. Newark: Gann Law Books. 1968. Pp. xv, 234. $8.50.

NEGROES, BALLOTS, AND JUDGES: NATIONAL VOTING RIGHTS LEGISLATION IN THE FEDERAL COURTS. By Donald S. Strong. The author examines the Voting Rights Act of 1965 and concludes that, from the standpoint of the increase in the number of voting Negroes, the law has been a qualified success. University: University of Alabama Press. 1968. Pp. vii, 100. $5.00.

THE PEOPLE AND THE POLICE. By Algernon D. Black. The author, former Chairman of the 1966 Civilian Complaint Review Board of the Police Department of the City of New York, explores the diverse reactions of the propertied middle classes and the urban ghetto-dwellers to the use of police power. New York: McGraw-Hill Book Company. 1968. Pp. x, 246. $6.95.

POLITICAL JUSTICE. By Otto Kirchheimer. An examination of the use of legal machinery to put down dissident and opposing political groups. Princeton: Princeton University Press. 1961. Pp. xiv, 452. $3.95 (paperbound).

ROMAN MILITARY LAW. By C. E. Brand. An account of the combination of Roman law with its military organization, both of which had a considerable impact on the development of civilization. Austin: University of Texas Press. 1968. Pp. xix, 226. $6.50.

THE SOCIOLOGY OF LAW: INTERDISCIPLINARY READINGS. Edited by Rita James Simon. The author presents an overview of the major trends in the sociology of law in the United States during the last half century. San Francisco: Chandler Publishing Co. 1968. Pp. xii, 688. $8.50.

THE TRIAL OF THE ASSASSIN GUITEAU: PSYCHIATRY AND LAW IN THE GILDED AGE. By Charles E. Rosenberg, Associate Professor of History, University of Pennsylvania. A reconstruction of the assassination of President Garfield and the trial of his assassin, Charles Guiteau. Chicago: The University of Chicago Press. 1968. Pp. xvii, 289. $5.95.

THE TRUTH ABOUT INHERITANCE. By Robert A. Farmer & Associates. This work seeks to answer questions of interest to laymen about every aspect of inheritance law. New York: Arco Publishing Company, Inc. 1968. Pp. 124. $4.95.

THE VICTIM AND HIS CRIMINAL: A STUDY IN FUNCTIONAL RESPONSIBILITY. By Stephen Schafer, Professor of Sociology and Criminology at Northeastern University. The author presents an introduction to "Victimology" — the study of criminal-victim relationships. New York: Random House. 1968. Pp. viii, 178. $2.45 (paperbound).

THE WARREN COURT AND ITS CRITICS. By Clifford M. Lytle. A history of the Warren Court from 1954 to present with an investigation of the types, sources and grounds of Court criticism. Tucson: The University of Arizona Press. 1968. Pp. xii, 133. $5.00.

WHAT YOU SHOULD KNOW ABOUT LIBEL & SLANDER. By Michael F. Mayer. The author considers, through reconstructions of actual court cases, the entire spectrum of libel and slander law. New York: Arco Publishing Company, Inc. 1968. Pp. 173. $4.95.

THE WORK OF THE PROBATION AND AFTER-CARE OFFICER. By Phyllida Parsloe. After a brief historical description of the probation service, this book concentrates on the work methods of the probation officer — of the decisions to be made about treatment, and of the treatment itself, in both an individual and a group form. New York: Humanities Press, Inc. 1967. Pp. viii, 104. $1.50 (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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