Vanderbilt Law Review

Volume 21
Issue 5 *Issue 5 - October 1968*

Article 11

10-1968

Book Reviews

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BOOK REVIEWS

COUNSEL ON APPEAL. Edited by Arthur A. Charpentier. New York: McGraw-Hill, 1968. Pp. xi, 223.

If there is any lingering doubt that the realistic school of legal philosophy has captured the market of appellate advocacy, it should be quickly dispelled by *Counsel on Appeal*, published by the Bar of the City of New York. This book contains the views of six leading attorneys, called together by Judge Charles Breitel, now on the New York Court of Appeals, concerning the role of the lawyer and advocate in the appellate process. The book may be divided into two segments. The first part contains a discussion of the techniques of civil and criminal appeals, consisting of a lecture on the criminal appeal by Harris Steinberg (who has served both as a prosecutor and defense counsel in a career specializing in criminal cases) and a lecture dealing with the civil appeal, by Milton Pollack (who was appointed to the District Court of the Southern District of New York soon after these lectures were delivered). Civil and criminal appeals are contrasted by Whitman Knapp, author of a previous article on oral argument[1] which I, somewhat heretically, have always considered better than the famous one by John Davis.[2] Mr. Knapp does not let me down here; his article is probably the best in the book. The second half of the book compares courts: Samuel Gates contrasts "hot" and "cold" benches; Thurgood Marshall (Solicitor General at the time of writing) focuses on the special problems inherent in appealing in the federal system; and Judge Simon Rifkind compares appeals to lower and higher courts within the same system, touching upon the differences between appealing to state and federal courts. Judge Breitel cogently summarizes the speeches, and adds his own views.[3] In addition, the book contains the questions addressed to each speaker after the main presentation; some of the more pungent remarks are found here.

Stressing the the need for understanding the court, knowing the views of each judge, and underlining every issue with an emotional pitch, these attorneys take us through the valleys already illumined

1. Knapp, *Why Argue on Appeal; If so, How?*, 14 RECORD N.Y.C.B.A. 415 (1959).

2. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940).

3. Throughout the book, references are made to Judge Breitel's introductory remarks which are not included in the text. The absence of these remarks must be considered one of the book's failures.

by, among others, Karl Llewellyn, John Davis, and Frederick Weiner. If only for its reiteration of this realistic view, this is a valuable book.

Thus, Judge Pollack suggests that the worst thing to do is to let a judge stay inattentive: "Insult him if you have to, call him by name, point out some previous experience, but get him into a conversation."[4] Mr. Justice Marshall offers a sanguine piece of advice for appellees: "I am more and more impressed by the failure of lawyers to use a beautiful opinion by the lower court, scholarly done, busting with research."[5] Steinberg, Pollack, and Knapp seem to agree that in civil appeals the appellant should emphasize the wrongful result, while in criminal cases the spotlight must focus upon the inadequacy of the procedures used to convict. Samuel Gates urges the appellant to avoid raising new theories: "A judge approaches an argument that appears to be ingenious with instinctive suspicion; it gives the distinct impression of being merely verbal."[6] Judge Rifkind, in a tight analysis, observes that neither courts nor classes of appeals are alike and that the advocate must make conscious changes in approach, depending on the cases and the court. Additionally, Rifkind declares that "the higher the court, the lower the pitch of the argument, the less strident its tone, the smaller the role of the brasses and drums."[7] Finally in concluding the book, which constantly reiterates John Davis' call for candor in oral argument, Judge Breitel explains the importance of a reputation for honesty and candor: "If his reputation is bad, I don't care what he says or how he says it—he is climbing a glass mountain in shoes covered with oil."[8]

In summarizing the reason for a seminar and book on appellate advocacy written by advocates, Judge Breitel bemoans the fact that the preponderance of articles on the topic are prepared not by counsel, but by judges.[9] The fact is, however, that judges have been and are

4. N.Y.C.B.A., COUNSEL ON APPEAL 58 (1968) [hereinafter cited as COUNSEL ON APPEAL].

5. *Id.* at 152.

6. *Id.* at 230.

7. *Id.* at 169.

8. *Id.* at 206.

9. In my view, six of the leading authors of articles on appellate advocacy are judges: Dore, *Expressing the Idea—The Essentials of Oral and Written Argument*, 9 RECORD OF N.Y.C.B.A. 413 (1954); Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L.Q. 1 (1951); Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285 (1953); Rossman, *Appellate Court Advocacy: The Importance of Oral Argument*, 45 A.B.A.J. 675 (1959); Rutledge, *The Appellate Brief*, 28 A.B.A.J. 251 (1942); Ughetta, *The Appellate Brief: Some Observations*, 33 BROOKLYN L. REV. 187 (1967). However, only five of the leading writers are practicing counsel: F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (1961); Bachrach, *Reflections on Brief Writing*, 27 ILL. L. REV. 374 (1932); Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940); Knapp, *Why Argue an Appeal; If So, How?*, 14 RECORD OF N.Y.C.B.A. 415 (1959); Llewellyn, *A Lecture on Appel-*

writing these articles because they are trying to tell us something; and what they are trying to tell us is that the appellate process is in bad shape; that in fact, most judges would prefer to see oral argument abolished and frequently eschew the dubious "help" rendered them by dogmatic, screaming, inarticulate, unreasonable briefs; this makes judges and others wonder whether the process really works. It is in touching on this theme that *Counsel on Appeal* makes its real contribution.

Each of the authors, for example, stresses the rather stupendous odds against winning an appeal. Harris Steinberg notes that in the New York Court of Appeals the reversal figure for criminal appeals is roughly ten percent and in the Appellate Term, roughly four to five percent.[10] Milton Pollack indicates that only in a maximum of 25 percent of the cases does there exist a real chance of reversal on a civil appeal.[11] The real question, however, is not what are the chances of success on appeal, but why the chances *are* that way. Part of the answer lies in the inherent nature of the appellate process. The desire to protect the status quo and to make the law meaningfully final at the trial level, where it touches the average citizen most, is a prime goal of the judicial system. If all appeals (or most) were successful, the appearance of finality and certainty would quickly die. Thus we see the narrowing of the scope of review, particularly of those review functions which are intertwined with issues not strictly and clearly "legal," and the liberalization of the powers of the trial court to make the original trial even more "just" and "fair" in terms of pleadings, remedies, and other trial activities. In addition, of course, there are factors peculiar to various types of appeals. Whitman Knapp and Harris Steinberg focus on the criminal appeal, and both come to the same general conclusion: The appellant should *never* argue the merits of the case; only the procedural violations which occurred before and during the trial should be raised on appeal. The reason, says Steinberg, is that judges do not want to free criminals.[12] Knapp sees the problem in a somewhat different light: judges do not like criminal appeals, because the whole criminal process of "taking a man, locking him up, or even killing him" is a "messy business" from which judges shirk. Moreover, most of those persons

late Advocacy, 29 U. CHI. L. REV. 627 (1962). Of course, this may not necessarily be as bad as it first seems, since it may be true that the best advocates are appointed judges. For example, of the writers of the present work, three (Breitel, Marshall, and Rifkind) had been judges and two (Marshall and Pollack) were appointed to the bench before the book was published.

10. COUNCIL ON APPEAL 5.

11. *Id.* at 35.

12. *Id.* at 8.

convicted are, in fact, guilty. Thus, Knapp concludes that "it is my over-simplified suggestion that no appellant's brief should ever have a point that 'guilt was not established beyond a reasonable doubt.' "[13]

The observations made by Knapp in this connection are both stunning and captivating. But it seems to me that, inherent in the last of Knapp's remarks and expressed in some of the other materials in this book is the real nub of the current plight of our courts: the prevalence of insubstantial and, therefore, poorly-written appeals. In one of the question and answer sessions Judge Breitel declared: "I would estimate roughly from examining appeals in our court that in any month we probably have twenty to thirty *coram nobis* appeals of which no more than two or three present a truly decidable question, and . . . twenty substantive appeals of which maybe one-fourth would present a decidable question."[14] Mr. Steinberg quotes Judge Stanley Fuld as saying that 80 per cent of the criminal appeals would be affirmed if only a token brief were submitted by the state.[15] Mr. Justice Marshall brings the same analysis to the Supreme Court: "In the October, 1964, term of the Supreme Court there were 2,178 applications for review. Only 132 were accepted for argument. I think it clear that many of those 2,000 plus applications should not have been submitted to the Court."[16] Milton Pollack reaffirms this position in yet another light: "It is perfectly clear that in less than twenty percent of civil cases that go up on appeal has the advocate any influence on the case at all. Only in this small percentage are questions raised on which two different viewpoints are possible and equally acceptable from the juridical standpoint."[17] The bare fact of the matter is not that truly appealable cases are usually lost, but that there simply are not that many appealable cases, and that the large majority of appeals—all of these authorities agree the number is at least 80 per cent—should never have been taken in the first place.

In a rather informal survey of the Fourth Circuit which I took about a year and a half ago, I noted that of 61 cases which had been heard on oral argument and were decided by that court in April and May, 1967, 16 (25 per cent) were decided by per curiam opinions of less than one page. Of course, such brevity does not necessarily indicate that the case was one which lacked any appealable point; judges often hide their disagreements in approach by joining in per

13. *Id.* at 68-69. Judge Breitel disagrees, stating that judges do decide on the merits but speak only in terms of rules. *Id.* at 97.
14. *Id.* at 26.
15. *Id.* at 8.
16. *Id.* at 146-47.
17. *Id.* at 35.

curiams. But surely some meaning can be found in this figure. Even if the number is reduced to fifteen per cent, the implications are staggering. If each judge is to hear fifteen cases per month (as in the Fourth Circuit), at least two of those cases—at most four—should not even have been appealed. Moreover, it is often these cases, brought by counsel who are not really sensitive to the nature of the appellate process, which bring forth magna opera, through which the judges and their law clerks must wade. Bitterness born of such waste must, almost of necessity, carry over to other perhaps more debatable cases. Moreover, this brief analysis is based solely upon those cases *heard* by the court. In the Fourth Circuit, for example, it is the practice of the court to screen all indigent habeas corpus appeals to determine whether the case should be heard on oral argument or dispatched by memorandum decision. For this purpose, one or two full-time law clerks are hired. Their jobs consist entirely of reading the records in each appeal and determining whether the case has sufficient merit to be heard on oral argument. If the case is found to be lacking in merit, the law clerks write a memorandum opinion, which must be read by three judges of the court and approved unanimously.

Clearly, far too many appeals are completely without foundation and are taken either to assuage the client, to bilk him, or to salve the conscience of the attorney, who believes that he has mishandled the case below and effuses with glee over the opportunity to relitigate. Some of these appeals, perhaps most, are in good faith. Nevertheless, they clog the machine and irritate the judges, which in turn means less chance of success on a truly appealable case.

The plight of the pestered court is beginning to win the sympathies of some who have, heretofore, been rather severe critics of the courts. For example, Professor Philip Kurland has recently indicated that one of the reasons for the lack of workmanship in Supreme Court opinions, which he decries so much, may be the inordinate flood of materials engulfing the Justices. Thus, Kurland suggests a "sub Supreme Court" which would winnow the wheat and hear federal question cases, leaving only constitutional cases for the docket of the Supreme Court.[18]

Our current concepts of justice and fairness reflected in decisions such as *Griffin*[19] and *Gideon*,[20] and statutes such as the Criminal

18. Kurland, *The Court Should Decide Less and Explain More*, New York Times, Sec. VI, June 9, 1968, at 34. *See* COUNSEL ON APPEAL 182 n.I, indicating that less than one-half of the cases decided on the merits in the 1964 Supreme Court term involved constitutional issues.

19. Griffin v. Illinois, 351 U.S. 12 (1956).

20. Gideon v. Wainwright, 372 U.S. 335 (1963).

Justice Act,[21] have expanded the number of possible cases for review. Yet the social values inherent in these review processes cannot be dismissed; the only answer is to seek a solution elsewhere. The best chance for improvement would seem to be in the civil field, where several remedies could be proposed. First and most obviously, simply by more rigorous enforcement of allowing costs if the appeal is frivolous or insubstantial, attorneys could be persuaded not to appeal so often. Second, in cases where appeal has been insubstantial, the courts could demonstrate a willingness to use additur and remittitur as a penalty. Finally, the courts could adopt something along the lines of the "consensus" proceeding suggested by Judge Pollack (discussed below) in which the issues on oral argument would be narrowed.

Additionally, much of the future problem might be mitigated if law school courses in appellate advocacy, such as the one I teach, stressed the necessity of choosing the right case to appeal and, more importantly, the technique of convincing the client that he should not appeal. Indeed, more sweeping steps might have to be taken. The urge to appeal, after all, is not lessened by the fact that our case books contain almost entirely cases which are, almost by definition, appealable cases. In fact, the Socratic method is used to reinforce the student's impression that almost any case can be argued effectively on both sides. Perhaps these courses on appellate advocacy should confront the student with six or seven records from which he must choose the most promising case for appeal. This, of course, is not feasible in many schools; however, in the larger, urban schools, where there are numerous law offices and courts which would embrace the aid of law students with some degree of enthusiasm, it might well be possible. In lieu of that, at least it may be suggested in these courses that some types of cases should not be appealed except in the most extraordinary circumstances. Among these types are: (1) cases involving questions of fact only, particularly where there has been a jury; (2) cases involving only questions about the adequacy of damages granted; and (3) appeals from decisions of lower courts affirming in toto decisions of administrative or other expert bodies. The suggestion of these categories is made with great trepidation, for clearly there can be cases in these groups which could and should be appealed; nevertheless, these cases should be carefully screened prior to appealing.

Yet another factor must be taken into account in the calculus—the resistance to the use of "appellate lawyers." In his article on the "cold and hot bench," Samuel Gates cites Chief Judge Lombard of the

21. 18 U.S.C. § 3006A (1964).

Second Circuit as saying that only ten percent of the oral arguments that he heard were well argued.[22] Hopefully, if fewer cases were appealed and appeals were limited to truly arguable issues, this percentage would increase. Furthermore, with the burgeoning of appellate advocacy courses, which at least orient the budding lawyer in the general direction, these figures may increase. The fact remains, however, that many lawyers, even some good trial lawyers, are simply not good appellate advocates and do not understand the intricacies of appellate processes, or have had little contact with it. Indeed, Gates found that "of 758 arguments of counsel in a single term [in the Second Circuit], 625 were made by lawyers who appeared only once that year."[23] While he appears to backtrack on this position later, Gates seems to be advocating the use of specialized appellate counsel, on the ground that they will be more familiar with what a specific court wants and needs and thus would be able to tailor their arguments and briefs accordingly. Since involvement in the trial process leaves every losing lawyer with the feeling that he was robbed and that justice will prevail only if an appeal is taken, the use of outside counsel on appeal might reduce the number of cases brought on appeal. Counsel who work with appellate courts are much more wary and much more detached. Thus, the suggestion that specialized counsel be used would seem to be a good one.[24] However, Judge Pollack apparently disagrees,[25] on the ground that the trial lawyer knows the case better.

It may be, however, that counsel who consistently handle appeals lose the forest for the trees. It is amazing, as Judge Breitel points out in his summary, that in these essays—sometimes subtly, sometimes expressly—each of the six counsel stresses one thing in common: the court is the enemy, and the advocate who will win is the advocate who knows the personalities or the bench and where each member stands on the issues. Indeed, it was Harris Steinberg who came most dramatically to the point: "I believe we can find evidence in support of the proposition that in a criminal appeal . . . the appellant's real adversary is the court's reluctance to take a step which has the necessary practical effect of setting at liberty a man who has done dangerous and destructive things."[26] The point is reiterated, to a lesser or greater degree, by each of the advocates: get the judge rather than the opponent. To some extent, of course, this is good advice. After

22. COUNSEL ON APPEAL 110.
23. *Id.*
24. *See* Wiener, *Specialized Appellate Counsel: His Importance, Necessity and Usefulness*, 45 A.B.A.J. 677 (1959); *cf.* COUNSEL ON APPEAL 197.
25. COUNSEL ON APPEAL 58.
26. *Id.* at 8.

all, it is the court and not the adversary who will make the final determination. The appellant's objective is to move the court, to convince the judges, and to shape the mind of the three men in front—not the one man behind. But what this ignores, as Judge Breitel so vociferously and plaintively reminds us, is that the court's desire for oral argument is really a cry for help:

> Now, we want all the help we can get. We want you to talk as long as you can, so long as you are helping us. We want you to write your briefs as long as you can, so long as you are helping us . . . . There is not a good lawyer who has been doing a good job in arguing a case who hasn't had this happen to him; when his time for argument has been exceeded, the judges keep him on his feet arguing some more.[27]

The advocate who concentrates on the court, to the virtual snubbing of his opponent, is not helping the court but rather trying to manipulate it. More important, the constant attempt to "influence" rather than persuade the court may result in a court which is confused and unsure of its position, even after the oral argument. But even assuming that oral argument should be aimed at the court, how does the advocate decide how to aim? Judge Rifkind attempts to answer: if the court is big, don't cater to one judge; if the court is high in the appellate atmosphere, talk more in terms of policy—of what the law should be rather than in terms of precedent.[28] But here he stops, frustratingly. To the real loss of all concerned, Judge Rifkind's enigmatic observation that "[m]anifestly, if I were preparing . . . an argument for Judge Moore alone, it would be different from an argument designed for Judge Friendly alone" remains unexplained.

It may be obvious by now that these counsel stress the oral argument over and above the brief. Indeed, Mr. Justice Marshall is the only advocate to urge the supremacy of the brief: "I maintain it is the brief that does the final job . . . . In the seclusion of his chambers the judge has only the briefs and the law books. At that time your brief is your only spokesman."[29] There may be a reason for this; most of these advocates practice before what Samuel Gates calls a "cold" bench, one which has not read the briefs.[30] Here, as he recognizes,

27. *Id.* at 203-04.

28. *Id.* at 170-79. This would seem to be what Mr. Knapp calls the legislative appeal, *Id.* at 87-88. Mr. Justice Marshall would apparently say that all Supreme Court issues are "legislative" appeals. *See Id.* at 147, 183.

29. *Id.* at 146.

30. Mr. Gates states that the Third Circuit, most other federal circuit courts, the New Jersey courts, and the First Department of the Appellate Division in New York are "hot," but that the Second Circuit and U.S. Supreme Court are usually "cold"; Judge Rifkind indicates that the N.Y. Court of Appeals appears to have no rule. *See* F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 16-18 (1961).

the success of the argument depends more on the persuasiveness of counsel. On the other hand, when practicing before the hot bench, oral argument itself becomes less persuasion and more information. It is upon this facet of appellate advocacy that the main cleavage in the book occurs. For it is quite clear that some of the participants prefer the "cold" bench, which calls for their best oratorical skills, while others prefer the "hot" bench, which focuses on the specific legal problems involved. Gates, for example, sees the "hot" bench as one in which the judges have preconceived notions about how the case should be decided. He implies that the hot bench is also loaded: "[T]here is a tendency for the entire panel to arrive at a composite judgement . . . on the ultimate decision even before hearing the oral argument."[31] On the other side of the spectrum is Judge Pollack, who not only sees the desirability of a hot bench, but indeed proposes an innovative approach to oral argument, designed to bring the bench and the advocates to the boiling point. Pollack calls it a "consensus," which consists principally of agreement between the bench and counsel on both sides as to which issues will be discussed on oral argument. This, of course, is sometimes done by the United States Supreme Court and does away with much of the wasted time in oral argument. It would also insure that the legal issues in the case would be thoroughly discussed, and counsel would no longer have to guess at what they think would interest the judges.

The use of concensus might have some other desirable results. Counsel whose briefs had posed no real issues might be challenged as to whether, in fact, their case was truly "appealable." Likewise, such a procedure might result in more extensive use of dismissal procedures for frivolous claims, thus saving the valuable time of oral argument for cases truly deserving consideration and conserving the energy which oral argument requires of a hot bench. Further, if such conferences were personal, they would bring the bench and the appellate bar much closer together, a clearly desirable objective. The employment of this technique, together with stricter standards of dismissal and court costs, might well discourage appeals taken simply for the sake of appeal. It would make oral argument more frequently meaningful and, perhaps, much shorter than many are today. Counsel would not have to guess at the issues which intrigue the court, nor be ready to reorganize his argument in mid-stream—the advice always given every advocate today. This would place the appellant and appellee on an equal footing; the appellee would have no advantage in watching his adversary sweat through a series of questions which, ultimately, demonstrate the interests of the court.

31. COUNSEL ON APPEAL 121.

One major drawback to this scheme is that, though there are some benches which refuse to read the briefs and records prior to argument as a matter of policy, most benches are "cold," not through any preordained pattern, but as a matter of workload. In these "cold" benches, it is often weeks or months before the judges who are not assigned the opinion get around to reading the briefs and records. (The fact that most briefs are not read prior to oral argument should lend weight to the consensus proposal; the result is an undermining of the value of oral argument, thus indicating the necessity for pungent and serious briefs.) Moreover, to require all members of the panel to read the briefs and records in every case might prove a hardship on those courts whose workloads at the moment are mountainous and increasing daily.[32]

The *real* argument against Pollack's suggestion, however, and it is not quite so facetious as it may first sound, is that it would remove the glamour from appellate advocacy. For, whether one agrees with Gates or not that "hot" benches have already prejudged the case (a conclusion which my clerking experience with the Fourth Circuit, which was always hot, would deny), it is certainly true that use of the technique might well result in the lessening influence of counsel on decisions and would mean the downgrading of the artful use of the statement of facts, or phrasing of the issue. Oral argument would become nothing more than a highly sophisticated debate on the legal issues and philosophies and the reading of the precedent, its interpretation and history resulting in an oral law review note. The fire of oral argument would be dimmed if not extinguished.[33] Indeed, with stress on precedent in the lower appellate courts and on policy in the higher courts, the current "rules" for oral argument (as outlined by Davis,[34] Knapp,[35] and some of the other writers in this book) would undergo severe modification if not eradication.

It is not an easy task to decide on the desirability of such a giant step. Again judging on the basis of my clerking in the Fourth Circuit during which I saw numerous lawyers plying their trade inarticulately, ineptly, and inanely, I certainly cannot grieve the loss of the kind of oral argument which would seem to be a myth more than a reality. And if Judge Lombard of the Second Circuit, Mr. Justice Marshall,

32. According to Mr. Justice Marshall, the number of appeals docketed in the Second Circuit last year increased by 20%. *Id.* at 145. Kurland, *supra* note 18 at 124, cites figures that the Supreme Court's docket has increased 250% in the last 30 years.

33. *See* COUNSEL ON APPEAL at 118-21, describing the power of counsel before cold courts.

34. Davis, *supra* note 9.

35. Knapp, *supra* note 9.

and all others who have dealt objectively and suffered long, still find the level of oral arguments less than a happy one, it would seem that, at the very least, an experimental operation of "consensus" might be tried. Indeed, there are several indications that such an approach has been tested. In his article, Judge Pollack mentions several instances in which courts have, in fact, asked for something similar to consensus prior to argument or decision. Just recently, the Eighth Circuit in a major school expulsion case asked for briefs and memoranda from both parties and amici prior to the argument and held a conference between all concerned before the actual oral argument began. These new, hesitant steps along the path toward "consensus" should be watched carefully to determine whether the participants on both sides of the bench think them worthwhile.

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LAW WITHOUT SANCTIONS. By Michael Barkun. New Haven and London: Yale University Press, 1968. Pp. 175. $6.50.

This book seeks to define the nature of law by means of a broad and extremely abstract sociological analysis. The author arrives at what might be termed a natural law position; but it is natural law in a literal sociological sense. Discarding the parochial formulation that "law is what courts do," Barkun concludes that law is what all societies do—with or without the aid of courts and physical sanctions—when faced with the necessity of resolving conflict non-violently. He finds that all societies naturally adopt certain patterns of conduct for dealing with conflict. Although these patterns become increasingly complex as the complexity of the society increases, they are sufficiently similar in all societies to justify the common appellation of "law."

Barkun begins his analysis with an argument against Austin's command theory of law, which defines law as the command of the sovereign backed by physical sanctions. The author feels that this definition is inadequate on its face, if for no other reason than that it excludes much of what has in the common experience of man been labeled "law." Adopting the hypothesis that law requires neither a sovereign nor physical sanctions, the author proposes to test this hypothesis by examining societies which have neither sovereigns nor sanctions, to determine whether there are mechanisms in those societies which perform the basic function which law performs in mu-

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nicipal law societies. If such mechanisms do exist, it can then be determined whether similar mechanisms operate in municipal law societies, and if so, the extent to which they, rather than the sanction-backed commands of the sovereign, really are the essence of what we call law.

The societies selected for analysis are "the segmentary lineage societies of equatorial Africa" and the world community of nations, which governs its relations by international law. These societies are defined as horizontal in structure: that is, composed of autonomous and theoretically equal participants who resolve their conflicts by self-help and self-restraint, rather than by the legitimated force of a sovereign. The geographic unit of study adopted by Professor Barkun is the jural community, which he defines as that area in which all actors recognize that a common method exists for settling disputes.

In the most simple of stateless societies, disputes are settled by what appears to be a process of bilateral negotiation. Barkun argues, however, that this process can properly—if metaphorically—be described as one of mediation in which the shared legal concepts of both participants act as an "invisible mediator," defining and limiting possible solutions to the dispute. These shared concepts are effective mediators despite the lack of legal sanctions. They have the force of custom (precedent), and by their very existence and general acceptance they limit the participants' intellectual ability to conceive of alternative ways of resolving the dispute. "[T]he legal concepts are the lenses through which the particular social world is seen, and the resultant perceptions dictate the alternatives."[1]

In more complex stateless societies such "implicit mediation," as Barkun calls it, gives way to "explicit mediation," involving a flesh and blood third party mediator. This mediator is a legal expert who, because of the relative complexity of the legal framework in which he operates, acquires a measure of discretion in the manipulation of legal concepts. His role resembles that of a subtle advocate more than that of a decision-maker, but as Barkun observes and as all lawyers know, "the solutions to a problem may depend upon the way the problem is put." Moreover, although he lacks physical sanctions, his actions are not without sanctity:

> He operates without physical sanctions but he possesses the symbolic means for legitimating action. He is the custodian of a symbol system that can be manipulated successfully only by experts, and he uses his expertise in the service of social stability.[2]

1. M. BARKUN, LAW WITHOUT SANCTIONS 117 (1968).
2. *Id.* at 148.

Barkun concludes that all jural communities, whether multicentric and horizontal or unicentric and vertical in structure, possess certain common "legal universals": (1) In all jural communities law consists of a set of interrelated symbols, which are more or less complex according to the complexity of the society. (2) These symbols have empirical referents; but there may be a time lag between the symbol and the referent, which, again, varies with the complexity of the society. (3) The possibility of manipulating these symbols, and hence the need for manipulative expertise, increases with the complexity of the system. (4) The system is always a means of describing and managing the social environment. (5) As societies become more complex law becomes increasingly distinct from other conceptual frameworks such as religion and politics. (6) Legal process always transforms dyadic interactions into triadic interactions (that is, it transforms negotiation into mediation).[3] As societies become increasingly complex the "invisible mediator" of shared legal concepts is transformed into a flesh and blood third party mediator.

When these features are present, a system of law exists regardless of whether physical sanctions are also present. The existence of sanctions may increase the range of activities that are susceptible to legal action and may increase obedience to legal rules, but sanctions are not the essence of law. The sanctionless rules of stateless societies perform essentially the same ordering function as do the laws of nation-states, and the efficacy of the latter depend, not primarily upon the effect of the threat or imposition of sanctions upon the "disobedient few," but upon the voluntary acquiesence of the obedient many.

The most attractive feature of this book is its *proposed* methodology. The idea of defining law by observing patterns of social behavior, and then proceeding—as the author says—upward to the legal superstructure, is a sound and interesting one. The assumption on which this methodology is based, that law is a universal ordering process which man reflexively creates and accepts when confronted with social conflict, is equally interesting. Barkun's anthropological approach to the question "what is law" not only promised a fresh look at an old controversy, but also promised to give added significance to the controversy. This was not to be a mere definitional debate, a "manipulation of the legal corpus," but an empirical study of the nature of legal process and of the real importance of physical sanctions in that process.

Unfortunately, these promises were not fulfilled—at least not for

3. *Id.* at 151.

this writer. Instead of inductively examining the ordering processes of stateless societies, the author embarked upon a series of abstract declarations concerning these processes. As a result of what is in effect an exchanging of the manipulation of the legal corpus for manipulation of the sociological corpus—the author's argument is much less clear and much less convincing than one might have hoped. Granted, this book does not purport to be an exhaustive survey of primitive and international legal systems, still it does seem that a dozen or so of the author's conclusory abstractions could have been replaced by concrete examples and descriptions. Interesting as some of the author's conclusions are, they lose much of their interest because they appear to be adopted by fiat rather than being reached by observation and analysis.

This book has, in many respects, the quality of a preliminary synopsis or outline of a major empirical study. It is hoped that it may yet perform that function, for Barkun's methods and conclusions are worth pursuing on a larger, more concrete scale.

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