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## Book Reviews

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## BOOKS REVIEWED

**African Law: Adaptation and Development.** Edited by Hilda Kuper and Leo Kuper. Berkeley: University of California Press, 1965. Pp. viii, 275. \$7.50.

**Law and Social Change in Ghana.** By William B. Harvey. Princeton: Princeton University Press, 1966. Pp. xiii, 453. \$10.00.

Both these volumes focus upon the problem of the interaction between law and society in Africa. In so doing, they mark a welcome forward step in the scholarship of law in Africa. Until now, anthropologists tended to be concerned only with describing customary rules in simple societies of Africa, and lawyers were primarily concerned with a flat, positivistic description of the corpus of rules. Almost for the first time, the function of law in modern African society comes under analytical study.

*African Law: Adaptation and Development* is a collection of papers read at the second interdisciplinary seminar arranged by the African Studies Center of the University of California, Los Angeles, in 1963. It contains four essays by anthropologists on traditional legal systems and five essays by lawyers on the present legal position. Professor M. G. Smith contributes a theoretical essay on "The Sociological Framework of Law," and the editors a thought-provoking introduction which tries to tie the papers into a coherent whole.

Dean Harvey's particular interest in *Law and Social Change in Ghana* is the allocation and control of public power, which he traces with respect to the status of the traditional authorities, the tension between the claims of regionalism and unity, the legal profession, the judicial structure, the formal hierarchy of legal norms, and the legal tools of political monopoly. Nobody concerned with the development of Ghana in the independence era can fail to be impressed by the range of information which Dean Harvey has compressed within this rather slender volume, and the precision which legal scholarship can bring to bear upon the analysis of the problems with which the author has concerned himself.

How useful will these books be to the lawyer concerned with law and social process in Africa? That question can be answered by considering, first, the burden imposed upon lawyers by the imperatives of the African circumstance; secondly, the extent to which the anthropological information can be of help to concerned lawyers; and thirdly, the utility of the models of the interaction between law and society offered by the authors concerned with the problem.

### I

In American legal scholarship, the thrust of academic study has in the main been directed at aiding the practising lawyer to predict the outcome of specific litigation. In a settled legal system, in which the principal occupation of lawyers is to represent clients within the interstices of the decision-making

process, it is apparent that a close attention to what might be called the micro-legal is to be expected.

In Africa, the position is otherwise. The colonialists found in Africa a continent in which the dominant law was the customary law of tribal society—unwritten, usually enforced by negotiation and compromise, rather than by the invocation of centralized authority, appropriate to the claims and demands generated by a subsistence economy. They impressed upon the continent the fundamental structure of the law of the metropolis. In the Anglophonic states, a complex set of rules was devised, with the consequence that customary law tended to control juridical relationships of Africans within the traditional sector of the economy, and English law, the relationships of Europeans within the colonialist enclave. English contract law, supported ideologically by the myth of “freedom to contract,” was used to determine the relationships between Africans who crossed over to the colonialist enclave to work in mines and on plantations for the Europeans, compelled to seek wage employment, in most cases, by a highly artificial structuring of the labour market.

This pluralistic legal system was the very engine of colonialist exploitation. It directed state power towards maintaining a colonial economy and a colonial society, in which Africans were consigned to live in a hazardous, poverty-stricken and technologically backward subsistence economy, providing a pool of cheap labour for the great European enterprises. It is a pattern which South Africa today proposes to freeze forever by apartheid and Bantustan.

The independent African states perceive the received legal pluralism as incompatible with the perspectives of independence. Economically, legal pluralism was the institutional expression of exploitation; politically, it remains a divisive wedge in societies which must rapidly become nations as well as states; socially, it remains a cruel reminder of long decades of subordination to an alien power.

This unhappy colonialist legacy poses seemingly overwhelming problems of structural change to the legal order. If the bright promises borne on the winds of change are to be realized, the received institutions plainly must be transformed. Every African government today has a central plan of some sort, purporting to blueprint the “highway to development.” The tasks for the law, implicit and explicit in the plan, are primarily jobs calling for the use of state power drastically to change old institutions, and to create entirely new ones: import controls, agricultural cooperatives, new systems of land tenures, new tax structures, nationalized banking systems, new marketing systems, and on and on and on.

That this is the order of challenge of African law is recognized both by the Kupers in their Preface, and by Dean Harvey. The Kupers say that the adaptation and development of law in Africa “poses theoretical problems for jurists, political scientists, sociologists and anthropologists; the practical implications for governments of the new African states are obviously crucial.”<sup>1</sup>

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1. Preface to Kuper & Kuper, *African Law: Adaptation and Development* (1965).

Dean Harvey suggests a similar concern: "[W]hat role has law to play [in Africa] in altering critical value perceptions so that it can be an instrument of planned social change?"<sup>2</sup> The challenge of Africa to the lawyer requires that he consider the macro-legal structure in order that he may play his role as social engineer in a continent adrift in the seas of change. The prediction of the results of specific litigation, primarily as between private individuals, while not unimportant, seems a secondary priority.

## II

It is instructive to compare the focus of interest of the anthropologists and of the lawyers in these books. For the lawyer the legal problems of Africa are not abstract paradoxes, to be examined, as the mountain is climbed, merely because they are there. That approach seems to inspire much of the anthropological material printed. Professor Vansina, for example, contributes a sparkling brief description of Kuba society as it was in 1890.<sup>3</sup> From this study he generates the perhaps not very startling proposition that "wherever political systems are different, legal systems are different too."<sup>4</sup> Professor Forde describes the legal system of the Ibo of Nigeria as it was under colonial rule, concluding that although the imposed judicial system under colonial rule was a frequent cause for resentment, in the long run the new system came to be widely respected and accepted by the people of the district. Professor Gluckman contributes another of his discussions of the utility of the concept of the reasonable man in the jurisprudence of simple societies, maintaining that the concept is the indigenous version of role-expectation in contemporary sociological and anthropological analysis. The Mayers describe the dynamics of land law among the Gusii of Kenya, demonstrating how the earlier notions of land tenure—notable for their vagueness in a period of an abundance of land—developed between 1925 and 1950 into a well-articulated set of norms, after the British overlords restricted the tribe to a limited area. Without significant guidance from the British, the Gusii developed a new form of agrarian organization, with its own rules of tenure and of descent and distribution, based upon pre-existing notions of the descent and distribution of cattle.

For lawyers, the challenge of African lawyer is *toto coelo* different from the academic challenge perceived by anthropologists. Lawyers are, after all, professionals. The question posed to them in Africa is, above all, how to hook up the engine of state power to the schemes and plans of the political decision-makers. To answer that question requires that the conscientious lawyer be able to predict for his governmental client that the laws or constitutions which he proposes will achieve their stated purpose. The road to the El Dorado of development the world around is littered with ineffective paper norms.

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2. Preface to Harvey, *Law and Social Change in Ghana* at vii (1966).
  3. Kuper & Kuper, *op. cit. supra* note 1, at 97.
  4. *Id.* at 116.

## III

Prediction, in law as in other disciplines, requires a theoretical model, substantiated by empirical data, by the use of which the lawyer can achieve a reasonably high probability of successful prediction. One can perceive four different models suggested in these several essays.

Dr. Elias, to take one extreme, follows the traditional Austinian pattern. He describes the changes in the rules of constitutional law in the new states, especially the Anglophonic ones. These rules he organizes into conceptual categories based upon their stated content. He assumes that the norms of conduct described in the rule are in fact the norms of conduct observed. For example, he describes certain contemporary changes in the traditional roles of the chief, his council and his court. He then asserts that traditional African societies which had well-organized political and administrative machinery were "often more heterogeneous, cosmopolitan, and sophisticated" than the chiefless societies, and that "the effect of the recent constitutional changes is therefore more profound on chiefless than on chiefly societies."<sup>5</sup> Yet Dr. Elias does not offer any empirical evidence to substantiate this claim. Indeed, nowhere in his essay does he consider how the rules of law which he describes in fact operate.

It would seem plain that, whatever may be the virtues of the Austinian model in predicting what judges will do in specific cases, it cannot by its nature serve the purposes of social engineering. One cannot predict that rules of law will function as designed by focusing myopically upon the rules of law themselves. A model which directs attention to both norms and actual conduct seems a minimum requirement.

Professor Smith, an anthropologist, submits an involuted essay on "The Sociological Framework of Law." Regretfully, the language is extraordinarily dense, and—*mirabile dictu*—suffers adversely by comparison with most of the writing of the lawyer contributors. If I understand him correctly, he asserts, first, that the sociologist must examine law in the broad context of social relationships. For Africa, that context is pluralism deriving from a "colonial situation." His definition of a "colonial situation" is drawn from Adriano Moreira: "There is a colonial situation whenever one and the same territory is inhabited by ethnical groups of different civilization, the political power being usually exercised entirely by one group under the sign of superiority, and of the restraining influence of its own particular civilization."<sup>6</sup> Smith asserts that in a "homogeneous society" the basis of society is "primarily consensual"; a plural society, by definition, on the other hand, is coercive in its base, in that the ruling group has imposed its will through the use of power upon the subordinate group. Hence, in Professor Smith's words, "whereas in homogeneous societies it is society that constitutes law, in plural societies,

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5. Id. at 189.

6. Id. at 25. (Footnote omitted.)

such as those of Africa, there is evidence that law may serve to constitute society."<sup>7</sup>

It is suggested by Smith that there are many "sociological frameworks of law," of which he mentions three: society itself, in which law is the prototype of Durkheim's "social fact"; the institutional framework within which its regulation is manifest; and the "milieus of thought" within which systems and theories of law develop. He then purports to demonstrate that, in Africa, it was the last which was decisive in determining the variant approaches to customary law taken by the British and French. The common law, based as it was upon the recognition of custom—the law of corporate bodies whose existence is not necessarily dependent upon the imperium—could readily accommodate to the corporate nexus of relationships in indigenous society. French law, based upon the notion of a centralised imperium, could not.

The utility of this model to the tasks of law in Africa may well be questioned. By premising a pluralistic society as one dependent upon ethnic differences between rulers and ruled, it would seem that Professor Smith limits his analysis to colonial societies, for independent Africa does not fit his definition. Even with respect to colonial societies, he seems merely to state a tautology: that if it is desired to recognise customary law as a source of law, one must adopt a theory of law which recognizes customary law as a source of law. His major assertion concerning the relationships between law and society—that in a homogeneous society, society creates law, but that in a pluralistic society, law creates society—is probably incapable of empirical verification. His is not a model to which a social engineer in a modern, independent African state can usefully look even for heuristic guidance.

Professor Allott, a lawyer, is the only one of these writers who makes a four-square prediction of the future of African law. To make a prediction requires that there be some model which can be used to extrapolate into the future. He finds the model essentially in a neo-Savignian *Volksgeist*. Prior to independence, there was true legal pluralism, but

with the handing over of power to, or its seizure by, the indigenous peoples, the distinction between the native or indigenous laws . . . and the received laws of European origin ceases to have relevance. It is true that differences in origin, principles, and methods of European and indigenous legal institutions continue to exist until altered or removed; but the source of the laws, whether African or European, is in a fundamental political sense the same: it is the will of the people subject to the laws. Customary law had in the past been the people's law, springing directly from the African consciousness and molded to their own desires and practices by those subject to it, whereas English law had been an imposed and alien thing, corresponding imperfectly, if at all, to African structures and aspirations. This distinction is no longer valid.<sup>8</sup>

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7. Id. at 26.

8. Id. at 218.

Professor Allott thus finds that the essential pluralism in Africa lies between European and African, and the source of law in the consciousness of the people subject to it. Looking into the future, he foresees, therefore, no significant problems arising out of the pluralistic nature of African society, because that disappeared when the bright colors of independence streamed first in the African sun. What is left is the contradiction between an inherited dualistic legal order and a pervasive need to modernise, to unify, and to Africanise law and legal systems.

Professor Allott's model would seem subject to criticism. One need not raise again in 1967 the issue, whether there is in fact a *Volksgeist*, a national consciousness; the notion that there are "essential" ethnic differences has long since been exploded. Even if it were empirically demonstrable, however, that there were a specifically "African" consciousness, how does that help the lawyer who is actually faced with the sorts of problems that present themselves in Africa: to formulate an import-licensing statute, to devise adequate procedures for a national planning commission, to meet the challenges of corruption, to devise efficient forms for public corporations?

The invocation of the *Volksgeist*, in fact, directs the lawyer's attention away from the critical issues for modern Africa. Substantively, it places in the centre of the lawyer's view only those limited problems which exist both in tribal society and in modern society: family law, descent and distribution, land tenures. It is in part because of the prevalence of this limited focus that so much of academic legal scholarship in Africa has worn blinders for so long.

However, the *Volksgeist* also blinds lawyers to the essential fact that despite ethnic similarities between the governors and the governed in Africa—despite the fact of independence—vast cultural, social and economic differences continue to stratify African society. Expatriate firms still dominate the economy. The African elites who govern in most of the Anglophonic states have a set of value-acceptances vastly different from those of the traditional authorities, and of the African peasant in the bush. The future of African law is plainly going to be a resultant of the interaction among the various social strata as they struggle in the political arena to achieve their diverse objectives. To assume that independence dissipated the stratification of African society is to blind oneself to the central facts of African life.

Dean Harvey is not primarily concerned with describing a model for the prediction of the success of legal institutions. While he conceived his task in broad philosophical terms, the central thrust of his work is to use the storehouse of formal legal materials as primary evidence from which to infer the value-acceptances of the ruling elite. Yet he inferentially suggests a model for the study of law and social process, while explaining that he himself lacked the facilities or time to make the necessary empirical studies that his model would require.

Dean Harvey's model is essentially that of the American legal realist. For his purposes, he defines law as a "technique of social ordering deriving its essen-

tial characteristic from its ultimate reliance on the reserved monopoly of systematically threatened or applied force in politically organised society"<sup>9</sup>—a definition deriving from Pound. Professor Smith, in his essay, objects to the use of a concept of law which posits, as does Dean Harvey's, a centralised bureaucratic apparatus. That, of course, is a valid terminological objection only if one insists that the concept of law has an inherent desirable value-content, which one wishes to preserve for tribal society. Since Dean Harvey expressly asserts that, in his view, law is value-neutral, the objection would seem irrelevant.

However, although law in this view is value-neutral as a technique, any specific scheme of legal ordering is necessarily normative, and hence value-loaded. Law, after all, tells us what we ought to do. It is a normative system.

The realist definition which Dean Harvey has adopted asserts, then, that law is a normative system of social control relying upon the reserved monopoly of force in the state as sanction for breaches of the normative system. How valid is that model to guide the African lawyer in his major function of social engineering?

No doubt, the most difficult of the social sciences are those that attempt to deal with the normative. Norms describe not only what society expects a role-occupant to do, but also, to the extent that a norm is internalised—and most law is internalised by those subject to it—it is the reason which the role-occupant gives for acting as he does. The normative system is thus a model for explaining how human consciousness manifests itself in social action. It is a model which purports to explicate the thorniest of all philosophical problems, that of the relationship between thought and action.

To understand a normative system requires that we study both the norms themselves and the role-performance of the role-occupant. That a set of norms defines a role in a specified way (in law, that the rules of law describe how a person ought to behave) by no means states that the role-performance complies with the norms (that the actor in fact complies). This was one of the great assertions of the realist movement; as Dean Harvey puts it, one must guard against "what might be called the positivistic fallacy. This involves the assumption that critical roles in manipulating the legal technique are adequately revealed by an examination of formal sources such as constitutions and statutes."<sup>10</sup> As the realist said, over and over again, one must not assume that the law-in-the-books is the same as the law-in-action.

If law is to be used as a technique for social engineering, it would seem that some model similar to that which Dean Harvey has adopted is required. A social structure can best be visualised, as modern sociology teaches us, as composed of interrelated roles. The problem posed for the social engineer is to use the tools at his disposal to ensure that the goals which are set for specific positions are in fact achieved. If they are not achieved, the social engineer must first discover why they are not. It may be because of deviant motivation on

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9. Harvey, *op. cit.* supra note 2, at 343.

10. *Id.* at 14.

the part of the role-occupant; it may be because the normative system itself is insufficient to solve the problems which the role-occupant must solve.

In either case, the social engineer must devise a solution which is relevant to the cause of the deviation. In most cases, he will seek to use state power to accomplish his end: either by removing the cause of the deviant motivation (by education, retraining, or employment of more competent or more honest personnel), or by devising new and more appropriate norms of conduct sanctioned by state power. His success as a social engineer will necessarily depend upon how carefully and accurately he has analysed the role at issue, and how apt to solve the deviation are his solutions.

Dean Harvey's model is one which, by directing attention to both the normative structure and the role-performance, directs the lawyer's attention to the relevant components of his study. If that study is to be in sufficient depth, it would seem that it must seek to encompass all the aspects of the relevant roles. It is intriguing that Dean Harvey, despite the theoretical completeness of his model, has permitted his own value-perceptions to narrow his examination to the problems of public power—as he himself clearly perceives and concedes.

Dean Harvey set himself the task of seeking to use the legal materials available as empirical evidence of the value-acceptances of the ruling elite in Ghana during the first years of independence. But he does not use all the legal materials available; instead, he limited himself to the problem of the allocation of public power.

If Dean Harvey's model is to be used, however, it would seem to require that all the norms controlling specific roles be examined. The legal materials concerning public power in Ghana plainly suggest that in the value-competition between authoritarianism and democratic forms, the elite chose in fact the authoritarian path. An examination of materials concerning social and economic development might have led, however, to other, perhaps more sophisticated, conclusions. It is not enough, one would think, to rest upon the determination that the ruling elite quite roughly used the implements of state power to strike down opposition. Did they do this in an effort to maintain their own social and economic position? Or did they do so out of conviction that only in this way could the country as a whole proceed to rapid economic and social development?

My own perception of the values held by some of the Ghanaian elite is that economic and social development is their central animating demand, and the decisions with respect to the wielding of political power are instrumental to that desideratum. On the other hand, some of the elite had no greater objective than feathering their own nests by fair means or foul, and exercised despotic power to achieve this. Until additional materials are examined relating the fact of despotic power to the objectives for which it was used, one would think that Dean Harvey has not fully completed the task he assigned himself pursuant to the model which he has projected.

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**Recovery for Wrongful Death.** By Stuart M. Speiser. New York: Lawyers Co-operative Publishing Co. 1966. Pp. v, 1094. \$15.00.

## I

It is no doubt presumptuous for members of the academic community to undertake a critical analysis of the work of a noted trial lawyer. However, academicians are not noted for their reticence, and we are obliged to uphold the honor of the profession.

The goals of this review are twofold: (1) to provide a somewhat conventional review of Speiser's book; and (2) to critically examine some of the implications of the law from the standpoint of economic and social consequences. This examination will obviously be limited to a few points to be manageable within the limits of a book review. Furthermore, our treatment of even these few points must be regarded as indications that the rationale of the law should be subject to critical examination, rather than a complete analysis of the points in question.

## II

Speiser identifies the objectives of his work as: (1) to supply a needed treatise which has not been available since Tiffany;<sup>1</sup> (2) to point out some of the anomalies and defects in wrongful death law; and (3) by implication, to raise the status of wrongful death law within the family of torts law.

Even if a reader is unaware of Speiser's background, he will not proceed much beyond the title of the book before discovering that it was written by a plaintiffs' attorney. However, even if this bias does show through in places, the reader is not left with the impression that all of the burden of loss should inevitably be placed on the defendant or his insurer. In fact, the work is remarkably free from strictly emotional appeals and arguments which characterize much of the recent literature in negligence law.

While much of the emphasis of the book is on the applied, and does not attempt to develop the complete rationale of the law, it is not lacking scholarly attributes. In our opinion, the compendium of state and federal statutes affecting death actions and the extensive citations listed by Speiser are of such utility to the practicing attorney, jurist and scholar as to justify the publication of such a work. A basic guide to the law on wrongful death has long been needed. Tiffany, never wholly satisfactory, was badly outdated.

Overall, we have little quarrel with what Speiser says. However, we are somewhat critical of his work because it does not fully summarize that rationale of liability in wrongful death cases. As Speiser points out, the basis of a suit under the wrongful death or survival statutes is the wrongful act, neglect or default of the defendant which is a proximate cause of another's death. Thus, by necessity, it encompasses negligence or another social basis of liability. Since recovery for wrongful death is based on "social fault" the primary question remains—is there liability? The title, *Recovery for Wrongful Death*, suggests coverage

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1. Preface to Speiser, *Recovery for Wrongful Death* at iii (1966).

of liability. However, one senses that the book presumes liability and is essentially about damages. In the chapter dealing with liability, the reader is left with the impression that the author's attitude was "let's get through the liability section so we can get started on the book." This may appear justified in that his book is apparently intended for trial lawyers and judges who normally are better schooled in liability than damages. Nevertheless, from "death of a human being is not a wrong from which a survivor can complain" to the present general rules of liability for wrongful death has not been accomplished in one bold stroke. Moreover, it is unlikely that the development of the law of wrongful death damages and wrongful death liability can be separated.

It is likely that Speiser's work will be most widely used by the new or general practitioner, law student and inexperienced judge rather than the personal injury specialist, in which case treatment of the rationale of both liability and damages is essential. Furthermore, the utilization and conservation of human capital through legal policy goes far beyond the concern of the legal profession.

Speiser could have made an even greater contribution to the understanding of the wrongful death problem had he treated the liability area in greater depth. It seems particularly unfortunate that he omitted this, for in writing this book he probably has read more recent decisions, comments, and articles dealing with wrongful death than any other authority. His combination of scholarship and practical experience undeniably places him in an excellent position to give reliable assessments of the current status and attitudes in liability as well as in damages.

Additional weaknesses of the liability sections lie in the failure to fully cover the defenses to a wrongful death action. Even though much of the author's experience has been in the aviation field, which seemingly approaches liability without fault, as a personal injury expert, he has encountered more formidable opposition in practice than he discloses. The reader is left with the feeling that something is being held back. The disagreement is not with what is said about defenses, such as contributory negligence, but rather what is not said.

### III

The general rule of law is that the injury should be "repaired" or the injured "made whole." If the pecuniary elements of damages are defined as those having a market dimension, then the economist can assist in evaluating the extent of damage resulting from a wrongful death. When a family is considered to be an economic unit, the loss to that unit resulting from the death of one of its members is measured in terms of the value of the goods and services which the unit would have enjoyed if the member in question had not been killed.<sup>2</sup> This loss is measured both in terms of the money contributed to the family and/or the cost of replacement of the services rendered. Stated another way, the loss to the family is represented by that amount of money necessary to maintain the

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2. Lassiter, Jr., *Estimating the Monetary Value of Damages in Negligence Cases Involving Death*, 15 U. Fla. L. Rev. 384, 385 (1962).

unit at the level of living they otherwise would have enjoyed. It is evident that the courts in recent years have moved more closely to this concept as a measure of the "pecuniary" loss, particularly in the case of family members whose chief contributions consisted of services.<sup>3</sup>

The economic concept also allows recognition of loss to persons other than survivors. The loss to society arising from a negligent death, or any death for that matter, is the present value of the anticipated lifetime earnings of a person less his expected maintenance cost.<sup>4</sup> These lifetime earnings represent the sum of the annual market appraisal of the worth of the person's services to society. This is not to suggest that the tortfeasor should pay twice for a negligent death, but it does recognize that persons or parties other than the legal survivors are affected by a tortious act. Society may also be the loser if the survivors are inadequately compensated. The community may have to provide support for survivors, or if the surviving children of a negligently killed parent are less productive than they otherwise would have been, society's loss is measured by the present value of the differences of lifetime productivity. Furthermore, this concept allows recognition of the value of a person having no survivors to bring legal action. Basically, it is our contention that such a broader concept of damages is essential in appraising the loss resulting from a negligent death, even though we acknowledge the difficulties inherent in recognizing damages to parties other than legal survivors.

Such a concept of loss obviously is "speculative," in that the emphasis is on the future. However, such a determination is no more speculative than that employed in estimating the value of real property where such value is based on future income, or in the pricing of securities such as common stocks. The difficulty of appraising loss when a person is killed is increased because direct market prices of human beings are not available as a reference point. It might be observed that if society permitted the institution of slavery or lifetime indenture, the job of assessing damages in wrongful death actions would be considerably simpler, because the market would furnish a consensus evaluation of at least certain persons in the form of a price.<sup>5</sup>

Some aspects of measuring the economic loss are as follows:

*Present Values and Interest.*—The courts have generally held that future earn-

3. See, e.g., *Legare v. United States*, 195 F. Supp. 557 (S.D. Fla. 1961).

4. Weisbrod, *The Valuation of Human Capital*, 69 J. Pol. Econ. 425 (1961).

5. For a discussion of market appraisal of the value of slaves see Dublin & Lotka, *The Money Value of a Man* 6 (rev. ed. 1946).

It might be argued that the use of verdicts in other cases would provide a consensus to be used. It is our position that comparison of verdicts is undesirable. There are considerable variations: (1) among the jurisdictions in the element of damages allowable; (2) in earnings even within an occupation for persons of the same age; (3) in interest rates over time; and (4) in incomes among the various regions of the country. Our position would be that each case must be individually appraised on the evidence available.

ings or benefits should be discounted.<sup>6</sup> While the rate of discount has obvious effects on the magnitude of compensation due, relatively little attention has been given to the "proper" rate to be employed. Some jurisdictions use the "legal rate of interest,"<sup>7</sup> while others have specifically disapproved its use.<sup>8</sup> As contrasted to earlier cases where there was no apparent relationship between the rates of discount employed and market interest rates, there appears to be a trend toward employment of discount rates which reflect what a "prudent" but unsophisticated investor could safely earn.<sup>9</sup> This trend may have originated from cases brought under the Federal Employers' Liability Act where it has generally been held that the rate employed should be based on the interest available from safe investments.<sup>10</sup>

In determining the present value of future losses, from a technical standpoint the determination should be made at the time that the amount awarded changes hands. However, in most cases practicality would dictate that the present value should be determined at the time of the trial. It is our opinion that the jury requires assistance in determining the present value of future losses, either by an expert's testimony as to damages or by someone selected by the court. Jury members typically do not know what present value means, nor how to employ a table of present values.

As indicated earlier, selection of the rate to reduce damages to present values has been influenced by the unsophisticated investor concept. This is punitive to the defendant in that the rate may not reflect the risk associated with benefits which the decedent would have bestowed on survivors. On the other hand, use of a higher rate places a burden on the survivors which they may not be equipped to bear in terms of their investment ability. If the unsophisticated investor notion is to be employed, the best approximation to be used would be the rate on long-term federal government bonds. This rate would insure that the survivors would receive the benefits projected in the estimate of loss, and at the same time would reflect the consensus of the market in terms of prospective inflationary trends.

In determining present values, the table selected should be that which allows for the variations in damages over the period in which the damages are expected to occur. A straight line or average projection of damages is inappropriate in all but a very few cases. Examination of lifetime earnings by occupations will indi-

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6. Annot., 105 A.L.R. 234 (1936).

7. *Patton v. Baltimore & O.R.R.*, 120 F. Supp. 659 (W.D. Pa. 1953), *aff'd*, 214 F.2d 129 (3d Cir. 1954); *Gregorius v. Safeway Steel Scaffolds Co.*, 409 Pa. 578, 187 A.2d 646 (1963). It has been stated that any rate other than the legal interest rate would be "purely arbitrary." *Florida Cent. & Peninsular R.R. v. Burney*, 98 Ga. 1, 5, 26 S.E. 730, 732 (1895).

8. E.g., *Noble v. Tweedy*, 90 Cal. App. 2d 738, 747, 203 P.2d 778, 783 (Dist. Ct. App. 1949).

9. 3 *Personal Injury—Actions—Defenses—Damages* 209-11 (Frumer, Benoit & Friedman ed. 1965).

10. Annot., 105 A.L.R. 237 (1936).

cate substantial variation over the life span of individuals in these occupations. Furthermore, in the case where services are significant to the survivors, there are substantial variations in the services rendered over a period of time. For example, a housewife serves as a governess, a manager of household affairs and a domestic worker. The role of governess disappears as children leave home, and the responsibilities as a manager of household affairs and a domestic worker are reduced as the children grow up and leave. The tables given by Speiser<sup>11</sup> are for straight line projections and thus are inappropriate for most cases in that they do not provide for discounting on a year-by-year basis.

The fact that most jurisdictions do not provide for interest on the damages prior to adjudication places a burden on the survivors in terms of their real income position. They must borrow, spend out of savings, or reduce their real income position during the long period of time from the date of the accident to the date on which money changes hands in compensation. In no case should the damage prior to the time of settlement be discounted, but allowance should be made for the sacrifices incurred. The rate employed to adjust for these sacrifices will be different from that appropriate to the safe investor test. This rate should be that at which the survivors can borrow, in that this represents the sacrifice which they have made.

*Inflation and Real Income Changes.*—Speiser deals at length with inflation and its effects on survivors.<sup>12</sup> While no one would quarrel with the conclusion that inflation may seriously erode the position of survivors, it is desirable that there be a differentiation between inflation and real increases. Inflation is, of course, reflected in a decrease of the purchasing power of the dollar. On the other hand, incomes may increase by more than the loss of purchasing power, resulting in an increase in the total of goods and services which can be purchased with these incomes. An example will help. In 1929 the Consumer Price Index (on a 1957-1959 base) was 59.2. By 1964, the index amounted to 108.4.<sup>13</sup> The price of commodities measured by the index has thus increased 81% from 1929 to 1964. During the same time period the average earnings of wage and salary workers in all industries increased from an average of \$1,405 to \$5,393 or an increase of 284%.<sup>14</sup> Obviously, the well-being of these workers has substantially increased in terms of goods and services which could be purchased from their incomes. In addition, the real incomes of persons in various occupations may change by more or less than the variations in the price level, depending on the relative demands for persons in these occupations. It is our position that historic real increases in wages and salaries provide a better basis for estimating future contributions of the deceased to his family than do movements in the price level. Furthermore, it is incumbent on anyone projecting future incomes in other than

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11. Speiser, *Recovery for Wrongful Death* 505-09 (1966) (hereinafter cited as Speiser).

12. Speiser 515-28.

13. National Educ. Ass'n, *Research Rep't 1965-R7 Economic Status of Teachers in 1964-65*, at 41 (1965).

14. *Id.* at 23.

real terms to project the increase in prices also. The process of determining present values implicitly assumes that dollars of constant purchasing power are being discounted.

*Income Tax.*—Speiser indicates the lack of unanimity in connection with the question of instructions to the jury regarding the nontaxability of a verdict and the computation of loss before or after taxes.<sup>15</sup> The question is obviously complex. To begin with, it is the public which has bestowed the benefit and if the net income after taxes is to be the basis of determining the loss to survivors, then the tortfeasor should pay to the United States Treasury the present value of the tax liability inherent in the prospective gross earnings. We would concur that estimation of tax liability is no more speculative than estimation of future gross earnings. However, the nature of the contribution of the family member to the unit must be considered and made explicit. If part or all of the value of the deceased were in terms of services rendered, the value of these contributions would not have been taxed anyway.

If the jury is to be instructed regarding the tax question, these instructions must indicate that taxes would not have been paid on the value of services rendered by the decedent to survivors. Furthermore, since the damages are reduced to present value, the instructions should state that the earnings on the award are taxable. Failure to allow for taxes on the interest earnings would mean that survivors would not be fully compensated for their loss, or stated another way, their real income position would be lower than if the decedent had not been negligently killed. In order that the award be fully compensatory, the jury should make allowances for the present value of the future tax liability on interest earnings.<sup>16</sup>

*Mitigation of Damages.*—The question as to whether life insurance or pension plans to which the deceased contributed should be used to mitigate against the loss of survivors is not as straightforward as it might appear. For example, it can be demonstrated that the total loss to major parties may be greater for a person who carried life insurance than for a person in the same income category who did not carry this insurance. An overly simplified example may help. Assume that the loss to survivors from the death is \$10,000 a year over a remaining ten-year life expectancy. The present value of this loss at 4% (an arbitrary rate) is \$81,109. Assume further that the deceased carried term life insurance with a face value of \$50,000. In this particular case, the net gain to survivors in terms of the insurance settlement is \$50,000 less the present value of \$50,000 which would be expected to be received ten years from now, or \$26,222. In addition, there are no premium payments to be made over the remaining ten years of life expectancy. Assuming that these premiums amounted to \$300 per year, the family does not have to forego \$300 per year for the ten years to pay the life insurance premiums. These premium payments would have a present value

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15. Speiser 528-38.

16. The courts made the first step in the adjustment process in *Meehan v. Central R.R.*, 181 F. Supp. 594, 614 (S.D.N.Y., 1960).

of \$2,433. Now \$81,109, the present value of the loss, less the \$26,222 would give \$54,887, which would be the net loss to survivors excluding other factors. In addition, assume that the deceased paid net premiums of \$300 per year for twenty years for the life insurance. The family unit did not receive goods and services in the amount of \$300 per year in order to pay for the insurance protection. Furthermore, interest should be allowed on the value of the premiums paid. Allowing for this interest, again assuming a 4% rate, would amount to \$9,169, which represents the monetary value of the sacrifice made by the family unit to protect itself against the loss of the member in question. Then, the \$54,887 plus \$9,169 would give a total of \$64,056, from which should be deducted the \$2,433 representing the present value of the future premiums which would have been paid. Thus, the net loss to the survivors would amount to \$61,623.

However, this does not represent the total loss to all concerned parties. The insurance company paid \$50,000 now rather than ten years from now, so that the loss to the insurance company is \$50,000 minus the present value of \$50,000 payable ten years from now, or \$26,222. Furthermore, the insurance company would have received \$300 per year premiums over the ten-year period. Again, assuming an interest rate of 4%, the present value of the premiums which they would have received would amount to \$2,433. The loss to the insurance company would have been the difference between \$50,000 paid now and the present value of the same amount payable ten years from now, plus the present value of premium payments. The total loss to the insurance company would be \$28,655. The total loss to other parties would be the loss to survivors amounting to \$61,623 plus the \$28,655 loss to the insurance company. In this case, the total loss to all directly concerned parties is greater than the present value of the originally stated annual loss to survivors.

Another problem in mitigation of damages arises from the services performed by a member of the family to the deceased prior to his death. In essence, these services represent an opportunity cost which is borne either by the other family members in terms of reduced services to them because of the demands on the time of the person ministering to the injured party, or in terms of the money which could have been earned had the person pursued this alternative. The almost unanimous rule suggested by Speiser that such damages are compensable ignores a Massachusetts case where the wife was, in fact, a registered nurse and where the court refused to allow damages amounting to the value of the nursing services she rendered.<sup>17</sup> In this particular case the court's ruling obviously ignored the fact that the wife could have increased the money loss by accepting employment elsewhere herself and hiring a registered nurse to replace her services to the injured husband. The court ignored the opportunity costs involved; that is, the wife could either have earned income out of the home, or she could have ministered to the injured husband.

*Death of a Minor Child.*—In the case of a death of a minor child, the question

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17. Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939).

arises: What is the economic loss to the parent? Typically, the courts have placed heavy emphasis on the loss of services to the parent.<sup>18</sup> However, in modern urban society children's economic contributions to the family unit are minimal, and, when the values of the services are discounted, negligible, if not negative. While at one time children represented real economic assets in terms of their contribution to the family farm enterprise, they now, in fact, are more nearly economic liabilities.<sup>19</sup> Furthermore, the changing attitudes of society and provision for pensions, medicare, etc., all but destroy any value of the children to the parents as providers of old age security. We believe that retention of the notion of compensation for the loss of services of a minor child is an anachronism which provides a loophole for awards for other elements of loss for which the statutes do not provide. In the case of loss to the estate, two points are of economic significance. First, the parents would not have been likely to have been the recipients of the estate because of both the differences in life expectancies and the likelihood of a surviving spouse of the deceased. Secondly, the present value of any reasonable estimate of the estate is not likely to be very great in most cases. To illustrate this point by working in the reverse direction, an award of \$50,000 for the estate of a seven-year-old white male child would implicitly assume that this child would have accumulated a net estate worth \$800,380 by the time of his death.<sup>20</sup>

A significant loss to parents arising from the death of a minor child is that associated with the cost of bringing the child up to the age in question, and secondly, interest on these expenditures. In connection with interest on the expenditures, the concept of opportunity costs arises again. This interest represents what the parents might have received or might not have had to borrow. For families in most income brackets, the interest rate should be that at which they could borrow. An example may be helpful. Speiser presented an illustration of the cost of raising a child through age seven.<sup>21</sup> If it were assumed that the hypothetical family in question could have borrowed money at 6% (probably too low), then, allowing for interest, the expenditures for the child through age seven would increase the value of this investment from \$5,292 to \$6,430.<sup>22</sup> Basically, this concept of loss allows compensation to parents for the monetary importance attached by them to the child's development within the income restraints which they faced. The parents were willing to forego goods and services in the amount of this investment to bring up the child.

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18. Speiser 332-34.

19. 2 Harper & James, Torts, § 25.14, at 1330 (1956). See also Prosser, Torts § 121, at 931-32 (3d ed. 1964).

20. Using a discount rate of 4½% (the approximate rate of yield to maturity on United States government bonds as of March 3, 1967) and a life expectancy of 63 years.

21. Speiser 349.

22. It should be noted that Speiser's illustration and the estimate developed from it are below that estimated by Dublin and Lotka based upon 1935-1936 price levels. See Dublin & Lotka, *op. cit. supra* note 5, at 57.

Our position is that in most cases the major elements of damage to parents arising from the negligent death of a minor child are the loss of the investment in the child and such factors as the mental anguish and loss of companionship. While we are not in a position to place a dollar value on the psychological elements of damage, we would maintain that it would be far more honest if the statutes provided for these types of loss rather than forcing the use of subterfuges such as the antiquated notion of value of services rendered and inflated estimates of the present value of the estate which the child would have left.

*Punitive Damages.*—Punitive damages are significant only if such awards, in fact, deter grossly negligent action. It can hardly be claimed that the vicarious suffering imposed on an insurance company, in fact, deters grossly negligent acts. No doubt provision for punitive damages may encourage action where actual damages are so small as to discourage such action. However, this is of doubtful social merit.

*Attorneys' Fees.*—It is obvious that in most cases the survivors are not "made whole." Even if the most valid evidence is presented and the jury correctly assesses the loss, the survivors receive considerably less than this loss when counsel fees are deducted. It is not the intention here to question the contingent fee system. However, it is our opinion that the jury should be instructed that attorneys' fees will have to be paid from the amount awarded and also with regard to the magnitude of prevailing fees in terms of the local area. It is absurd to allow for compensation of attorneys in setting the awards in property condemnation proceedings and to completely ignore one of the major elements of cost in a wrongful death action. Survivors should not have to bear the cost of pressing their claims if the injury to them was the result of another party's negligence.

#### IV

In summary, Speiser's book represents a worthwhile contribution to torts literature. Its merit is considerably enhanced both by the absence of any other significant work since Tiffany, and its usefulness to the practicing attorney. The book should also be of use to judges and students of the law, and should enhance the status of wrongful death law within the family of torts law. We would hope that Speiser will someday revise this book and in that revision strengthen those few weak points to which we have alluded and which are considerably outnumbered by the merits of the book.

In addition, we would hope that economists would direct attention to this important area of concern to society. The whole question of the distribution of loss and the resulting economic and social consequences is as yet largely unexplored by economists and other social scientists. Such a lack of attention clearly indicates professional negligence. Speiser's work should make the task of such investigation and study much easier.

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**The Warren Revolution.** By L. Brent Bozell. New Rochelle: Arlington House, 1966. Pp. 15, 366. \$7.00.

In any balanced treatment of constitutional law, it is important to ask not only whether a particular result is good but also which governmental body, if any, should bring it about. For the Constitution is concerned with more than merely achieving desirable social ends. It is also concerned with dividing power between federal and state authorities and, within the federal government, separating the governmental functions as among the three coordinate branches which are hopefully designed to check and balance each other in their operation.

In recent years, the trend of both scholarly and lay analyses of constitutional development has been result-oriented to an excessive degree. Confronted with a judicial fait accompli which it regards as desirable in effect, the scholarly community has often allowed its approval of the result to obscure the issue of means and has tended to sanction uncritically the methods by which the desired results have been achieved.

In this volume, L. Brent Bozell focuses on this question of means rather than ends, as witness his first sentence: "This book is concerned with how our society makes, or should make, public policy, rather than with what our public policy is, or should become."<sup>1</sup> It is Mr. Bozell's purpose to follow this book with a subsequent volume evaluating the wisdom of the recent changes in our constitutional system. At the outset of this first volume, he makes the important distinction that, while Great Britain has an unwritten constitution, the United States have both a written and an unwritten constitution. Or, more precisely, we have a fixed and a fluid constitution, with the principal difference between them being in the method by which they are made and changed. The fixed constitution is made and changed by formal procedures of ratification and amendment. The fluid provisions, on the other hand, are a reflection of a continuing constitutional consensus. The changing content of the equal protection clause, and the free speech provisions of the first amendment, are illustrative of fluid provisions which have their origin in written provisions of the Constitution. The evolution and general acceptance of federal welfarism illustrate, on the other hand, a fluid provision not so clearly springing from any specific written provision. But the most important characteristic of a fluid provision is that, by its nature as a reflection of an ongoing constitutional consensus, it defies reduction to a precise and exhaustive formulation.

The author cites the no-third-term tradition for Presidents as illustrative of an originally fluid constitutional consensus which became sufficiently hardened to warrant written inclusion in the fixed Constitution so that it could not be temporarily defied by a transitory majority as it was in 1940. The eighteenth amendment, however, is described by the author as an unwise attempt to transmute into a fixed provision a simplistic solution to the nation's drinking problem. Similarly, the reduction in the first amendment of freedom of speech to

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1. Bozell, *The Warren Revolution* 15 (1966).

precise words of illusory finality settled little or nothing. The author mentions the Civil War as the most calamitous instance where the constitutional system of informal adjustment failed to function.

It is the author's first thesis that until recently "the constitution-makers of the United States by and large observed the distinction between the type of provision that is suited to the country's fixed constitution and the type that is suited to its fluid constitution, with the result that the country for the better part of this 165-year period enjoyed internal peace."<sup>2</sup> The second and more important of the Bozell theses is that,

during the past twelve years the Supreme Court, with the encouragement of the country's intellectual establishment, has instituted a third kind of constitution-making, which is revolutionary both in its method and in its consequences. This new kind of constitution-making, to state the phenomenon broadly, has sought to transfer the solution of some of the most momentous problems of contemporary public policy from the fluid constitution to the fixed constitution—by judicial decree. The result is that the internal peace of the country has been gravely disturbed, and the country's potential for peaceful growth in the future seriously jeopardized.<sup>3</sup>

Mr. Bozell describes the franchise amendments (the fifteenth, twenty-third and twenty-fourth) as showing "that meaningful provisions of the written Constitution must have the support of a broadly-based consensus—that while the written Constitution can record, it cannot peaceably produce a change in the society's underlying ethical substructure."<sup>4</sup> It is the vice of the Supreme Court, in Bozell's opinion, that it has disregarded the essential difference between the fixed and fluid constitutions. The race problem, church-state relations, legislative apportionment, and the national policy toward political dissidence are issues where "we have seen matters about which a hard constitutional consensus does not exist treated as though such a consensus *did* exist; we have been summoned to accord merely judge-endorsed policies the same dignity we accord policies that have passed the muster of the Constitution's formal amendment procedures."<sup>5</sup> Mr. Bozell properly criticizes the Court's handling of the issue of political dissent, where the Court has cast aside the accustomed competition between "each man's concern for personal freedom and the society's concern for consensus and self-preservation," in favor of an absolutist treatment "as though only one concern were involved—in this case the First Amendment's paradigmatic statement about freedom."<sup>6</sup> The Supreme Court, here and elsewhere, has assumed "not just a participant's role in the making of the fluid constitution, but the umpire's role."<sup>7</sup> Moreover,

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2. *Id.* at 25.

3. *Ibid.* (Emphasis omitted.)

4. *Id.* at 27. (Emphasis omitted.)

5. *Id.* at 29. (Emphasis omitted.)

6. *Ibid.*

7. *Ibid.* (Emphasis omitted.)

the only recourse for those who disagree with the Court, under the new understanding, is to the formal amendment procedures of the written Constitution. Thus, a Supreme Court decision has become equivalent to a provision of the fixed Constitution. . . . The one respect in which a Court decision differs from other provisions of the fixed constitution is that it has acquired that status, not by securing the endorsement of a hard national consensus, but by securing the certification of a nine-man tribunal.<sup>8</sup>

After quoting the extract from *Cooper v. Aaron*,<sup>9</sup> in which the Supreme Court first asserted expressly that its interpretations are "the supreme law of the land,"<sup>10</sup> Mr. Bozell neatly points up the incongruity between the Court's assumption of this prerogative and sound representative government:

The great anomaly in the Court's new method of constitution-making is that while nine judges can draw up a fixed constitutional provision without the authority of a hard constitutional consensus, their decision cannot be reversed except on the authority of a hard constitutional consensus. Remember that before the *Brown* case, neither the proponents of the mandatory integration of public schools, nor its opponents, could muster sufficient popular support to overcome the obstacles of Article V and incorporate their point of view in the fixed constitution. But thanks to the proponents' success in enlisting the aid of the Supreme Court in the role of final arbiter, the opponents must now corral a hard constitutional majority, as reflected by Article V's formal amendment procedures, in order to restore the *status quo ante*. They must either do that, or persuade the Court to change its mind. That is why we may speak today of Judicial Supremacy.<sup>11</sup>

It is a basic issue Mr. Bozell raises, and he does so impressively. He proceeds to analyze and document the evasion by the Court, in *Brown v. Board of Educ.*,<sup>12</sup> of the plain intent of the framers of the fourteenth amendment. And this is as good a point as any to remind ourselves that Mr. Bozell's volume is concerned with method and not at all with the desirability of the effects of the *Brown* or any other decision. *Pennsylvania v. Nelson*<sup>13</sup> is next employed by the author as a classic case of judicial misconstruction of a statute. The Court's misinterpretation there of the Smith Act<sup>14</sup> to preempt and therefore invalidate all state sedition laws was so palpable as to be charitably described as perverse. Similarly the school prayer cases—*Engel v. Vitale*,<sup>15</sup> *School Dist. of Abington Township v. Schempp*<sup>16</sup>—are analyzed by the author in terms of their judicial craftsmanship, rather than substantive results, and he finds the majority opinions there ignorant in historical perception and slovenly in execution.

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8. *Id.* at 30. (Emphasis omitted.)

9. 358 U.S. 1 (1958).

10. *Id.* at 18.

11. Bozell, *op. cit. supra* note 1, at 34. (Emphasis omitted.)

12. 347 U.S. 483 (1954).

13. 350 U.S. 497 (1956).

14. Alien Registration Act of 1940, ch. 439, 54 Stat. 670.

15. 370 U.S. 421 (1962).

16. 374 U.S. 203 (1963).

Mr. Bozell, however, is at his best when he examines the reapportionment case of *Wesberry v. Sanders*,<sup>17</sup> where the Court applied the rule of strict population apportionment to congressional districts. In considerable detail, the author proves that the Court's reliance in *Wesberry* upon the command of article I, section 2, that Representatives be chosen "by the People of the several States," was wholly unfounded. With the probable and solitary exception of James Wilson, there is not the slightest shred of evidence that the framers, in the debates of the 1787 Convention, intended that congressional districts *within each state* should be apportioned by population. Rather, their abundantly clear intent was that the number of Representatives, *as among the states*, should be apportioned by population. Moreover, in this chapter and in a startling appendix consisting of the unexpurgated statements of various framers laid beside Mr. Justice Black's assertions of what they said, Mr. Bozell convicts Mr. Justice Black, and the Court majority for which he wrote, of either monumentally shoddy scholarship or wilful distortion. And in the context of his presentation, the author understates his case when he wonders "not merely whether Justice Black and the Court majority that supported him performed as conscientious scholars, but whether they had any intention of performing as conscientious scholars. And the verdict, we suspect the reader will agree, fairly raises the larger question of whether the Warren Court is any longer entitled to the confidence and presumption of good faith which, as schoolboys, we accorded past Supreme Courts as a matter of course."<sup>18</sup>

The remaining two-thirds of the book is devoted to an analysis of the varied types of judicial review and of the framers' intention, or lack of such, to invest the power of judicial review in the Supreme Court. The English jurisprudential precedents and the handful of pre-1787 American cases which are commonly cited in support of the notion that the Constitution conferred upon the Supreme Court the status of a final arbiter are searchingly analyzed by Mr. Bozell and his analysis supports the conclusion that the prevailing jurisprudential ideas at the time espoused legislative supremacy and that "there is not a single case to support the proposition that a judicial power to nullify an act of legislature was recognized in the American States prior to the framing of the federal Constitution."<sup>19</sup>

There next emerges from the Bozell analysis of the supremacy clause in article V the eye-opening but correct conclusion that the clause was proposed in the Convention by "the champions of States' rights" as a more "federal" alternative to the nationalizers' proposed congressional negative on state laws which had just been defeated. The supremacy clause, in its inception, thus was far from an intended weapon for the aggrandizement of national power. Moreover, Bozell denies that the supremacy clause implied a power in the Supreme Court to void whatever congressional or state laws it found to be contrary to

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17. 376 U.S. 1 (1964).

18. Bozell, *op. cit.* supra note 1, at 109.

19. *Id.* at 214. (Emphasis omitted.)

the Constitution. Rather, the primary agents for enforcing the Constitution were intended by the framers to be "the Judges in every State," as the phrase is used in the supremacy clause which implicitly released the State judges from their accustomed duty to enforce enactments of the state legislatures when those enactments contravened the federal Constitution.

There was never at any time in the 1787 Convention a systematic consideration of the problem of judicial review. And the available evidence indicates quite clearly that the framers regarded "the federal system's built-in consensus machinery as the ultimate means of enforcing the Constitution"<sup>20</sup> rather than any single branch of government such as the Supreme Court. The ultimate recourse was to be to the people acting through the forms of representative government. The *Federalist Papers* are also painstakingly examined by Mr. Bozell in support of this general conception.

The framers intended the business of interpreting the Constitution to be a joint enterprise among all the authorities of the various governments and the people themselves. This consensus machinery is a composite of the division of powers as between state and federal governments, the separation of powers among the branches of the federal government, the intricate system of checks and balances, and, most importantly, practical sense and a keen appreciation of human nature. It is a virtue of Mr. Bozell's work that it provides reassurance as to the dimensions and soundness of the original framework, and it measures the contemporary reduction of that framework, largely through the agency of the Supreme Court, to a shambles.

One summary paragraph of Mr. Bozell's is particularly worth an extended quote here:

Enduring political authority needs the sanction either of physical force, or of some mode of legitimacy. Of force, and the judicial department's want of it, no elaboration is required. As for legitimacy, history has observed three ways in which it is conferred: by custom and tradition; by a tolerated assertion of divine right; by the deliberate choice of the governed. Obviously the judges of the early American commonwealth could look neither to tradition nor to the divinity to support an assignment to rule the country. But what of the third possibility? Was there anything that excluded the crowning of the courts, *ex nihilo*, by the commonwealth's deliberate choice? In a world of abstractions, nothing at all. Theoretically, there was nothing to prevent the American people from suddenly deciding in a moment of collective afflatus to entrust their ultimate destiny to a small group of judicial potentates who would be appointed to their stations by some intermediary officials over whose selection the people had only indirect control; and who, themselves, would never thereafter be answerable to the people. The difficulty is that men do not live in a world of abstractions. In the real world of late eighteenth-century America, the possibility that a people passionately and notoriously committed to the idea of representative self-government would deliberately embrace such a proposal is in a class, not with Hollywood fantasy, but with science-fiction.<sup>21</sup>

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20. *Id.* at 313.

21. *Id.* at 337-38. (Emphasis omitted.)

In the fine art of favorably reviewing a book for a legal periodical, it is standard to conclude with an exhortation that the book belongs in the personal library of every lawyer and student. In this case, however, the suggestion is not routine, but rather it is seriously and urgently meant. And here the recommendation should be broadened. For it would serve the national interest if this book were studied as well by the members of Congress, the legislators of the fifty states, and, finally, by the nine Justices of the Supreme Court of the United States. Indeed, a widespread appreciation of the constitutional realities expounded by Mr. Bozell is essential to a reconstruction of representative government in this republic. For Mr. Bozell has performed, with precision and restraint, a critical task of basic exposition. A generation or so ago his work might have been considered academic and unnecessary. It is a fair measure of our contemporary uncritical acceptance of judicial supremacy that his work will doubtless strike many as civic heresy and indeed revolutionary. Nevertheless, he is sound in his analysis. And he should be read, by those who agree and also by the judicial supremacists who can ignore his work only at the price of forfeiting their claim to intellectual respectability.

CHARLES E. RICE\*

*Justice and the Press.* By John Lofton. Boston: Beacon Press. 1966. Pp. xiv, 462. \$5.95.

*Justice and the Press* is another contribution to the current discussion of how to harmonize the interdependent but sometimes antagonistic institutions of free press and fair trial. Being both an editor and a lawyer,<sup>1</sup> author John Lofton is well qualified to present a stereoscopic view of that problem which he sees as one of many which are related to an overall consideration of the orderly and fair administration of justice.

Mr. Lofton begins with an historical survey of the development of freedom of the press and the rights of the accused. In the first chapter, "Words on Trial," he recalls the trials of Socrates and Jesus for "seditious" utterances, the struggles in the sixteenth century for freedom for the individual to interpret scriptural authority followed by "the assertion of the right to question and challenge political authority."<sup>2</sup> Subsequent advances and retreats in the evolution of freedom of expression noted by the author include the establishment and abolition of the Star Chamber, the passage in 1792 of Fox's Libel Act which afforded trial by jury to defendants in defamation cases, and Lord Campbell's Act of 1843 which made truth a defense in a prosecution for criminal libel. A delineation of similar experience in America includes the trial of Peter Zenger for seditious libel in

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1. Mr. Lofton is Associate Editor of the Pittsburgh Post-Gazette and a member of the South Carolina Bar.

2. Lofton, *Justice and the Press* 5 (1966) [hereinafter cited as Lofton].

1735, the Alien and Sedition Act of 1798-1801, mob attacks on Garrison and Lovejoy in the 1830's, the Milligan-type Civil War court martials,<sup>3</sup> Holmes' enunciation in the *Schenck*<sup>4</sup> case in 1919 of the clear and present danger test and its development and modification in *Gilow*,<sup>5</sup> *Near*<sup>6</sup> and *Dennis*,<sup>7</sup> and, finally, the 1965 endorsement by the Supreme Court of the United States in *New York Times Co. v. Sullivan*<sup>8</sup> of robust, uninhibited, and less-than-accurate criticism of official conduct.

Although the author begins the second chapter, entitled "Man on Trial," by describing how the law of trial procedure had evolved beyond blood revenge before Hammurabi, he concentrates largely on the development of the rights guaranteed to the accused by the Constitution of the United States culminating in such mid-Twentieth Century cases as *Powell v. Alabama*,<sup>9</sup> *Mapp v. Ohio*,<sup>10</sup> *Robinson v. California*,<sup>11</sup> *Malloy v. Hogan*,<sup>12</sup> *Pointer v. Texas*,<sup>13</sup> and *Miranda v. Arizona*.<sup>14</sup>

Before focusing on the right of the accused to be protected against prejudicial publicity, Lofton includes a third background chapter on "The Accused in the Press" which contains thumbnail sketches of the publicity which attended more than three dozen sensational trials from Aaron Burr's to Sam Sheppard's. This third chapter together with chapters five (The Range of Press Influence) and six (Injustice in the Press) constitute a veritable anatomy of "trial by newspaper." Five case studies are described as examples of "sustained press unfairness to an innocent suspect." The unfairness takes the form of reports of "solved" cases and confessions, and of other information which may not be admissible in court as evidence. The author also decries newspaper comment on the law, news of prior records, and the use of words such as "mobster," "sex-fiend," "sadist," "trigger-man," and "unhuman thing," which tend to set the accused off from society and suggest that he is a person of inherent depravity. Lofton sees such newspaper reporting as both a response and a stimulus to the public's appetite for crime news, its need for scapegoats, and its severe attitude toward law enforcement.

The traditional remedy for such conduct is the power of the court to punish for contempt—a remedy which Mr. Lofton deems unsuitable for use in this

3. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

4. *Schenck v. United States*, 249 U.S. 47 (1919).

5. *Gilow v. New York*, 268 U.S. 652 (1925).

6. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

7. *Dennis v. United States*, 341 U.S. 494 (1951).

8. 376 U.S. 254 (1964).

9. 287 U.S. 45 (1932) (right to counsel).

10. 367 U.S. 643 (1961) (exclusion of illegally seized evidence in state courts).

11. 370 U.S. 660 (1962) (criminal conviction for narcotics addiction is cruel and unusual punishment).

12. 378 U.S. 1 (1964) (guarantee against self-incrimination in the state courts).

13. 380 U.S. 400 (1965) (right to confront and cross-examine witnesses).

14. 384 U.S. 436 (1966) (various rights of suspect during custodial investigation).

country. He traces the origin of such power in the state courts through Blackstone's *Commentaries* of 1769 back to the premature opinion of Justice Wilmot in the case of *The King v. Almon* in 1765 which stated:

Some . . . contempts may arise in the face of the court; as . . . by speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones, without proper permission) of causes then depending in judgment; and by any thing . . . which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.<sup>15</sup>

A similar power was provided for the federal courts in the Judiciary Act of 1789. In both the state and federal courts such contempt power waned in the middle half of the nineteenth century but waxed again until 1941 when the United States Supreme Court in the case of *Bridges v. California*<sup>16</sup> limited its use to conduct creating a clear and present danger to the orderly and fair administration of justice. By reaffirming the *Bridges* rule in *Pennekamp v. Florida*<sup>17</sup> and *Craig v. Harney*<sup>18</sup> the Supreme Court in effect told the courts, in Lofton's words, "to turn to other remedies, such as granting motions for change of venue or for postponement of the trial."<sup>19</sup>

Because such alternate remedies were not used or were ineffective, the Court has reversed and remanded convictions in *Marshall v. United States*<sup>20</sup> for the reporting of prior convictions and other evidence not admitted by the trial judge, in *Irvin v. Dowd*<sup>21</sup> where attendant newspaper and television publicity created a "pattern of deep and bitter prejudice," and in *Rideau v. Louisiana*<sup>22</sup> where local television carried the eliciting by the sheriff of a confession from the accused in his cell. Furthermore the Supreme Court found in *Estes v. Texas*<sup>23</sup> that the televising of the trial and pretrial hearing "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Similarly, the Court held in *Sheppard v. Maxwell*<sup>24</sup> that "the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom . . . ."

The remedies specified in the *Sheppard* opinion—granting of motions for change of venue, for continuance or for mistrial, sequestration of the jury, "stricter rules governing the use of the courtroom by newsmen," and "some effort

15. Lofton 112.

16. 314 U.S. 252 (1941).

17. 328 U.S. 331 (1946).

18. 331 U.S. 367 (1947).

19. Lofton 127.

20. 360 U.S. 310 (1959).

21. 366 U.S. 717, 727 (1961).

22. 373 U.S. 723 (1963).

23. 381 U.S. 532, 542-43 (1965).

24. 384 U.S. 333, 363 (1966).

to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides"<sup>25</sup>—coincide in many respects with the previously formulated recommendations of Mr. Lofton who also urges that judges be less willing to allow prospective jurors to be the judge of their own bias. The author also calls for changes in methods of disciplining and selecting judicial and law enforcement personnel which he thinks would render them less susceptible to editorial and other types of community pressure. He recommends the zealous disciplining of lawyers through vigorous enforcement of the fifth and twentieth Canons of Professional Ethics.<sup>26</sup> Believing that a major obstacle to a better qualified judiciary is the reliance upon the elective system by three-quarters of the states, Lofton advocates, instead, the executive appointment of judges for life or for long terms at the end of which judges would stand for re-election on a non-partisan ballot without opposition but subject to discipline by a judicial committee organized on the California model. Juries, Lofton feels, should be made more representative by the use of the Kraft-Rosenbluth method of insuring that criminal defendants are "not judged by persons who know little or nothing about the social milieu in which the majority of the accused in criminal cases are reared."<sup>27</sup>

With Wilbur Schramm, Lofton senses an emerging "'social responsibility' concept of mass communication,"<sup>28</sup> and he urges journalists as the "operators of semipublic institutions" to promulgate voluntary codes of professional conduct, to start criticizing each other more, and to establish an American counterpart to the British Press Council with the duty to reprimand newspapers for unethical conduct including disregard of the right of the accused to an impartial trial. The improved conduct envisaged by Lofton would include more balanced and perceptive crime reporting<sup>29</sup> by trained specialists, more regard for the law's presumption of innocence, more emphasis on white collar crimes and less on crimes of violence, and more interest in what happens to the offender after he comes out of prison. As a succinct summary of the type of press responsibility he advocates, Mr. Lofton quotes the following passage from a speech by Associate Justice (now Ambassador) Arthur J. Goldberg to the American Society of Newspaper Editors:

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25. *Id.* at 358-59.

26. Canon 5 is entitled "The Defense or Prosecution of Those Accused of Crime." Canon 20 provides: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement."

27. Lofton 326.

28. *Id.* at 271.

29. Examples cited by the author include John Bartlow Martin's book, *Break Down the Walls*, articles by William F. Buckley, Jr. in the *National Review*, and series of articles in the *Washington Post* on teen-age drinking and alcoholism and in the *New York Times* on experimental methods in dealing with narcotics addiction.

The entire Bill of Rights is in the press' charge—not only the Free Speech Clause of the First Amendment . . . . The press must be the protector of all the Amendments not only against their invasion by government, but against their infringement by the press itself.<sup>30</sup>

Against the factual background of scores of pertinent cases, Mr. Lofton has presented a well documented exploration of the free press-fair trial issue at all times keeping the reader aware of the many related problems with which the press and the courts are faced in executing the public trust each holds. Neither can function in a vacuum, Mr. Lofton warns, as "they are inseparable forums of justice."<sup>31</sup>

GEORGE D. HAIMBAUGH, JR.\*

*The American Jury.* By Harry Kalven, Jr. and Hans Zeisel. Boston: Little, Brown & Co. 1966. Pp. xiii, 559. \$15.00.

The title of this book, *The American Jury*, is misleading. First, it is not about the American jury in general, but about its role in criminal cases only. Second, it is less concerned with the jury than with the research techniques of its authors. A better title would be: *Statistical and Sociological Methodology as Applied to a Study of the American Jury in Criminal Cases.*

The findings are based upon a survey of about 3500 cases, in each of which the trial judge indicated on a questionnaire how he would have decided the case, and, if he would have decided it differently from the jury, his view as to the reasons for the divergence. In 72% of the cases, judge and jury agreed; in the remainder, they disagreed. In the latter group of cases, the jury's decision was usually more lenient than the judge's—*i.e.*, the jury acquitted when the judge would have convicted or the jury found the accused guilty of a lesser offense than the judge would have found. In a small minority of these cases, however, the judge was more lenient—*e.g.*, he would have acquitted when the jury convicted. The cases are analyzed in great detail as to the type of charge, the rules of law involved, the character of the defendant, etc., and from this analysis, the authors attempt to identify the factors making for jury leniency or the reverse. For example, they conclude that juries sometimes refuse to convict when they dislike the law under which the accused is being prosecuted, and that juries are more prone to acquit defendants with whom they are sympathetic than those whom they find unattractive. The text bristles with statistics, percentages and charts, documenting such findings. The trials which were studied took place mainly in 1954-1955 and 1958, thus indicating that the book was in gestation for a dozen years or more. It is only the second book to come out of the much publicized and lavishly financed (by the Ford Foundation) University of Chicago Jury Project.

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30. Lofton 295.

31. *Id.* at 355.

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The book may be of value to statisticians and sociologists, but I doubt that it will be of much use or interest to lawyers or law students. It tells them only what they know already, or can easily find out by visiting a courthouse or talking to an experienced trial lawyer or reading a few good courtroom novels—namely, that in most cases, judges and juries react alike; that in a minority of cases, they react differently, with juries tending toward leniency more often than judges; and that the reactions of both judges and juries vary with the type of case and the nature of the defendant involved. Why this should take so much time and money to find out or why it should take so many pages to say is beyond my comprehension. Also mystifying is why the book should have elicited several ecstatic reviews. I suppose it is another case of new clothes for the Emperor.

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