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Anderson: American Law of Zoning: Zoning, Planning, Subdivision Control (4 Vols.)

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BOOKS REVIEWED

American Law of Zoning: Zoning, Planning, Subdivision Control (4 Vols.).
By Robert M. Anderson. Rochester: The Lawyers Co-operative Publishing Company. 1968. Pp. Vol. I: xviii, 647; Vol. II: xii, 703; Vol. III: xiv, 690; Vol. IV: xiv, 879. \$100.00.

Comprehensive "zoning" as a method of regulating land use is just over fifty years old, and its constitutional validity under the fourteenth amendment was established only a little more than forty years ago.¹ Edward M. Bassett, the "father of zoning," published the first definitive treatise on zoning in 1936.² Bassett's treatise, which was republished with revisions in 1940, is still invaluable for any student of the topic who wishes to understand the early history of zoning and the underlying purposes and assumptions of those who drafted the pioneer New York City zoning ordinance of 1916³ and the Standard Act⁴ which provided the model for most of the original state zoning enabling acts. Since World War II, however, Bassett's treatise has become more and more out of date as a result of America's explosive urban growth, the development of new types of zoning regulation, the use of zoning regulation for new purposes, and the tremendous increase in the number of litigated cases dealing with zoning.⁵ It has thus been apparent for some time that the legal profession is in need of a new treatise which will do for modern zoning law what Bassett's treatise did for the zoning law of thirty years ago. Professor Robert M. Anderson's new treatise entitled *American Law of Zoning* succeeds to a remarkable extent in filling this need.

American Law of Zoning is a comprehensive four volume treatise which deals with land-use planning, subdivision controls, and official maps as well as with zoning. The first three volumes consist of text, about ninety per cent of which is devoted to zoning. Volume 4 consists of statutes, charter provisions, ordinances and forms, a table of cases, and an index. Unlike several other treatises

1. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

2. E. Bassett, *Zoning* (1936).

3. *City of New York, N.Y., Building Zone Ordinance* (1916). This first comprehensive zoning ordinance is discussed in 1 R. Anderson, *American Law of Zoning* § 2.07 (1968) [hereinafter cited as ALZ]. Bassett was a member of the commissions which carried out the preliminary study and proposed the regulations to be embodied in the 1916 New York zoning ordinance. He is generally regarded as the principal draftsman of that ordinance.

4. *Advisory Comm. on Zoning, Dep't of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations* (Rev. ed. 1926). The Standard Act is reprinted in 4 ALZ § 26.01. Bassett was a member of the committee which drafted the Standard Act.

5. Bassett cited all the zoning cases in his 1936 treatise. It would obviously be impractical to try to cite all the zoning cases in a contemporary treatise, and Professor Anderson has wisely refrained from attempting to do so.

on zoning published before 1968,⁶ the text of *American Law of Zoning* is analytical as well as descriptive. Its scholarly character does not, however, preclude its serving as an extremely practical aid to the practicing lawyer, municipal attorney, or professional planner who has a problem in the field of public control of land use. As Professor Anderson points out in the first section of his treatise, "the materials are arranged and finely subdivided in a manner intended to serve the attorney or planner who is seeking an answer or a lead, rather than a person who is undertaking to read a chapter or more."⁷ Although this method of organization occasionally results in repetition of the same material in different chapters, its practical utility probably outweighs its disadvantages.

Twenty-one out of twenty-five chapters in *American Law of Zoning* are devoted entirely or mainly to zoning. Municipal planning, metropolitan and regional planning, subdivision controls, and official maps rate one chapter each. It is obviously impossible in the space allotted to this review to discuss in detail the exhaustive treatment of zoning law in the treatise. Suffice it to say that no topic of any importance is omitted, and that the quality of the analysis and exposition is astonishingly high. It is inevitable, however, that anyone attempting a large scale treatise like *American Law of Zoning* will omit discussion of some matters the reviewer thinks important, and occasionally fall into error in setting forth the current state of the law in a particular jurisdiction. If I seem unduly critical in the rest of this review, let it be clear at the outset that my overall evaluation of *American Law of Zoning* is highly favorable.

Chapter 2, entitled "The Power to Zone: Constitutional Issues," deals with what is probably the most basic problem in zoning law. On the whole, the chapter is well done, but I found it disappointing in several respects. For example, Professor Anderson does not comment on the failure of the Supreme Court to discuss the problem of reduction in land value in *Village of Euclid v. Ambler Realty Co.*,⁸ nor does he comment on the Supreme Court's extremely ambivalent attitude toward the land value problem—an ambivalence which is clearly demonstrated when one tries to reconcile the *Hadacheck*,⁹ *Mahon*,¹⁰ *Euclid*,¹¹ *Nectow*,¹² *Goldblatt*,¹³ and *Consolidated Rock Products Co.*¹⁴ cases. It is also surprising to find no discussion of the Supreme Court's almost complete refusal

6. The principal treatises prior to ALZ, other than Bassett's, are J. Metzenbaum, *The Law of Zoning* (2d ed. 1955); C. Rathkopf, *The Law of Zoning and Planning* (3d ed. 1956) (supplemented annually); E. Yokley, *Zoning Law and Practice* (3d ed. 1965). Of these treatises, Rathkopf's is the only one that might be described as "analytical" or "scholarly."

7. 1 ALZ § 1.01, at 2.

8. 272 U.S. 365 (1926). The case is discussed in 1 ALZ § 2.09.

9. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

10. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

11. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

12. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The case is discussed in 1 ALZ § 2.11.

13. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

14. *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, appeal dismissed, 371 U.S. 36 (1962).

to review zoning or other land use control cases since *Nectow*. As Professor Norman Williams has pointed out,¹⁵ the Supreme Court's abstention in this field has left the state courts with little guidance on constitutional issues arising in connection with public control of land use.

The discussion in *American Law of Zoning* of the general criteria of constitutionality developed in the state courts is quite good. I believe, however, that Professor Anderson understates the degree to which different states have in fact adopted substantially different judicial criteria of constitutionality. He flatly states, for example, that "[a] zoning ordinance which deprives a landowner of the entire use value of his property is unconstitutional."¹⁶ But in California it appears that a zoning ordinance will be held constitutional even if it does deprive the landowner of the entire use value of his land, provided the ordinance is well-calculated to protect or promote an important public interest. The California court so held in *Consolidated Rock Products Co. v. City of Los Angeles*,¹⁷ which is neither discussed nor cited in connection with basic criteria of constitutionality discussed in Chapter 2 of *American Law of Zoning*. If California is a lonely exception to the general rule, it is nevertheless a very important exception.

It is rather disappointing to find Professor Anderson using the terms "taking" and "deprivation" indiscriminately in describing situations where state courts find that zoning regulations are unconstitutional because they reduce land values too much.¹⁸ It should be clear, despite the loose use of language by the courts, that the terms are not synonymous. Every "taking" of private property for public use without payment of just compensation is necessarily a "deprivation" of property without due process of law, but the converse is not true. Some attempt by Professor Anderson to articulate the distinction, perhaps along the lines suggested by Professor Dunham¹⁹ or Professor Sax,²⁰ would have been desirable.

It should also be noted that the quotation from *Gust v. Township of Canton*²¹ at page 120 of Volume 1 of *American Law of Zoning* gives the reader a very misleading impression of the current attitude of the Michigan court with respect to "municipal power to zone for the future." The very restrictive view expressed in the *Gust* case was later repudiated in *Padover v. Township of Farmington*,²² which is neither discussed nor cited anywhere in the treatise.

Chapter 3, dealing with the sources and distribution of the power to zone, and Chapters 4 and 5, dealing with legislative limitations on the zoning power, both procedural and substantive, are generally excellent. My criticisms are

15. Williams, *Planning Law and the Supreme Court*, 13 *Zoning Dig.* 57, 57-59 (1961).

16. 1 *ALZ* § 2.22, at 93.

17. 57 *Cal. 2d* 515, 370 *P.2d* 342, 20 *Cal. Rptr.* 638 (1962).

18. See 1 *ALZ* §§ 2.20-23. Professor Anderson frequently uses the phrase "taking of property without due process of law." He also uses the term "confiscation" to denote the same concept.

19. Dunham, *A Legal and Economic Basis for City Planning*, 58 *Colum. L. Rev.* 650, 670 (1958).

20. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36, 67-76 (1964).

21. 342 *Mich.* 436, 70 *N.W.2d* 772 (1955).

22. 374 *Mich.* 622, 132 *N.W.2d* 687 (1965).

minor in character. It would appear that the "change or mistake" requirement in connection with zoning ordinance amendments is not really a "legislative" limitation, since the requirement is wholly judge-made in those jurisdictions where it is recognized. It is also doubtful whether it is necessary or desirable to treat this topic in two different sections in two different chapters.²³ More important, it is doubtful whether the judicial condemnation of "spot zoning"²⁴ is really based on a "legislative" limitation upon the substance of zoning ordinances. I am inclined to agree with Professor Haar's assessment:

The spot-zoning cases . . . appear to make the legislative requirement of accordance with a comprehensive plan in effect a nullity. The words become merely a supererogatory reminder of the underlying test of constitutionality. So long as the legislation is reasonably related to the police power, plausibly serving the ends of health, safety, welfare, or morals, and not demonstrably arbitrary or discriminatory, it will be sustained. To avoid the charge of spot zoning, the community must be sure only that in dealing with one land parcel, others similarly situated have been taken into account. In this sense, "comprehensive" is virtually synonymous with "uniform," the uniformity being in terms either of the ordinance itself or of a generalized, plastic "policy."²⁵

Chapter 6, dealing with nonconforming uses, is one of the best and most comprehensive in *American Law of Zoning*. I believe, however, that section 6.03, which deals with the enabling acts, substantially understates the extent to which current zoning legislation expressly preserves the right of landowners to continue nonconforming uses.²⁶ I was also surprised to find little discussion of the differing problems arising when the local governing body attempts to terminate different kinds of nonconforming uses, *i.e.*, nonconforming uses of open land, nonconforming uses in buildings which themselves conform to all zoning regulations, conforming uses in nonconforming buildings, and nonconforming uses in nonconforming buildings. Professor Anderson also fails to indicate clearly the wide range of meanings that may be attached to the concept of "amortizing" nonconforming uses. It is possible, for example, that "amortization" means that the owner of a nonconforming use must be allowed to continue it until he has "recovered his investment," or that he must be allowed to continue the use of a nonconforming building for its "remaining useful life," or that he must be allowed to continue a nonconforming business for such number of years as represents the multiplier applicable to the annual earnings of the business to determine its current market value, or that an "amortization" period is simply a period which sufficiently "cushions the economic shock of the restriction, dulls the edge of popular disapproval, and improves the prospects of judicial approval."²⁷ Moreover, Professor Anderson fails to mention some of the practical problems arising in connection with "amortization" programs—*e.g.*, the absence of efficient record-keeping and enforcement systems in most cities where zoning ordinances

23. 1 ALZ §§ 4.29, 5.03.

24. See *id.* §§ 5.04-.13.

25. Haar, *In Accordance With a Comprehensive Plan*, 68 Harv. L. Rev. 1154, 1170 (1955).

26. Cunningham, *Land-Use Control—The State and Local Programs*, 50 Iowa L. Rev. 367, 379 nn.57-58.

27. 1 ALZ § 6.65, at 447.

provide for "amortization" of nonconforming uses. He is likewise silent about the various legal techniques which might be used to make "amortization" programs more effective, such as granting financial aid for relocation of small businesses which constitute nonconforming uses and development of performance standards to control the deleterious effects of nonconforming uses during the amortization period.²⁸

Chapters 7 and 8, dealing respectively with the legitimate objectives of zoning and with types of zoning regulation are also among the best in *American Law of Zoning*. I have only minor criticisms to offer in regard to these chapters. I believe that Professor Anderson has understated the extent to which some states, at least, have approved the use of zoning (mainly through control of minimum lot size) to assure a "balanced" growth of suburban communities in terms of the economic and social groups who move into such communities.²⁹ The reference to Michigan as a state where the courts "have been less receptive than most to large lot requirements" is somewhat out of date, in view of the recent decision in *Padover v. Township of Farmington*³⁰ and I believe the discussion of "flexible zoning" techniques in Chapter 8³¹ would be more useful if it included a discussion of the "floating zone" device (which Professor Anderson has placed in Chapter 5)³² and a really adequate treatment of "planned unit development." The latter is nowhere to be found in *American Law of Zoning*, although Chapter 8 does contain a short section entitled "Planned Development Districts."³³ On examination, this section appears to equate "floating zones" with "planned development districts," but it cannot be considered an adequate treatment of the "planned unit development" technique.³⁴

Chapters 9 through 12 deal respectively with regulation of uses which have a unique relation to public welfare, home occupations, and uses for profit (agriculture, commerce, and industry). I have not had the opportunity to read these chapters in detail, but they appear to be well-done and likely to be extremely useful to practicing lawyers. Chapter 13, which deals with zoning administration in a general way is quite good, as are Chapters 14 and 15, which deal with administrative relief from zoning regulations by means of "variances" and "special permits,"³⁵ and Chapter 16, which deals with board of adjustment procedure.

28. See Comment, Elimination of Nonconforming Uses: Alternatives and Adjuncts to Amortization, 14 U.C.L.A.L. Rev. 354 (1966).

29. See, e.g., *Senior v. Zoning Comm'n*, 146 Conn. 531, 153 A.2d 415 (1959), appeal dismissed per curiam, 363 U.S. 143 (1960); *Clary v. Borough of Eatontown*, 41 N.J. Super. 47, 124 A.2d 54 (App. Div. 1956); *Bilbar Const. Co. v. Board of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958).

30. 374 Mich. 622, 132 N.W.2d 687 (1965).

31. 1 ALZ §§ 8.17-21.

32. Id. § 5.16.

33. 2 id. § 8.38.

34. For detailed treatment of "planned unit development," see Symposium: Planned Unit Development, 114 U. Pa. L. Rev. 3 (1965).

35. Professor Anderson uses the term "variance" in its ordinary sense, but he uses the term "special permit" to denote what the Standard State Zoning Enabling Act and most

My principal criticism of Professor Anderson's treatment of zoning variances is that he does not frankly recognize that the "unnecessary hardship" requirement, as interpreted by the New York court in *Otto v. Steinhilber*,³⁶ really applies a constitutional test. *Steinhilber* requires proof that because of "unique circumstances" the applicant's land "cannot yield a reasonable return if used only for a purpose allowed"³⁷ by the zoning regulations, and thus in substance requires the landowner to prove that the zoning regulations as applied to his land cause a deprivation of property without due process of law.³⁸ If all courts clearly recognized this fact, they would have less difficulty dealing with the vexing question of whether a landowner must "exhaust his administrative remedies" by applying for a variance before he is free to mount a direct attack on the constitutionality of the zoning regulations applicable to his land.³⁹ And courts would also be less likely to apply the "self-created hardship" limitation in cases where, if the right to a variance is barred on the ground of "self-created hardship," the landowner will then be in position to have the zoning regulations declared invalid as applied to his land on the ground that they deprive him of property without due process of law.⁴⁰

It should also be noted that Professor Anderson's discussion of the peculiar New Jersey "special reasons" variance⁴¹ is quite inaccurate and misleading. Professor Anderson says that construction of the term "special reasons" has been moved closer to that of "undue hardship" by decisions which suggest that the standards imposed by section 39(c) of the New Jersey zoning act⁴² in cases of "undue hardship" also apply to cases arising under section 39(d)⁴³ which authorizes the granting of variances for "special reasons." But the only case cited in support of this proposition is a 1949 lower court case⁴⁴ which was overruled

state enabling acts call a "special exception." See 3 ALZ § 15.01. He uses the term "exception" to describe cases where a landowner is entitled to devote his land to a particular use as a matter of right if certain facts exist, but the board of adjustment is authorized to determine in each instance whether the requisite facts do or do not exist. See *id.* § 1503.

36. 282 N.Y. 71, 24 N.E.2d 851 (1939), rehearing denied, 282 N.Y. 681, 26 N.E.2d 811 (1940). The *Steinhilber* case is discussed in 2 ALZ § 14.16.

37. 282 N.Y. at 76, 24 N.E.2d at 853.

38. Thus it is not literally true that "the board of adjustment is without authority to determine the constitutionality of an ordinance." 3 ALZ § 22.10, at 617. Rather, the board of adjustment has power to determine constitutionality, not for the purpose of invalidating the zoning ordinance, but for the limited purpose of determining whether a variance should be granted on "unnecessary hardship" grounds. In making this determination, the board must presume that the zoning ordinance is generally valid, but that it may bear so heavily upon the applicant's property because of unique circumstances as to deprive him of property without due process of law unless a variance is granted.

39. See discussion *infra* in text at nn.57-60.

40. See 2 ALZ §§ 14.41-44. See also 3 *id.* § 24.06, at 671-72 nn.3-4.

41. *Id.* § 14.15.

42. N.J. Rev. Stat. § 40:55-39(c) (1937).

43. N.J. Rev. Stat. § 40:55-39(d) (1937).

44. *O'Connor v. Mayor and Council*, 1 N.J. Super. 638, 65 A.2d 127 (Super. Ct. 1949), cited in 2 ALZ § 14.15, at 618 n.4.

by the New Jersey Supreme Court in the leading case of *Ward v. Scott*.⁴⁵ Although two later cases⁴⁶ raised doubts as to the continued authority of *Ward v. Scott* for the rule that no "undue hardship" need be shown to obtain a "special reasons" variance, all doubts were conclusively removed by *Andrews v. Board of Adjustment*.⁴⁷ All of the New Jersey Supreme Court cases since 1959⁴⁸—none of them cited by Professor Anderson—have followed *Ward v. Scott* and *Andrews v. Board of Adjustment*. The difficult problem today with respect to "special reasons" variances is not whether "undue hardship" must be proved; rather, it is to determine when a proposed use will "inherently" serve the general welfare (in which case no further "special reason" need be shown) and when the proposed use will not "inherently" serve the general welfare (in which case the applicant must show that the general welfare will be promoted in some special way by locating the proposed use at the particular location for which the variance is sought).⁴⁹

Chapters 17 through 20, which deal with municipal, metropolitan and regional planning, subdivision controls, and official maps, are all excellent. I have only minor criticisms to note. In dealing with the question of whether local planning boards may require subdividers to dedicate land for parks and playgrounds, Professor Anderson accurately states that "[s]ome courts have disposed of the question at the threshold by holding that the enabling legislation does not authorize a municipality to require such a dedication of land."⁵⁰ One wishes, however, that he would discuss the express wording of the enabling statutes so construed, and that he would express an opinion as to the probable construction of the following language from the Standard City Planning Enabling Act: "Such [subdivision] regulations may provide for the proper arrangement of streets in relation to other existing or planned streets and to the master plan, for adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population . . ." ⁵¹ Many of the current enabling statutes still use this language, either verbatim or in substance. Consequently, if the provision of "adequate and convenient open spaces for traffic" is considered to authorize the local planning board to require dedication of subdivision streets, it would appear that the similar language with regard to "recreation" should be deemed to authorize required

45. 11 N.J. 117, 93 A.2d 385 (1952).

46. See *Moriarty v. Pozner*, 21 N.J. 199, 121 A.2d 527 (1956); *Ranney v. Istituto Pontificio Delle Maestre Filippini*, 20 N.J. 189, 119 A.2d 142 (1955).

47. 30 N.J. 245, 152 A.2d 580 (1959).

48. For discussion of these cases, see Cunningham, *Discretionary Powers of the Zoning Board of Adjustment and the Municipal Governing Body Under N.J.S.A. 40:55-39*, in *Institute for Continuing Legal Education, New Jersey Zoning and Planning 3001, 3007-09, 3043-65* (1968); Cunningham, *Flexible Zoning and the New Jersey "Special Reasons" Variance Procedure*, 15 *Zoning Dig.* 169 (1963).

49. See *Kohl v. Mayor and Council*, 50 N.J. 268, 234 A.2d 385 (1967).

50. 3 ALZ § 19.39, at 481.

51. Standard City Planning Enabling Act § 14. The text of this Standard Act is reprinted in *American Law Institute, A Model Land Development Code (Tentative Draft No. 1)*, Appendix B (1968) (emphasis added).

dedication of subdivision land for parks and playgrounds, and perhaps even the exaction of money in lieu of land dedication.

It is clear, of course, that the required dedication of land to provide new or expanded school facilities, or the exaction of money in lieu of land dedication for that purpose, is not authorized by the Standard Act language quoted above. Reasonably explicit enabling act language is required to authorize such exactions.⁵² Assuming, however, that many states may eventually amend their enabling legislation to authorize subdivision exactions for the purpose of providing new or expanded educational facilities, a serious constitutional question will remain: On what theory, and by adoption of what standards, can such exactions be squared with the due process requirements of the state and federal constitutions? Professor Anderson's discussion of this question is rather disappointing. It is unfortunate that he did not choose to discuss and express an opinion as to Professor Reps' argument that subdivision exactions are constitutional only if they are located where their benefit inures exclusively to the landowners in the subdivision itself or are of a type which according to traditional notions could be financed by a special assessment,⁵³ Professor Heyman's opposing argument that subdivision exactions are constitutional as long as they merely require subdivision residents to pay the increased municipal costs attributable to their presence,⁵⁴ and Professor Doebele's suggestion that subdivision exactions should be recast as excise taxes on the "business" of land subdivision.⁵⁵

The last five text chapters of *American Law of Zoning* are devoted to judicial review and judicial enforcement of zoning and planning regulations and decisions. The coverage of these topics is comprehensive, but the organization of the discussion is rather peculiar. Declaratory judgments are dealt with under the heading "Judicial Enforcement of Zoning and Planning Regulations,"⁵⁶ although declaratory judgment actions are used almost exclusively as a means by which *landowners* may obtain *judicial review* of zoning and planning regulations. And the chapter on injunction actions includes a discussion of injunctions to *restrain* enforcement of zoning regulations and a discussion of the exhaustion of administrative remedies requirement as it applies to *landowners* seeking such injunctions, despite the fact that the chapter heading is "Judicial Enforcement of Zoning and Planning Regulations."⁵⁷ I believe it would have

52. The language was held to authorize such exactions in *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966). The Wisconsin Statute, however, was not really very explicit.

53. See Reps & Smith, Control of Urban Land Subdivision, 14 Syracuse L. Rev. 405, 407-12 (1963).

54. Heyman & Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 Yale L.J. 1119, 1141-46 (1964).

55. Doebele, Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico, 2 Natural Resources J. 321, 341-42 (1962). See also Heyman & Gilhool, *supra* note 54, at 1152-54.

56. 3 ALZ ch. 24 (emphasis added).

57. *Id.* ch. 23 (emphasis added).

been preferable to deal first, on a comparative basis, with all the various methods by which landowners may obtain judicial review of zoning and planning regulations—including declaratory judgment actions as well as mandamus and injunction actions—and then to deal separately with actions to enforce zoning and planning regulations.

Professor Anderson's separate treatment of the exhaustion of administrative remedies requirement in connection with mandamus, injunction, and declaratory judgment actions is especially disappointing.⁵⁸ It not only results in a considerable amount of repetition, but also fails to highlight whatever differences in application of the exhaustion requirement there may be when different means of obtaining judicial review are used.⁵⁹ Moreover, the sections on exhaustion of administrative remedies are much too general. The reader comes away only with the general idea that exhaustion is not required as a prerequisite to obtaining judicial review of zoning and planning regulations "[i]f the available administrative remedies are inadequate, or if they are vain and useless . . ."⁶⁰ I would like to have seen Professor Anderson address himself to more specific questions, e.g., whether a landowner, before challenging the constitutionality of a zoning regulation by an injunction or declaratory judgment action, must seek a variance in a case where it appears that the zoning regulation imposes a "unique" hardship on him; and if, in such a case, it makes any difference whether the landowner wishes to develop his land immediately or only wishes to be able to sell it free from the zoning regulation of which he complains.⁶¹ I also wish Professor Anderson had dealt with the troublesome question whether a judicial decision denying a variance on the ground that insufficient "hardship" was shown should be considered *res judicata* if the landowner later challenges the zoning regulations directly on the ground that they permit no reasonable use of his land.⁶²

As previously indicated, the last volume of *American Law of Zoning* consists largely of statutes, charter provisions, ordinances, and forms. The selection of materials is excellent; the materials included should be particularly useful to municipal attorneys and professional planners.

Having pointed out a number of instances where I think *American Law of Zoning* falls short of perfection, let me repeat again my judgment that the treatise as a whole is very good indeed. It fills a need which has long been apparent, and Professor Anderson deserves a vote of thanks both for undertaking to fill

58. See *id.* §§ 22.10, 23.14, and 24.06.

59. Professor Anderson seems to suggest that exhaustion of administrative remedies is less often required when the complainant brings mandamus to require issuance of a permit on the ground that the zoning ordinance which provides a basis for refusal of the permit is invalid, than in cases where the complainant seeks a declaratory judgment or an injunction against enforcement of a zoning ordinance. See *id.* § 22.10.

60. *Id.* at 616.

61. The discussion of these problems is quite ambiguous. See *id.* §§ 22.10, 23.14, 24.06.

62. See discussion of this problem in *Arverne Bay Const. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938).

the need and for accomplishing the undertaking so well. No lawyer with a substantial planning and zoning practice can afford to be without *American Law of Zoning*.

ROGER A. CUNNINGHAM*

Origins of the Fifth Amendment: The Right Against Self-Incrimination.

By Leonard W. Levy. New York: Oxford University Press. Pp. xii, 561 \$12.50.

REVIEW I

Most potential readers of Professor Levy's¹ book would probably surmise that it has to do with what has been called "the privilege against self-incrimination" and not about other provisions of the Fifth Amendment, and they would be right. Indeed the subtitle of the book reads: *The Right Against Self-Incrimination*. The author states that he calls "it a 'right' because it is one,"² and claims that his book is the first on the origins of the right.³ Most of the book concerns those events in the history of England that show how and why certain claims were made which eventually developed into a right recognized by the law of England, the American colonies, and finally embodied in the Constitution of the United States by the adoption of the Fifth Amendment in 1791. Of the thirteen chapters into which the book is divided, the first ten deal with English history, the remainder with American.

This book makes terrible reading. Only out of a sense of duty, or perhaps because of morbid curiosity, can the reader stay with the first nine chapters. They are characterized very well by the jacket illustration, reproduced from Foxe's *The Book of Martyrs*, showing a man trussed to a stake and being consumed by flames. The very first sentence of Chapter 1 reads as follows: "In 1537 John Lambert was chained to a stake in Smithfield, England, and roasted in the flames as an obdurate heretic."⁴ There follow accounts of beheadings, disembowelings, hangings, and tortures of various kinds inflicted on persons who happened to differ with the authorities on matters of religion and politics. This bloody history is the matrix out of which the right against self-incrimination arose. The relevance of the various details related in the earlier chapters becomes clear upon reaching the tenth chapter in which the career of John Lilburne is related. This fabulous champion of freedom, democracy and tolerance, used most of the arguments of his predecessors, as is shown in the preceding chapters, adding some arguments of his own, and despite the torment and

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1. Earl Warren Professor of Constitutional History and Chairman of the Dep't of History, Brandeis University.

2. L. Levy, *Origins of the Fifth Amendment* vii (1968).

3. *Id.*

4. *Id.* at 3.

harsh treatment he received from the government, won popular approval and is generally accredited with having been largely responsible for the recognition of the right against self-incrimination.

The origins of the right go back to pre-Norman times in England. For even then there existed an accusatorial system of criminal justice as distinguished from the inquisitorial system of the ecclesiastical courts. The rivalry between the two systems continued through post-Reformation times. Henry II gets credit for upholding the accusatorial system of the King's courts. The ecclesiastical courts recognized and applied the maxim *nemo tenetur prodere seipsum* (no man is bound to accuse himself), but only in a rather literal fashion. One was not obliged to come forward and confess, but once formally accused (even rumor was sufficient), there was no right to remain silent. In fact, the ecclesiastical courts, later culminating in the Court of High Commission, and also other non-common law courts, for instance, the Court of Star Chamber, employed the oath *ex officio*, whereby the accused was required to swear that he would answer truthfully all questions to be asked in the subsequent proceeding even though the accused was not informed at the time of the oath as to the charges preferred against him or as to what questions would be asked. The accused was likely to be a person suspected of having written a pamphlet criticizing the government or expressing unapproved views concerning religion. If he took the oath *ex officio* he would then be required to answer, by confessing, the question concerning his authorship or else be guilty of perjury. Many noteworthy heroes of the history of liberty refused to take the oath. The cases are discussed at length by Professor Levy. Many of the arguments used by these heroes were based on what they believed to be the common law of England, which in turn was believed to be embodied in the Magna Charta. There was some substance to the belief concerning the practice of the common law courts. The accusatorial procedure previously referred to entailed from very early times the notion that the defendant was not required to testify against himself. Indeed he was not permitted to testify at all under oath. He could freely confess, however, but he was not required to testify at the trial. This circumstance made the crucial difference between the common law courts and the High Commission or Star Chamber. There were cruelties in the common law courts also, and Professor Levy does not fail to specify them; but from very early times in the common law courts the prosecution had to prove its case. This obviously was not so in those courts that used the oath *ex officio*. Much of the book is taken up with accounts of the battles against the oath *ex officio* and the High Commission and Star Chamber. The oath and the courts administering it were finally abolished on July 5, 1641.

Some renowned lawyers of the sixteenth and early seventeenth century contributed to this result. In addition to Sir Edward Coke, there were Nicholas Fuller, Robert Beale and James Morice. It was as a result of the efforts of these lawyers that the Magna Charta, which they used to attack the oath *ex officio*, became known as a great charter of liberties.

An argument made by Fuller is of special interest to students of constitutional law in that it anticipates the thought of John Marshall in *Marbury v.*

*Madison*⁵ and the action of the Supreme Court and other American courts in subsequent cases too numerous to mention. Professor Levy condenses the argument as follows:

The exposition and construction of the laws belonged to the judges: ". . . to uphold the right of the lawes of England, the Judges in ages past have advisedly construed some wordes of divers statutes contrary to the common sence of the words of the statute, to uphold the meaning of the common lawes of the Realme."⁶

It would seem that largely through the efforts of John Lilburne and the popular support accorded him "the right against self-incrimination was an established, respected rule of the common law, or, more broadly, of English law generally."⁷ However, Professor Levy traces the development of the rule in cases subsequent to Lilburne's time, up to the Declaration of Independence and beyond. "It was not until the mid-nineteenth century that the preliminary examination of the suspect became a judicial process in which the right was fully respected."⁸

The last three chapters deal with the American development. Despite the paucity of reports it seems that the common law right was established in the American colonies well before the Revolution. In one form or another the right was embodied in various constitutions and bills of rights adopted by the several states after independence had been declared. Professor Levy points out the discrepancy between the language adopted and the actual scope of the right in practice. The right had been claimed by and allowed to witnesses other than the accused. Also it had been allowed in proceedings other than criminal proceedings. Yet the language used by George Mason in section 8 of the Virginia Declaration of Rights was as follows:

That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.⁹

James Madison, the father of the Bill of Rights, in drafting what became the Fifth Amendment, used the following language:

No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.¹⁰

5. 5 U.S. (1 Cranch) 137 (1803).

6. L. Levy, *supra* note 2, at 238.

7. *Id.* at 313.

8. *Id.* at 329.

9. *Id.* at 405-06 (emphasis omitted).

10. *Id.* at 422.

It will be noticed that Madison's draft did not restrict the right to criminal cases.

The Fifth Amendment, however, as finally adopted in its self-incrimination clause is by its terms restricted to criminal cases. Of course, as is well known, it is not so restricted in actual practice. In this connection Professor Levy makes the following observation:

The clause by its terms also protected against more than just "self-incrimination," a phrase that had never been used in the long history of its origins and development. The "right against self-incrimination" is a short-hand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him. The clause extended, in other words, to all the injurious as well as incriminating consequences of disclosure by witness or party. But this inference drawn from the wording of the clause enjoys the support of no proof based on American experience, as distinguished from English, before the nineteenth century. Clearly, however, to speak merely of a right against self-incrimination stunts the wider right not to give evidence against oneself, as the Virginia model put it, or not to be a witness against oneself, as the Fifth Amendment stated. The previous history of the right, both in England and America, proves that it was not bound by rigid definition. After the adoption of the Fifth Amendment, the earliest state and federal cases were in accord with that previous history, which suggests that whatever the wording of the constitutional formulation, it did not supersede or even limit the common-law right.¹¹

The importance of this observation should be obvious in view of the fact that the decisions have not always been faithful to the common law ideal and some will require overruling, *e.g.*, those involving blood samples.¹²

Professor Levy's scholarship is impressive and will likely be persuasive in the future. There are seventy-six pages of notes, twenty-four pages of bibliography and sixteen pages of index. It is well worth the considerable effort of reading and will doubtless prove a valuable reference work for many years to come.

ROGER PAUL PETERS*

REVIEW II

Those Americans whose memories go back fifteen or twenty years will remember such phrases as "taking the Fifth," and "Fifth Amendment communists"—fighting words in their time. Of course everybody who has read the Fifth Amendment knows that it concerns guarantees of several matters: a grand jury accusation in federal prosecutions; a guarantee against double jeopardy; a guarantee of that usefully vague decency, "due process of law"; and a guarantee against confiscation of a man's property by the national government without compensation for it. The fifth amendment also pledges that no man "shall be compelled in any criminal case to be a witness against himself."

11. *Id.* at 427-28 (footnote omitted).

12. *Schmerber v. California*, 384 U.S. 757 (1966); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

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Professor Levy, who has long-since earned an honored place among the small group of scholars adept in legal history, chose for his title *Origins of the Fifth Amendment*, but by his subtitle limits his main preoccupation to the ancient principle *nemo tenetur seipsum prodere*. Still his title is well chosen; it suggests a broader concept than the burden of conviction cast on the prosecution of the accused by the exemption from self-accusation. Much of our Bill of Rights, and its state counterparts, are intended precisely to make difficult public conviction and punishment of those accused of conduct prohibited by public authority, most often correctly so accused. Dean Levy's book is a scholarly, scrupulous study of the irregular but persistent growth, through ages since the origins of Talmudic Law, of the deep-rooted idea that the fearsome power of public vengeance is dangerously corruptible, clumsy, liable to blunder, and perhaps futile;¹ that the well-being of our people is best served by making difficult its exercise. The "right against self-incrimination" is only one of many obstacles against that vengeance.

This book is not, of course, the first to treat of the origins of the rule *nemo tenetur*. Wigmore devoted much attention to it in his massive treatise on evidence, as did the late Professor McNaughton in his revision of volume eight of the third edition of Wigmore.² The two Maguires, Mary Hume Maguire in her study of the *Oath Ex Officio*³ and John MacArthur Maguire in *Evidence of Guilt*,⁴ have respectively presented the historical background and the modern status of the rule. Edmund Morgan's 1949 paper, "The Privilege Against Self-Incrimination," in the *Minnesota Law Review*⁵ gives an excellent brief introduction to the English antecedents of the modern American rule. Erwin Griswold's *Fifth Amendment Today* was written in 1955 to justify the rule *nemo tenetur* in the face of attacks on it for "coddling communists." There are many other published discussions. Dean Levy's admirable bibliography⁶ gives nearly eleven

1. In 1897, after sixteen years on the Massachusetts Supreme Judicial Court, Holmes wrote, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm? I do not stop to refer to the effect which it has had in degrading prisoners and in plunging them further into crime, or to the question whether fine and imprisonment do not fall more heavily on a criminal's wife and children than on himself. I have in mind more far-reaching questions. Does punishment deter? Do we deal with criminals on proper principles? A modern school of . . . inquiries which [has] been started look[s] toward an answer of my questions based on science for the first time. If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of; he cannot be improved, or frightened out of his structural reaction." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 470 (1897).

2. 8 J. Wigmore, *Evidence* ch. 80 (J. McNaughton rev. 1961).

3. M. Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts of England*, in *Essays in History and Political Theory in Honor of Charles Howard McIlwaine* 199 (1936).

4. J. Maguire, *Evidence of Guilt* 4 (1959).

5. 34 Minn. L. Rev. 1 (1949).

6. L. Levy, *Origins of the Fifth Amendment* 520-44 (1968).

pages of secondary sources, and fourteen pages of manuscript and printed primary sources. Perhaps the exhaustive thoroughness of Dean Levy's research, his reportorial detail, the impressive list of material he studied, and his scrupulous care in correcting errors of previous writers,⁷ are the features which best demonstrate his book's outstanding excellence and which will make it a reliable sourcebook of permanent value.

Origins of the Fifth Amendment is far more than the genealogy of a constitutional clause; it is a history of the times from which that clause emerged. The first seven chapters of the book contain brilliant accounts of the religious controversies in England which gave rise to the oath *ex officio*. One learns that there is no new thing under the sun: in 1533 Sir Thomas More, finding heresy "the wurste cryme that canne be" opposed abandonment of the *ex officio* oath procedure because without it "the stretys were lykely to swarme full of heretykes."⁸ Crime in the streets!⁹ Levy's ninth chapter admirably tells the story of "freeborn John Lilburne" whose stubborn, cantankerous hardihood contributed so much to the abolition of the oath.

One author can undertake to tell only part of the history of any time; *ars longa vita brevis*. Dean Levy leaves unasked and unanswered the one cardinal question in the history of his subject during the last five hundred years. What is it that during those centuries has continued to mitigate governmental treatment of those who offend its laws? *Nemo tenetur seipsum prodere* is only one instance among many. *Peine forte et dure* has disappeared; the list of capital offenses is diminishing; where capital punishment remains it is rarely applied; there were no capital executions in the United States in 1968. Torture is no longer tolerated. The involuntary confession is barred in court. This process of gentling our government must have responded to the general will, for we make and amend our constitutional provisions and our criminal statutes as we see fit. The reason for our milder behavior remains obscure, as indeed remain obscure the causes of most of the pervasive changes in popular opinions. Lecky, wise historian of the rise of rationalism in Europe, describes the progress of disbelief in witches, but gives us no reason why, with surprising suddenness, men found this diabolical seizure to be completely incredible. "It declined," he wrote, "under the influence of that great rationalistic movement which, since the seventeenth century has been on all sides encroaching on theology";¹⁰ but why the rationalistic movement? Ultimately the rule *nemo tenetur*, which is part of this mitigating process, must have originated, survived and spread because the people wanted it so

7. See, e.g., *id.* at 244. The author discovered, from search of a manuscript, that Coke did not, as the tradition has long had it, issue another writ of prohibition on the day after his encounter with the infuriated James I about the Prohibitions del Roy. Levy finds none until two months after the day of James' outburst. That, he justly says, was still "soon enough after the scene with the king." *Id.*

8. *Id.* at 65.

9. Those inclined to skepticism about the phenomenal "rise of crime in the streets" or indeed off the streets, might for confirmation of that doubt read R. Cipes, *The Crime War* (1968).

10. 1 W. Lecky, *Rationalism in Europe* 152 (1884).

until it became law in fifty states and in the Constitution of the United States.

But why did the people want it? Has the human race, or at least our part of it grown kinder and gentler? Does an increasingly majoritarian society distrust its own self-government, fear its own hasty severity? Do both of these factors contribute to the mitigating process? The ultimate psychological origins of the Fifth Amendment Dean Levy has not discovered, perhaps because they are undiscoverable. The historic facts are observable, but not their remote human cause. At any rate the fact is that our legislators, both national and state, have thus far maintained the rule *nemo tenetur*.¹¹ One of the most scholarly justices of our Supreme Court, often in his last years thoughtlessly accused of deserting the liberal standard, well phrased the underlying defense of difficult conviction:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.¹²

ARTHUR E. SUTHERLAND*

REVIEW III

Leonard W. Levy's *Origins of the Fifth Amendment* is an interesting, lucidly written but ultimately disappointing genealogy of the privilege¹ against self-incrimination.

His principal thesis seems to be that the privilege's antiquity establishes it as part of basic due process. Here Mr. Levy is dealing with an issue which divided the United States Supreme Court in 1908² but which is of limited importance today. The privilege is now clearly part of due process through the incorporation doctrine,³ and no major current criticism is based on the privilege's lack of antiquity.

Like a good genealogist, Mr. Levy has tried hard to include all the relatives. The result tends to resemble an overlong historical note in a constitutional law

11. Judge Henry J. Friendly, of the United States Court of Appeals for the Second Circuit has recently suggested, in a scholarly and thoughtful article, amendment of the Fifth to permit a trial judge to comment on a defendant's failure to testify. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968).

12. The words are those of Felix Frankfurter; this formula occurs in a seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (concurring opinion), but his words are fully applicable to the prohibition against compelled self-conviction of crime.

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1. Professor Levy believes that the terminology should be "right," not "privilege." Since the distinction seems purely semantic in this context, this review will use the more conventional term, "privilege." L. Levy, *Origins of the Fifth Amendment* vii (1968).

2. *Twining v. New Jersey*, 211 U.S. 78 (1908).

3. See *Malloy v. Hogan*, 378 U.S. 1 (1964).

casebook following *Malloy v. Hogan*.⁴ Many fascinating items are discussed, albeit briefly, but the catalogue is bewilderingly long. In few of the cases does Mr. Levy go beyond the bare bones. If the book were a note in a casebook, the good student would feel he needed to read the full report of most of the cases noted before he could appreciate the nuances essential to full understanding.

Despite Mr. Levy's own libertarian approach, his book does not escape the maxim that historical analysis of individual rights generally supports the conservative point of view. Originally the privilege was invoked as a procedural block to prosecution for heresy and other crimes of belief and expression. Such substantive charges would, of course, be unlawful by contemporary first amendment standards. Moreover, the privilege claimed was only against the oath *ex officio*, which permitted the prosecutor to conduct a fishing expedition with the suspect under oath before specific charges were made.⁵ However, after such charges were made, the defendant was expected to answer. The privilege today is considerably more extensive and applied in all types of criminal cases. Hence its critics can, and do, point to this history to support the position that the privilege has now been extended far beyond the point justified by its original purpose.⁶

The ultimate disappointment in Mr. Levy's book is that, perhaps because he accepts the privilege uncritically, he never faces the real enigma it presents. In recent years the privilege has been given an almost mystical position among the rights of an accused.⁷ Yet often it hinders the trial process in its purpose of accurately ascertaining facts. Furthermore, it is not supported by a clear-cut policy⁸ in the way that privacy and police discipline support the exclusion of unlawfully seized evidence.

4. *Id.*

5. It is interesting to note that the privilege was thus first successfully claimed at the investigative stage. It was not until early in the 18th Century that it was allowed after specific charges had been made. However, the privilege did not extend to preliminary examination not under oath until 1848; cf. *Miranda v. Arizona*, 384 U.S. 436 (1966).

6. E.g., *Griffin v. California*, 380 U.S. 609, 617 (1965) (Stewart, J., dissenting): "Certainly, if any compulsion be detected in the California procedure [comment by the prosecutor and the trial court on the defendant's failure to testify], it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced."

"Those were the lurid realities which lay behind enactment of the Fifth Amendment, a far cry from the subject matter of the case before us." *Id.* at 620 (footnote omitted).

7. The privilege is "enshrined" in the constitution. *Miranda v. Arizona*, 384 U.S. 436, 442 (1966); the privilege "reflects many of our fundamental values and most noble aspirations." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

8. For detailed discussion of the policy or the lack thereof supporting the privilege, see

Actually, the privilege is contrary to the common sense of life outside the courtroom. An honorable man is expected to admit and accept responsibility for his misconduct. The popularity of the Parson Weems legend about George Washington, banal as it is, indicates the prevalence of its moral. Moreover, no rational non-lawyer would investigate a report of misconduct without asking questions and expecting answers from the person who reportedly engaged in the misconduct.

This approach is followed in civil cases. A litigant is expected to admit in his pleadings those allegations of the opposing party about which there is no serious question,⁹ and an opposing party can be called to testify as on cross examination.¹⁰

The privilege, of course, makes the rule drastically different in criminal cases. Here the state is a party and the defendant's freedom is at stake. In part, the resulting procedural differences may rest on a concept of the relationship between the state and the individual.¹¹ Clearly the proponent of the privilege does not view this relationship as one of trust and confidence, or even of fairness. Rather he views the state as an irascible, unstable authoritarian, who is usually unfair, even cruel, and to be thwarted whenever possible.

This concept was heroic with John Lilburne appearing before the Caroline High Commission when charged with shipping seditious books into England. It is something less with a 1969 defendant before an American trial court when charged with murder, robbery or pushing narcotics.

Here historical analysis might provide insight as to why society should hobble the state in similar fashion in each case. Mr. Levy's book, unfortunately, is not much help.

SAMUEL S. WILSON*

The Relevance of International Adjudication. By Milton Katz. Cambridge: Harvard University Press. 1968. Pp. 165. \$4.95.

In this slim and elegant little volume of six lectures, Professor Katz, Director of International Legal Studies at the Harvard Law School, confronts the persisting problem of the limits of judicial settlement with a fresh and critical analysis. It is an analysis which is pervasively informed out of the interaction of his

McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Etre and Miscellaneous Implications*, in *Police Power and Individual Freedom* 223 (C. Sowle ed. 1962); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968).

9. See, e.g., Fed. R. Civ. P. 8(b), 11.

10. See, e.g., Ohio Rev. Code Ann. § 2317.07 (Page Supp. 1968).

11. "The roots of the privilege . . . tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state." In *Re Gault*, 387 U.S. 1, 47 (1967) (footnote omitted).

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distinguished official and academic careers. In his own words: "[i]n the present inquiry we seek to estimate how far adjudication and quasi-adjudication may be relevant to the settlement of the types of disputes that characterize contemporary international life."¹

The discussion is not in terms of the traditional distinction between "justiciable" and "non-justiciable" disputes. Although Professor Katz would appear to accept the distinction, he is not here concerned with filling in its content. He speaks rather of "the optimum conditions that foster a resort to adjudication." Referring also to his identified conditions as factors, he speaks further of moving through a range of possible variations toward the other end of the spectrum to reach the political questions or the non-justiciable disputes.

The approach is built up from an illuminating comparison of the cold war disputes with the American Civil War disputes. Could the constitutional disputes which were in some comparative modern terms international disputes between the Union and the seceding states, have been brought to judicial settlement? How was it that Lincoln was moved to the conviction expressed in his first inaugural address that the people will have ceased to be their own rulers if they were to leave the policy of the government, upon vital questions affecting the whole people, to be irrevocably fixed by decisions of the Supreme Court in ordinary litigation between parties and personal actions.²

The bulk of the book is taken up with the best and sharpest analysis that this reviewer has seen of the judgments in another Dred Scott type case in *South West Africa*,³ the 1966 judgment of the International Court of Justice. In furtherance of his analysis of the relevance of adjudication to such disputes, Professor Katz describes *South West Africa* as a "compound controversy between South Africa and the indigenous inhabitants of the territory of South West Africa, between South Africa and the other African states, and between South Africa and the organized international community as represented first by the Council of the League of Nations and then by the General Assembly and Security Council of the United Nations."⁴ The upshot of the decision, with the transfer of the problem to the General Assembly and its specially designated committees and commissions is sharply observed. He laments the failure of the General Assembly to bring a sense of law into their efforts to dispose of the problem. But, of even greater contribution to his thesis is his assessment of the "might-have-been" if that strangely participating and non-participating, and equally divided, court had gone the other way. The careful examination of the implications of the Jessup or Tanaka dissents, should either of them become determinative of new approaches to judicial or judicially controlled solutions, provides Professor Katz the occasion for a true *tour de horizon* which is also a *tour de force*. He makes the most of it for us. Perceptive bits of comparative law and private law analogy infuse the writing. In particular, the discussion of the posi-

1. M. Katz, *The Relevance of International Adjudication* 104 (1968).

2. *Id.* at 18-20.

3. *South West Africa Cases*, [1966] I.C.J. 4.

4. M. Katz, *supra* note 1, at 143.

tion of the charitable trustee in Anglo-American law is examined for its usefulness in the mandate trusteeship tangle in *South West Africa*.

Nevertheless, a note of melancholy settles upon his final pages with their reflection of what *South West Africa* has done to the role of the International Court of Justice and, unhappily, upon international adjudication or quasi-adjudication generally.

Although Professor Katz' lectures quite properly do not reach the usual "empty courtroom" description of the problem, this reviewer came away from his book with the feeling that he would agree that the present practice of states and of the judicial or quasi-judicial institutions they have created, or could specially create, should reflect a much greater recognition of their obligation to make use of the judicial or third party process. Surely the slowing down in recent decades of the judicial and arbitral contributions to international settlement and thereby, to international law, has made Professor Katz' task of developing his concept of relevance, and in particular, the notion of the outer limits of the judicial process, more frustrating and painful. But throughout, it is a sharp eye and fine hand that Professor Katz has brought to this fresh inquiry into the settlement of international disputes.

ALBERT H. GARRETSON*

How Nations Behave: Law and Foreign Policy. By Louis Henkin. New York: Frederick A. Praeger. 1968. Pp. xii, 324. \$7.50.

This is a significant book of more than temporary interest which seeks to discuss fundamental issues of general importance rather than particular problems arising from isolated and peculiar circumstances. Perhaps it is a result of the threatening and dangerous condition of our foreign relations that some thoughtful writers on international law recently have addressed themselves to basic problems and not to specific rules. Professor Louis Henkin, of Columbia University Law School, has attempted, in this book, to elucidate the eternal problem of the status and significance of international law in the conduct of foreign relations.¹

While theoretical treatises on foreign policy and international relations abound with philosophical discussions on the status, or at least the desired position, of international law, more practically-oriented discussions of international law are not as common. The classical discussion of recent times seems to be the one by Professor Philip C. Jessup published in 1940.² While emphasizing the reality of

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1. Another recent book, though dealing with more limited aspects, likewise is concerned with fundamental issues of International Law. M. Katz, *The Relevance of International Adjudication* (1968) (reviewed in this issue).

2. Jessup, *The Reality of International Law*, 18 *Foreign Affairs* 244 (1940). Professor Jessup is now Judge of the International Court of Justice.

international law, Professor Jessup not only referred to the facts that our Constitution specifically mentions the "law of nations," that international law is part of our law, that there is in existence an International Court of Justice, and that all foreign offices maintain legal staffs, but also discussed instances in the conduct of foreign relations where the parties expressly invoked international law to support their positions.

Professor Henkin presents a comprehensive survey of most of the current issues in foreign relations and seeks to show the relative importance of international law thereto. The book affirms the relevance and existence of international law not only with regard to issues of minor political significance but also regarding matters of fundamental import. The general affirmative tenor of the book seems reflected in a statement by the author that "governments (if not academics) have stopped asking why they are subject to international law."³

In order to appreciate the general theme of the book, it should clearly be appreciated that the book goes well beyond the recognition, rather undisputed by now, that international law is generally observed in matters of minor political significance. Professor Henkin mentions those areas and demonstrates that international law is generally observed in certain traditional areas, *e.g.*, when issues of territory or individual property arise,⁴ or when treaties of friendship concerning commerce, navigation, extradition, or double taxation are involved.⁵ Similarly, no objection can be made to Professor Henkin's emphasis on the fact that international law is constantly developed by "functional" specialized agencies of the United Nations, such as the International Labor Office, or by the International Monetary Fund.⁶ Rather questions can be raised in connection with Professor Henkin's broad contention that international law constitutes an important factor in the conduct of foreign relations even when they involve fundamental issues of major political importance.⁷ Before exemplifying this broad contention, Professor Henkin provides an elaborate analysis of the concepts of international law and politics.⁸ It is his view that the absence of physical force to compel nations to obey the law, does not derogate from the legal character of international law⁹ but rather that law "is observed because it is law and because its violation would have undesirable consequences."¹⁰ International law is observed, in Professor Henkin's view, not because of the fear of sanctions but because a nation, in weighing the expected costs and advantages of its proposed

3. L. Henkin, *How Nations Behave* 85 (1968).

4. *Id.* at 18.

5. *Id.* at 52. The author correctly notes that such observance seems due to the fact that reprisals could be taken easily and breaches of such treaties could immediately deprive the nation of the treaty's benefits—a recognition by the author which may be somewhat more obvious and clearer than the broader views expressed by him in consideration of the large issues.

6. *Id.* at 154-55.

7. See, *e.g.*, *id.* at 45, 84-94, 245, 257.

8. *Id.* at 84-94.

9. *Id.* at 88.

10. *Id.* at 89.

action, has reached the conclusion that there is no "expectation of important countervailing advantage to tempt a nation to violate law."¹¹ In this connection it seems noteworthy that Professor Henkin, quite properly, attaches considerable importance to the historical "law of nature" concept in the general international law observance by the United States.¹² The author also attributes little significance to the existence of the International Court of Justice in his attempt to explain the fact of international law observance. Nations do not seem prepared to submit to the court's jurisdiction; political officials seem to be reluctant to let their interests in a dispute get out of the control of their own diplomacy; flexibility and possible compromise are preferred to the all-or-nothing of a lawsuit; and there seems to be a lack of confidence in "foreign judges" and a fear that the court might extend its authority.¹³

The breadth of Professor Henkin's belief that international law plays an important role in the conduct of foreign relations can best be understood by examining specific issues of significant history which he discusses for the purpose of illustrating his thesis. The book is outstanding in its most careful and wide coverage of the details of diplomatic history. Professor Henkin lists large, general issues of foreign relations (the nuclear issue, the emergence of many new nations, the cold war, and the existence of the United Nations). He reaches the conclusion that "despite major political convolutions, international law did not go under or suffer major deterioration or transformation . . ."¹⁴ and that "international law has survived because it is still primitive, because it is not a complete network of developed norms governing all relations among all nations."¹⁵ The general indefiniteness of international law is recognized by the author when he states that some changes "begin as noncompliance, which is then widely practiced or accepted. Some noncompliance may be a purposeful invitation to others to join to make, unmake, or remake a norm."¹⁶

Perhaps the most drastic, and also most questionable, portion of the book is where Professor Henkin discusses specific recent instances of great political significance and seeks to show that international law played a substantial role. In a chapter entitled: "The Law Works: Suez (I)" the author attempts to show that it was the idea of "international law" which helped deter, or at least delay, the British at the time of the nationalization of the Suez Canal in 1956 from taking "important measures in the face of powerful pressures and with major interests at stake."¹⁷ Similarly, in his chapter entitled "The Law Fails but Is

11. *Id.* at 46.

12. *Id.* at 58.

13. *Id.* at 174-75.

14. *Id.* at 96.

15. *Id.* at 107.

16. *Id.* at 123. An extreme example showing the author's attitude of too readily finding and affirming international law in every situation, seems to be his statement: "Even the hostile reaction following the decision of the International Court of Justice in the South West Africa case does not represent any rejection of traditional law." *Id.* at 117.

17. *Id.* at 186. In this connection Professor Henkin claims that the international law requiring compensation for nationalization influenced Nasser in his actions in 1956. *Id.* at

Vindicated: Suez (II),¹⁸ Professor Henkin again contends that law played a significant role. While the author recognizes the highly political reasons motivating the great powers, he still concludes that, in their condemnation of the actions of Great Britain and France in 1956, the members of the United Nations were motivated by a desire to uphold law, and that maintenance of international law may have been a reason for the Soviet actions in that case.¹⁹ The attempt to find international law as a basis for the actions of the great powers seems equally tenuous in the author's chapter entitled "The Law's Other Influences: The Cuban Quarantine."²⁰ Here, the author provides a most instructive and thoughtful discussion of the diplomatic events and world policy involved and, in a most illuminating manner, describes the dangers of all-out military action. Still, Professor Henkin expresses the view that it was *international law* which influenced the policies of the United States, that legal considerations were significant matters, and that it was lawyers within the United States government who carried the day for imposing a quarantine rather than taking other action.²¹ Finally, in his chapter entitled: "The Law Fails: The Case of Adolf Eichmann,"²² the author advances startling propositions in support of his thesis affirming the significance of international law. After finding that Israel committed an international tort in abducting Eichmann from Argentina and that Israel's jurisdiction to try Eichmann was doubtful, Professor Henkin first opines that the question of jurisdiction can be answered by Israel's enactment of legislation in 1950 to punish Nazi war criminals, and then reaches the strange conclusion that the fact that Argentina "reacted moderately and soberly, that the case gained the attention of the world, and that the Security Council acted to reaffirm the law may make further violations of this character less likely and enhance the influence of the United Nations in support of law generally."²³

189. This seems doubtful. Justice Harlan's view in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428-30 (1964), questioning whether there exists any international law in this regard, is, perhaps, more straightforward.

18. L. Henkin, *supra* note 3, at 195-204.

19. *Id.* at 203-04.

20. *Id.* at 216-42.

21. *Id.* at 217, 223, 226. It should be noted that in this connection Professor Henkin states that international law is observed primarily for political reasons. This is a statement which perhaps casts doubt on the general theory of the author affirming the significance of international law in the conduct of great issues of foreign policy.

22. *Id.* at 206-15.

23. *Id.* at 215. True, after the precedent of the Nuremberg international trial and the resulting development of international criminal law punishing individuals it may perhaps be justified to emphasize international law concepts in that field more strongly than in the other grave areas of foreign relations discussed in the book. See text accompanying notes 17-21 *supra*. Probably the well-founded doubts of Professor Henkin as to the jurisdiction of Israel to try Eichmann can be more appropriately dispelled by finding, in the subsequent world reaction to the Eichmann trial, international recognition that, as in the case of "piracy," there has now come into existence a "universality" principle of jurisdiction to try war crimes. See Restatement (Second) of the Foreign Relations Law of the United States § 34, reporters' note 2, at 97 (1965).

As stated at the outset, this is an outstanding book of general importance. Nevertheless, this reviewer has certain reservations. These reservations do not spring from the contents of the author's explanations and discussions. They spring, rather, from this reviewer's doubt whether the author's broad understanding of the concept of international law in the great matters of foreign policy may not excessively dilute that concept to the point where the concept of international law becomes vague, meaningless and almost identical with the concept of foreign policy. As applied to basic matters of foreign policy, does the thesis advocated by the author reduce itself to an issue of definition? Is an advantage gained in the development of international law by utilizing, in the great matters of foreign policy, such broad discussions of law observance and law violation? While the author convincingly suggest that in matters of more traditional international law the fear of reprisals constitutes a valid reason for the existence of international law,²⁴ does not an explanation that law is "observed because it is law and because its violation would have undesirable consequences"²⁵ or that it is violated because there is no "expectation of important countervailing advantage to tempt a nation to violate law,"²⁶ serve to reduce the concept of law to that of international policy? The thought-provoking observation of the author in the concluding portion of his book may be symptomatic: "The fate of the more political norms and agreements will be shaped, if not determined, by the extent to which the principal political forces of our time emphasize the advantages of law observance, by the general state of international order and the climate of interstate relations, by the example of influential nations, and by their stand toward the violations of others."²⁷ Does what the author calls "law" in this respect occupy a significant portion of foreign relations in matters of great political significance? Is it realistic to separate such matters from other issues of political consideration?

However, this is a truly important book requiring the reader to rethink fundamental issues. It deserves thorough consideration.

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The Limits of the Criminal Sanction. By Herbert L. Packer. Stanford: Stanford University Press, 1968. Pp. xii, 385. \$8.95.

Herbert L. Packer, Professor of Law at Stanford University, has written one of the most readable and best reasoned works in the field of the criminal sanction. Although addressed to the common reader, Packer's book also merits the attention of specialists.

As the history of law shows, criminal law reform is a perennial and endless

24. See note 5 *supra*.

25. L. Henkin, *supra* note 3, at 89.

26. *Id.* at 46.

27. *Id.* at 245.

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process. Today, however, there is a special urgency to the problem in the United States. On the one hand, sharp attacks have been leveled for many years by some philosophers, criminologists and liberals against both the justification for, and the effectiveness of, criminal punishment. On the other hand, there is a strong popular demand throughout the nation for "Law and Order." This demand, translated into its simplest terms, is a cry for more and more criminal punishment.

Packer is concerned with both the theoretical foundations and the practical uses of criminal sanctions. He has divided his work into three parts: "Rationale," "Process" and "Limits." In Part I he treats the meaning and justification of punishment, and discusses the correlative problems of culpability and conduct, culpability and excuses, proof and proportionality. In Part II, Packer deals with the processes involved in the imposition of criminal sanctions. He divides these processes into three stages: from arrest to charge, from charge to guilt determination, and the review of errors. In Part III, which I found the most interesting section of the book, Packer sets out an approach to the problem of the limits of the criminal sanction, examines the relationship of law and morals and the concept of profit and loss for the light they can throw on these limits, and then applies his criteria for criminal sanctions to sexual offenses, the control of narcotics, and such crimes as abortion, drunkenness and gambling.

Although there are points of detail on which I would differ with Packer, I agree wholeheartedly with his general conclusion, entitled "Means and Ends." As Packer emphasizes, both the national reliance and the academic attack on the criminal sanction are largely misconceived. We shall never make real progress in criminal law reform until there is general acceptance of Packer's basic thesis: all uses of the criminal sanction are not equal. There must be constant study of the interaction of means and ends in both the substance and the processes of the criminal law. Above all, means must be kept subservient to ends. Any attempt to make the streets safe merely by spending more money on enforcement of our existing laws is doomed to failure from the start.

Although all of "Means and Ends" is worth quoting, there are two paragraphs that specially illustrate the excellence of Packer's style and the soundness of his basic approach:

The criminal sanction is the best available device we have for dealing with gross and immediate harms and threats of harm. It becomes less useful as the harms become less gross and immediate. It becomes largely inefficacious when it is used to enforce morality rather than to deal with conduct that is generally seen as harmful. Efficacy aside, the less threatening the conduct with which it is called upon to deal, the greater the social costs that enforcement incurs. We alienate people from the society in which they live. We drive enforcement authorities to more extreme measures of intrusion and coercion. We taint the quality of life for free men.¹

....

The criminal sanction is at once prime guarantor and prime threatener of human

1. H. Packer, *The Limits of the Criminal Sanction* 365 (1968).

freedom. Used providently and humanely it is guarantor; used indiscriminately and coercively, it is threatener. The tensions that inhere in the criminal sanction can never be wholly resolved in favor of guaranty and against threat. But we can begin to try.²

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2. *Id.* at 366.

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