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## Book Reviews

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## BOOKS REVIEWED

*Law Without Sanctions: Order in Primitive Societies and the World Community.* By Michael Barkun. New Haven: Yale University Press. 1968. Pp. vii, 179. \$6.50.

Few jurisprudential writers have had such an enduring influence on Anglo-American law as the nineteenth century British analytical theorist, John Austin.<sup>1</sup> What has come to be known as the "command of the sovereign" theory was described by Austin as follows: "Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies . . . . To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied."<sup>2</sup> Essential to the existence of a legal system in the analytical estimation is the availability of a sanction which can be employed by the sovereign in the event of a failure to obey a command.<sup>3</sup>

Michael Barkun, a political scientist at Syracuse University, contends, as have many others, that the Austinian concept is an inadequate explanation of law as a social phenomenon.<sup>4</sup> "The command theory of law gives evidence of default on two counts. First, it asks a limited and unfruitful series of questions that leads to an understanding of a circumscribed set of sanctions, at the expense of other features of the legal system. Second, it systematically excludes much in man's experience that has borne the name of law."<sup>5</sup> In particular, Professor Barkun submits two major manifestations of legal order for which the Austinians cannot provide an adequate explanation: the interrelationship of primitive tribes,<sup>6</sup> and international law.<sup>7</sup>

*Law Without Sanctions* is a scholarly, sometimes tedious, examination of the presence of an identifiable system of public order in primitive societies and the analogous characteristics reflected in the contemporary international community. The implication is that from a study of the former we will be better prepared to understand and cope with conflicts which arise in the latter. This is another in the rapidly growing body of works advocating cross-disciplinary study of law.

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1. See generally Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 *Vand. L. Rev.* 117 (1960).

2. J. Austin, *The Province of Jurisprudence Determined* 11 (Humanistic Press 1965).

3. "The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty, be broken, is frequently called a sanction, or an enforcement of obedience. Or (varying the phrase) the command or the duty is said to be sanctioned or enforced by the chance of incurring the evil." *Id.* at 15.

4. As is frequently the case in jurisprudential controversies, the disputants are not so much disagreeing as talking about different things.

5. M. Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community* 11 (1968) [hereinafter cited as Barkun].

6. Referred to anthropologically as a "segmentary lineage system."

7. Austin categorically denied that international law could come within his definition. J. Austin, *supra* note 2, at 201.

In the words of the author, "Law has for too long been anchored in common sense."<sup>8</sup> When the analytical blinders of traditional legal scholarship prove inadequate to provide answers for modern problems, then it is time "to revise the theory, not to doubt our vision."<sup>9</sup>

It is a difficult book, more difficult than it need be. The writing meanders within vaguely designated chapter headings, the language at times seems unnecessarily abstruse, the interrelation of the chapters is often unclear. Even with several readings, the reader frequently is in considerable doubt as to precisely where he is in the author's chain of thought. Yet patiently perused, the work does provide many interesting and thought-provoking ideas.

At the outset Professor Barkun, with acknowledged reliance on the work of Richard A. Falk,<sup>10</sup> distinguishes between "vertical" and "horizontal" legal systems.

A vertical legal system consists of a hierarchy of norms that is paralleled by a hierarchy of institutions that has the wherewithal to compel obedience to its commands. The horizontal legal system is a world apart; its participants are at least formally equal, rather than the occupants of a carefully scaled hierarchy. The implementation of its rules cannot very well depend solely upon force (it is nowhere sufficiently concentrated so that force can be effectively and invariably applied); instead, self-help and self-restraint take the place of the sovereign. Both systems, of course, are pure types, but more or less approximated in the real world.<sup>11</sup>

Vertical legal systems are amenable to Austinian analysis. Horizontal legal systems are not, and it is to this type of legal order that the author primarily directs his attention. Relying on studies by a number of cultural anthropologists, Professor Barkun outlines the intricate legal relationships which permeate a society of primitive tribes, notwithstanding the absence of an overriding sovereign authority with effective sanctioning power. Thereafter, an analogous relationship is described in the interaction of states in the international community.<sup>12</sup>

Following an explanation of the manner in which controversies arise in horizontal legal systems, the author turns to what he designates as "The Social Bases of Law."<sup>13</sup> The discussion follows the conventional argument of the sociological jurists, the significant point for present purposes being that norms of behavior arise out of society before they become a matter of legal duty, rather than the converse—that social patterns are imposed on society

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8. Barkun at 166.

9. *Id.* at 10.

10. See Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 *Temp. L.Q.* 295 (1959); Falk, *The Reality of International Law*, 14 *World Pol.* 353 (1962).

11. Barkun at 16.

12. "Segmentary lineage systems and international relations . . . are stateless societies whose major structural characteristics are substantially the same. Both consist of components that interact in regular ways, but there is no centralization of power that might produce a functioning hierarchy of command." *Id.* at 34.

13. *Id.* at 59-74.

by the sovereign authority. The presence of such a "living law"<sup>14</sup> is particularly relevant to a horizontal legal system in which an institutionalized sanctioning procedure is not available. The author acknowledges that any attempt to study diverse cultures runs the risk of misinterpretation because of the conscious and unconscious preconceptions—the "perceptual categories"—of the observer.<sup>15</sup> "[W]e shall see that law lies as it were, in the eye of the beholder."<sup>16</sup>

The significance of such differences in perception becomes apparent in the final chapters of the book concerned with what the author designates as "Mediation," the procedure by which conflicts arising in a legal order are resolved. "Mediation" may be explicit, in which instance a third party, perhaps a judge, invokes a designated system of values on the disputants. Or it may be implicit, in which instance the disputants endeavor to settle their disagreement themselves. The success of such efforts will depend largely on the extent to which they share common values or "perceptual categories." Professor Barkun provides this example of the latter process:

After evaluating the role of China in the Vietnam war, the United States had moved upon the premise that the bombing of the northern capital would be interpreted merely as part of the perceptual complex called "the Vietnam conflict," not as a component of a larger conflict directed at China itself. This conclusion was based upon the supposition that Americans and Chinese, in organizing the world that is external to themselves, did this in like manner.<sup>17</sup>

Having begun with a rejection of the Austinian concept of law, Professor Barkun concludes with an enumeration of "legal universals" which he contends will be found in all societies both vertical and horizontal. Law, we are told, is a set of interrelated symbols, all of which have some empirical referents. These symbols may be manipulated and can be arranged in propositional form. "Law as a symbol system is a means of conceptualizing and managing the social environment."<sup>18</sup> The legal process involves (1) "the correlation of fact-situations and normative outcomes"<sup>19</sup> and (2) "the transformation of dyadic interactions into triadic interactions"<sup>20</sup> *i.e.*, the employment of explicit mediation.

For those trained in the law, the subject matter, the method of analysis, and the language may seem somewhat alien. If the study of law need escape its anchorage in common sense those advocating reform might make the transition a little less harsh. Apparently this is Professor Barkun's first book,<sup>21</sup> and if it

14. Cf. E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936).

15. Cf. C. Kluckhohn, *The Philosophy of the Navaho Indians*, in *Ideological Differences and World Order* 356 (F. Northrop ed. 1949); F. Northrop, *Man, Nature and God* 30-49 (1962).

16. Barkun at 79.

17. *Id.* at 98-99.

18. *Id.* at 151.

19. *Id.*

20. *Id.*

21. For a related article, see Barkun, *Bringing the Insights of Behavioral Science to International Rules*, 18 *W. Res. L. Rev.* 1639 (1967).

is not entirely successful, it does afford significant new ideas to the study of law in general and international law in particular. It may be anticipated that in the future the author will expand upon these notions with greater clarity.

JOSEPH G. COOK\*

**The Warren Court.** By Archibald Cox. Cambridge: Harvard University Press. 1968. Pp. vi, 144. \$4.95.

*Can there be an intellectually satisfying way in which Supreme Court decisions interpreting the living Constitution can be analyzed?*—Arthur Selwyn Miller<sup>1</sup>

Professor Cox's book, an expanded collection of a series of lectures delivered in the summer of 1967 to an audience of "laymen and lawyers,"<sup>2</sup> is an interesting and useful compendium of what seems to be the dominant attitude among today's lawyers toward both the product and the performance of the Warren Court. The material covered by the author is not a neglected area and his significant premises and conclusions are neither original nor startling. There would clearly be substantial agreement among the legal profession with Professor Cox's views that: (1) the Warren Court, motivated by a desire to reform social and political ills, has spearheaded a revolution in constitutional doctrine; (2) there are occasions when the Court should play an active role in reforming such ills, even at the price of changing constitutional law; (3) any reformist Court is necessarily confronted with the horns of a dilemma: how to work a change in legal doctrine and yet retain a wide respect for the rule of law. Professor Cox wastes no time elaborating these and equally familiar premises. The central concern in his book is the theme of most significance to lawyers as a professional group: how well has the Warren Court functioned as an instrument of social reform? Again his basic conclusion is familiar and widely held: granted that many of the Court's recent reforms are essential, good, humane and long over-due, granted that few would wish to return to the days of compulsory racial segregation, legislative malapportionment and unrestrained law enforcement, nevertheless the Warren Court has unnecessarily and all too frequently acted not as a court required by fundamental precept to decide "according to a continuity of principle found in the words of the Constitution, judicial precedents, traditional understanding and like sources of law."<sup>3</sup> Rather the Court has all too often acted as a Council of Wise Men, basing its decisions as much on

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1. Miller, Notes on the Concept of the "Living" Constitution, 31 Geo. Wash. L. Rev. 881, 911 (1963).

2. Cox, Preface to A. Cox, *The Warren Court at v* (1968). These lectures in turn appear to be an elaboration of themes which Professor Cox developed in a recent article. See Cox, Forward to *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 91 (1966).

3. A. Cox, *The Warren Court* 21 (1968).

intuition as on the reasoned application of legal rules. In short, this is another in the long series of similar indictments brought against the Warren Court: its decisions are "unprincipled" and the results which the court decrees are not based upon recognized authority. To the obvious objection which laymen in the audience might raise to this observation ("so what?"), Professor Cox hastens to state another article from the lawyers' creed: in order to command respect for its decisions the Court must manifest an ability "to rationalize a constitutional judgment in terms of principles referable to accepted sources of law."<sup>4</sup> To the extent, then, that the Court fails to persuade lawyers and laymen that its decisions are based on enduring principles, the Court dissipates its power both as an institution and as an effective social reformer. Judged by this test the Warren Court grades low.

It would be a disservice to Professor Cox not to emphasize that his evaluation of the Warren Court's professional performance is in many ways unlike run-of-the-mill critiques of the Court which have reached similar conclusions. He is not out to disparage the Court for some ulterior purpose—if the Court has ever gored any of his pet oxen, he successfully hides the fact. Nor is he one to cripple the Court or weaken its influence in the nation. Unlike many critics, he approves of the significant reforms, finds them moderate and "in keeping with the true genius of our institutions."<sup>5</sup> He is sensitive to all the difficulties which the Court faces daily: the questions for decision are complex, counsel may present them inadequately, time is short and so on. The book is remarkably free of anything carping or petty. He is willing to concede that his faith in the value of opinions based on sound legal reasoning may be misplaced or excessively purist, much like the attitude Arnold Palmer might have toward a competitor who never missed a putt though he executed these shots with his club gripped in his teeth. All of which, coupled with the impressive lawyer-like skills reflected on every page, makes this book a particularly devastating documentation of the familiar charge that the Warren Court has been, to put it mildly, unprofessional. Random examples demonstrate this: regarding the state action problem in the sit-in cases, "no rationale was offered . . . which was not entirely open-ended";<sup>6</sup> in *Reitman v. Mulkey*, "the opinion fails to probe the true issues behind the doctrine of State action . . . the opinion is inscrutable . . .";<sup>7</sup> the prevailing opinion in *Time, Inc. v. Hill* failed to address itself "to the consequences of its enthusiasm for protecting the press against the individuals whom it injures";<sup>8</sup> as for Justice Black (for the Court) and Justice Douglas (dissenting) in *Adderly v. Florida*, "[o]ne wonders whether either opinion gets to the root of the issue";<sup>9</sup> and apropos *Harper v. Virginia Board of Elections*, the Court's opinion

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4. *Id.*

5. *Id.* at 134.

6. *Id.* at 39.

7. *Id.* at 46.

8. *Id.* at 101.

9. *Id.* at 111.

"seems almost perversely to repudiate every conventional guide to legal judgment."<sup>10</sup>

To repeat, it is likely that a majority of lawyers and laymen would agree with Professor Cox's findings, and he makes a persuasive argument. How then explain or justify one's dissatisfaction with the latest verdict in the continuing trial of the Warren Court? Initially, it should be noted that the trial started more than ten years ago,<sup>11</sup> and surely by now all the evidence necessary to support the charge of unprincipled, unreasoned opinions is in. Might we not, then, begin to spend our time on other matters relating to the Court? For example, how did the notion ever get about that the Court ever issued opinions based on tightly reasoned, logical applications of continuing constitutional principles? What are the criteria for identifying such opinions? Who can name one? Some of us in the hinterlands, cut off by communication and transportation problems from easy access to the sources of current opinion, still accept as dogma views about the nature of opinion writing which, for all we know, might long ago have been exploded. Yet there are enclaves where it is held even today that Marshall mastered the bootstrap argument and then called it quits, that Holmes would neither state nor rely on an enduring principle of constitutional law even if he could be forced to admit one existed, where no one any longer even tries to penetrate the murkiness of the Brandeis opinion in *Erie Railroad Co. v. Tompkins*,<sup>12</sup> and where even laymen giggle nervously when first exposed to the Cardozo—Frankfurter Due Process clause jargon: "ordered liberty," "shock the conscience," "civilized decencies" and all that. Perhaps some of us are uncertain about the value of piling up example after example of the Warren Court's inability or unwillingness to write competent opinions partly because the Justices blithely ignore all the complaints and partly because we have misunderstood Holmes' ancient dictum: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."<sup>13</sup> But if that does not paraphrase as Lawyers' Logic—Icing On The Cake, then what does it mean?

Professor Hart once made a convincing case that the Justices do not always consider or even listen to each other's views.<sup>14</sup> This is so deplorable and inexcusable it needs no comment. He also spoke of the need for opinions to be grounded in reason and for the Court to be "a voice of reason, charged with the creative function . . . of articulating and developing impersonal and durable principles . . ." <sup>15</sup> He suggested the Court might so function if its case load were reduced, but even if the Court considered but one case a term, there is no guarantee of improvement in quality. Professor Wechsler has tendered examples of "prin-

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10. Id. at 125.

11. If one dates it from the "opinions that do not opine" views expressed in Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 3 (1957).

12. 304 U.S. 64 (1938).

13. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting opinion).

14. Hart, *Forward to The Supreme Court*, 1958 Term, 73 Harv. L. Rev. 84, 123 (1959).

15. Id. at 99.

principled" analysis:<sup>16</sup> e.g., Holmes for the Court in *Pennsylvania Coal Co. v. Mahon*<sup>17</sup> and dissenting in *Abrams v. United States*<sup>18</sup> and *Gillow v. New York*.<sup>19</sup> The key statement of principle in *Pennsylvania Coal Co.* is, "[t]he general rule at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>20</sup> The rule parodies itself and deserves to be remembered only as an early example of what is now called Black Humor. As for the famous dissents, there is not even a pretense of articulating clearly anything remotely resembling a rational principle, unless it is that twenty years imprisonment for multi-lingual petty political agitation should be "recognized" as a bit much.

Not to put too fine a point upon it, there are some of us who remain unreconstructed. Many of this small band confess to having been corrupted by Arthur Selwyn Miller.<sup>21</sup> We more or less share these minority beliefs:

1. Warren Court opinions parse as well as any other opinions from 1803 onward.
2. Chief Justice Warren's opinion in the first school segregation case<sup>22</sup> is a model of what a significant reformist opinion should be.
3. The "principled" opinion philosophy was invented to serve two purposes: to inhibit the Court from acting as an activist Court and to flog it after the fact.
4. The current Justices are entirely capable of playing the logic-chopping, precedent-comparing game. The interesting question is, why don't they? The tentative answer is that the Court necessarily functions in ways fully as inscrutable as the Congress and the President.
5. We all agree with the statement, "the major influence in judicial decisions is not fiat but principles which bind the judges as well as the litigants and which apply consistently among all men today, and also yesterday and tomorrow. I cannot prove these points, but they are the faith to which we lawyers are dedicated."<sup>23</sup> All lawyers believe this and many other things, some silly. But our small group does not take our faith very seriously nor even pretend to live by it for more than an hour or two on Sunday morning.

Meanwhile, until the millennium arrives, when someone from the Wechsler—Hart—Bickel school has the decency to set forth the criteria for a Model Activist Judicial Opinion, or when the Justices are transformed into competent opinion writers when tested by the rigorous standards of all segments of the American legal profession, let us consider, using one of the Warren Court's most popular, unprincipled, open-ended guides, "more reasonable alternatives" for restoring to the Court some measure of its lost power and prestige so that the Court may continue to reform us as needed.

ALBERT M. WITTE\*

16. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 24-25 (1959).

17. 260 U.S. 393 (1922).

18. 250 U.S. 616, 624 (1919).

19. 268 U.S. 652, 672 (1925).

20. 260 U.S. at 415.

21. See Miller, *supra* note 1.

22. *Brown v. Board of Education*, 347 U.S. 483 (1954).

23. A. Cox, *supra* note 3, at 21-22.

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**Formation of Contracts: A Study of the Common Core of Legal Systems** (Vols. 1 & 2). Edited by Rudolph B. Schlesinger. Dobbs Ferry: Oceana Publications, Inc. 1968. Pp. xv, 1727. \$35.00.

Assemble nine outstanding scholars in the field of comparative law from a variety of countries,<sup>1</sup> give them the occasional assistance of other leading scholars, put them to work for ten years on the relatively narrow topic of offer and acceptance<sup>2</sup> in the law of contracts and one would have every right to expect a highly thorough, innovative, and useful work product. The expectations of this consumer of the product were amply fulfilled.

Comparative legal research offers awesome difficulties, both as to the manner of research and of reporting the fruits of that research. To illustrate, the relatively simple question has been asked: Do civil law systems recognize the privilege against self-incrimination? It has received relatively simple answers. Judge Holtzoff has answered it with a resounding "no," attacking the civil law as oppressive and tyrannical on this score.<sup>3</sup> On the other hand, at the International Congress of Criminal Law held in 1933, the United States' system of criminal proceedings was denounced as tyrannical by civil lawyers on the ground that the accused's interest in not incriminating himself was unduly hampered by the requirement that he testify, if at all, under oath.<sup>4</sup> This interest is better protected in civilian systems, the argument runs, because the accused can freely lie with impunity. The comparative lawyer realizes that both these views are superficial and in order to come to meaningful analysis he must know much more about subsidiary rules, practices<sup>5</sup> and judicial attitudes in the countries whose rules are being compared. More important, he will realize that the initial question was improperly posed. The question presupposes that there can be a meaningful research into a comparison of concepts; but the comparativist soon learns that the only fruitful path is first to identify the totality of legal concepts and rules affecting a life situation. Once this is done a comparison of rules and concepts begins to be possible.

The methodology employed by the authors involves a novel approach. The facts of reported decisions were distributed to the team members, each of

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1. A listing of the countries is not possible, since the majority of the authors have strong ties with more than one country. Listing them from the point of view of the country in which they hold their primary teaching positions, the following countries are represented: The United States by Rudolph B. Schlesinger (general editor and co-author), Ian R. Macneil, and W. J. Wagner; France by Pierre G. Bonassies; The British Commonwealth by Johannes Leyser; Germany by Werner Lorenz; Switzerland by Karl H. Neumayer; India by Ishwar Chandra Saxena; Italy by Gino Gorla. In addition to the countries listed, the study takes in account the law of Austria and South Africa as well as Poland and other Communist legal systems.

2. The title, "Formation of Contracts" is perhaps somewhat misleading. Questions of contract formation other than offer and acceptance are not treated except tangentially.

3. Holtzoff, Book Review, 20 Geo. Wash. L. Rev. 250 (1951).

4. See Pekelis, *Legal Techniques and Political Ideologies: A Comparative Study*, 41 Mich. L. Rev. 665, 679 (1943). See also R. Schlesinger, *Comparative Law—Cases—Texts—Materials* 14-17 (2d ed. 1959).

5. E.g., What is the practice in the United States regarding indictments for perjury committed by a defendant while testifying in his own behalf?

whom prepared working papers on the probable approach to, and outcome of, these cases in the legal system upon which he was reporting. Out of the working paper came individual reports on the state of the law on the issue in one legal system. The author of the report was then subjected to vigorous oral examination conducted by the entire research team as to whether he had accurately dealt with the issue from all possible aspects. Subsequently, a general report synthesizing the law in all the jurisdictions under consideration was prepared by an assigned reporter and revised under the impact of further group discussions. After this, the individual reports were rewritten to reflect the structure of the general reports. This is indeed rigorous discipline, but, as the editor points out, the oral discussions produced the somewhat startling revelation that it is well nigh impossible for one scholar armed with individual reports from all participants to prepare an accurate synthesis. This revelation casts doubt upon the value of a vast amount of comparative literature.<sup>6</sup>

My major quibbles with the two volumes relate to organization. The general reports appear first in Volume I from pages 75-182. This is followed on pages 185-323 by introduction to the individual reports, selected statutes and bibliography. The bulk of the material (pages 325-1693) consists of the individual reports.<sup>7</sup> The publication is organized around classifications usually found in Anglo-American literature on the law of contracts; e.g., "Offers Calling for a Promise and Offers Calling for an Act" and "When Acceptance Becomes Effective."

My first quibble has to do with the choice of compartments. Perhaps a book in English should be organized around traditional common law pigeon-holes, but I am not convinced this should wholly be so. First of all, this study is aimed at an international audience. The younger generation of European scholars by and large have a good mastery of English, but not of common law concepts. They have a hunger for literature about common law systems written from the perspective of their own systems.

Second, and more important, there are certain concepts which pervade the law of offer and acceptance in many civil law countries which deserve separate treatment. For example, in many civil law countries under the doctrine of *culpa in contrahendo* an offeror may have the power to revoke an offer, thus preventing the formation of a contract, but he may be subjected to tort liability for the exercise of this power. Conceptually, the doctrine may have nothing to do with the formation of contracts, but in an offer and acceptance situation the doctrine may be of crucial importance in affecting the behavior of the parties. It is occasionally and sporadically mentioned in the reports,<sup>8</sup> but there is no unifying discussion as to when the doctrine is available and whether it is available under differing circumstances in the various countries accepting it.<sup>9</sup>

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6. One might wonder if similar results would have been obtained if leading writers in purely domestic fields such as Corbin, Wigmore and Williston had undergone such thorough cross-examination by a panel of able scholars as to each section of their treatises.

7. In some instances, brief annotations were compiled instead of full-fledged reports.

8. See index under *Culpa in Contrahendo*, 2 R. Schlesinger, *Formation of Contracts* (1968) [hereinafter cited as Schlesinger].

9. There are American solutions to some of the problems solved in civil law countries

Another omission is the lack of reports on the objective and subjective aspects of mutual manifestation of assent. True, the individual reports often make reference to the problem in particular contexts. The French reports are particularly intriguing in this respect. We are frequently told in the French reports that the Code Napoleon is based on a subjective theory of contract requiring actual consent, and that this theory, not without some opposition, continues to dominate court decisions. Thus, for example, Professor Bonassies, the French reporter, indicates that a French court would hold that an offeror may revoke an offer without any attempt to communicate the revocation to the offeree, provided only that he produces some objective evidence that this was his intent prior to the perfection of an acceptance.<sup>10</sup> This is subjectivism pressed to its nearly logical extreme. On the other hand, we are informed that in France an offeree's "duty to speak" is somewhat broader than in common law systems.<sup>11</sup> Thus in a variety of circumstances an offeree will be held to an acceptance by silence no matter what his actual intent may be. The reporter recognizes and discusses the difficulty of squaring such a burden placed upon the offeree with the requirement of actual consent, but a separate unifying discussion of subjective and objective aspects of assent would have been most helpful. Without such a unifying discussion a reader cannot comprehend, unless he refers to scholarship extrinsic to these volumes, the rationale, practical application and consequences of the following statement about German and Swiss law:

If a written communication is worded so that it may be understood in good faith to be an offer, and when in fact it is understood to be one and accepted as such, a contract will be effected. If in such a case the communication was not meant to be an offer, the author may invalidate the contract on the grounds of lack of consent.<sup>12</sup>

A quibble of a second kind has to do with the placement and content of the general reports. As indicated above, the general reports are grouped together soon after the introduction. Statements in the individual reports to the effect that "French law is in general accord with the statements in the general report," caused this reviewer to spend considerable time thumbing through the first volume to find the general report in question. It would have made the reader's task somewhat easier if each general report had been immediately followed by the related individual report. As indicated above, the general reports consist of about one-seventeenth of the total number of pages. In essence they are black letter statements of the law coupled with statements introductory to the individual reports. Could they have been fully integrated syntheses of the individual reports in the manner of a chapter of a treatise? Would this have had more value? I rather think so. On the other hand I realize that perhaps another five years might have been required to accomplish this goal.

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by this doctrine. See Kessler and Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *Harv. L. Rev.* 401 (1964).

10. 1 Schlesinger at 854. But the offeror may be liable for damages for exercising his power of revocation. 1 *id.* at 852.

11. 2 *id.* at 1124-51. Indeed, it was formerly the rule that a merchant was always under a "duty" to reply to an offer.

12. 1 *id.* at 368.

Thus far this review has focused critically upon what the authors of these two volumes have not done. A book review could almost infinitely expand upon what the work under review has not done. Lest there be a grotesque misunderstanding, I will state emphatically and, I think, without overstatement that this is one of the most important law books published in America in recent decades. The editor's introduction is in good part devoted to the purposes which he and his co-authors had in mind in preparing this study. These purposes were multiple, but he focuses primarily on certain immediate and practical functions of such a study in the context of international and trans-national law. International law frequently makes reference to the "general principles of law recognized by civilized nations." Such references are found in Article 38(1)(c) of the statute of the International Court of Justice, in the charters and contracts of various international organizations, international arbitration agreements and other international and trans-national agreements. Where are such principles to be found if there is no text which extracts such principles from the positive law of the civilized nations? The authors thus hope in part to fill this void in the literature and to forge a method which others may adopt to discover further principles. If this were the primary worth of the study it could be applauded as a useful tool for international practitioners. I, however, do not view the primary utility and importance of these volumes in these terms. Rather, I suspect that both the content and methodology of these volumes will have far more ramifications in domestic than international matters.

Soon after independence was achieved from England, the courts and legislatures of the United States began to make significant departures from the common law and in many respects developed a law of contracts that was more responsive to commercial and non-commercial needs than the law inherited from the mother country. No less an authority than Mr. Justice Story, himself the author of many of these changes, ascribed this development of American law not to the particular genius of Americans, but to the openness of American lawyers, courts and legislatures to influences from the civil law of Europe.<sup>13</sup> This influence has declined since Story's day but still remains viable both in scholarly literature<sup>14</sup> and court decisions<sup>15</sup> and the comparative lawyer can see provisions throughout the Uniform Commercial Code which were almost

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13. Justice Story in 1834 wrote a summary of American law for a German publication. Its recent publication in America is due to the efforts of Kurt H. Nadelmann. Story wrote as follows:

"The Law of Bailments, of Agency, of Partnership, of Insurance, of Bottomry, of Promissory Notes, of Bills of Exchange, of Shipping and Navigation, and of other maritime and commercial contracts, is generally, (not universally) the same as that of England, except that the American law on these subjects is more expansive and comprehensive, and liberal, borrowing freely from the law of Continental Europe, and more disposed to avail itself of the best principles of commerce, which can be gathered from all foreign sources not excluding even the civil law." Story, *American Law*, 3 *Am. J. Comp. L.* 9, 22 (1954).

14. Ignoring comparative literature, foreign law has played a large role in seminal articles focused upon improving domestic law. E.g., Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52, 373 (1936).

15. E.g., *Frummer v. Hilton Int'l Inc.*, 19 *N.Y.2d* 533, 539, 227 *N.E.2d* 851, 855, 281 *N.Y.S.2d* 41, 46 (1967) (dissenting opinion). See Wolff, *The Utility of Foreign Law to the Practicing Lawyer*, 27 *A.B.A.J.* 253 (1941).

certainly influenced by the draftsman's knowledge of civil law systems. This is not to say that there is any inherent superiority in the civil law systems before which the common law should bow. In law, as in agriculture, there have been highly successful instances of exotic transplants<sup>16</sup> as well as invigoration by hybridization,<sup>17</sup> and both sides of the Atlantic (and Pacific) have received benefits from these processes.<sup>18</sup>

For these processes to occur, however, there is a need for reliable and accessible information. As the authors are well aware, many comparative bi-national studies exist. In a case involving the issue of jurisdiction over foreign corporations, Judge Breitel of the New York Court of Appeals was able to cite eight studies in English relating to the law of as many different foreign nations.<sup>19</sup> Few lawyers or judges are likely to research so extensively the laws of so many countries when at best the fruits of this research will be merely persuasive authority to courts no longer generally habituated towards arguments based on foreign law. A multinational study on the point in issue renders such research readily accessible by juxtaposing and synthesizing a variety of approaches and adds an added dimension to a mere statement of what the rule is in, for example, France. Thus, I see the primary practical utility of this study to American lawyers as a useful, persuasive source for argument in a domestic court. To illustrate, there is a New York case which held that identical offers which arose out of on-going negotiations and which crossed in the mail constituted a contract.<sup>20</sup> Both of the leading contracts

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16. The lists of transplants into the common law is vast. It includes such matters as the Statute of Frauds, [Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L.Q. Rev. 174 (1947)], *The Limited Partnership* [Ames v. Downing, 1 Bradf. Sur. 321 (N.Y. 1850)], and the Rule in *Hadley v. Baxendale* [Washington, *Damages in Contract at Common Law*, 47 L.Q. Rev. 345 (1931), 48 id. at 90 (1932)].

17. Recent reforms in federal and state rules relating to international cooperation in litigation were made after thorough comparative research. See, e.g., Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015 (1965).

18. See Lenhoff, *America's Cultural Contributions to Europe in the Realm of Law*, 16 Buffalo L. Rev. 7 (1966). A leading European scholar has recently written that the United States is at the "vanguard" of the contemporary world in development of those "new" fields of law which have been necessitated by modern conditions, such as consumer protection, oil and gas, urban development, and labor law. M. Cappelletti, *Il diritto comparato e il suo insegnamento in rapporto ai bisogni della societa' moderna*, 14 Rivista di diritto civile 162 (1968). I cannot accept this fully. While American legal scholars may be more active in the field of urban development than legal scholars in his country, it seems to me there is a good deal to learn from his country's experience with urban development, both in terms of the maintenance of a climate of "livability", and in terms of the recent peaceful absorption of a vast quantity of illiterate and semi-literate farm workers into city life and in training them for jobs within the industrial system. On the other hand it is probable that this country could profit from a study of American laws regarding collective bargaining. It is apparent, however, that a highly profitable interchange of ideas could and should occur.

19. *Frummer v. Hilton Int'l Inc.*, 19 N.Y.2d 533, 539, 227 N.E.2d 851, 855, 281 N.Y.S.2d 41, 46 (1967) (dissenting opinion).

20. *Morris Asinof & Sons, Inc. v. Freudenthal*, 195 App. Div. 79, 186 N.Y.S. 383 (1st Dep't 1921), aff'd mem., 233 N.Y. 564, 135 N.E. 919 (1922).

treatises<sup>21</sup> and the Restatement,<sup>22</sup> however, assert that identical cross offers cannot create a contract. How, they query, can there be a contract without an acceptance that it is referable to a communicated offer? An American lawyer in attempting to rely on the New York decision despite the well nigh unanimous criticism it has received, can find respectable arguments for it among German, Swiss and Austrian writers.<sup>23</sup> If the parties have manifested assent to the same terms and, at least, if this manifestation arises out of on-going negotiations, what need is there to impose the additional requirement that there be an offer and acceptance? Indeed one of the most illuminating parts of the book from the point of view of purely American law and practice is Professor Schlesinger's masterful assault on the notion that it is only rarely that a contract is reached without a process of offer and acceptance.<sup>24</sup>

All of the above discussion, however, does not in itself explain the importance of these volumes. If I am correct, this study will have a great seminal influence. We need, we almost certainly will have, and these volumes point the way towards, multinational treatises on the law of contracts, torts, insurance, domestic relations, etc. We need such studies for a number of reasons. First, it is plainly wasteful to ignore the legal experience and thinking of the rest of the world, particularly those parts which have similar economic and social structures and have wrestled with the same problems as we. Second, in earlier days it was relatively rare that an American lawyer would be concerned with in depth problems of foreign law; today, in many law offices such problems are routine. It has always been the duty of legal scholarship to provide treatises in fields where the practitioners were practicing. In this respect scholarship is lagging seriously behind legal practice. An American lawyer can find any number of works explaining, or from which he can distill, the advantages and disadvantages of choosing Delaware as perhaps the best place for his client to incorporate his subsidiary. But what of incorporation in Lichtenstein, Curacao or Luxemburg? Largely, the mystery has been solved by and kept within the knowledge of specialized practitioners. Why should this knowledge be disseminated in the standard treatises on corporations?

Aside from aiding research into bread and butter questions such as where to incorporate, legal scholarship has the function of improving the law. Recently there appeared an excellent study demonstrating the need in the United States for separate incorporation laws for close corporations.<sup>25</sup> I can only surmise how much more powerful the argument would have been had it been integrated with a study of the importance and utility in Germany of the *GmbH* and similar corporate forms elsewhere. Justice Douglas, prior to being appointed to the bench, developed a theory of *respondeat superior* based upon "enterprise"

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21. 1 A. Corbin, Contracts § 59 (1963); 1 S. Williston, Contracts § 23 (3d ed. 1957).

22. Restatement of Contracts § 23 (1932); Restatement (second) of Contracts § 23 (Tent. Draft No. 1, 1964). The second Restatement does allow identical cross offers to form a contract, but only in rather narrow circumstances.

23. 1 Schlesinger 702-04; 2 id. at 1613.

24. Id. at 1583-1601.

25. Kessler, With Limited Liability for All: Why Not a Partnership Corporation?, 36 Fordham L. Rev. 235 (1967).

liability.<sup>26</sup> In so doing he was doubtless unaware of, and therefore unable to utilize, a vast body of foreign law and scholarship, particularly in Italy, on the highly useful concept of "enterprise."<sup>27</sup>

The standard treatises do not include such information because it is improbable that any single author could successfully gather and synthesize the necessary information. Professor Schlesinger and his task force have developed a new method of team authorship pointing out how this can be done. They have done it well. They will be followed.

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26. Douglas, *Vicarious Liability and Administration of Risk*, 38 *Yale L.J.* 584 (1929).

27. See M. Cappelletti, J. Merryman and J. Perillo, *The Italian Legal System* 226, 237 (1967).

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