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BOOKS REVIEWED

Structure and Relationship in Constitutional Law. By Charles L. Black, Jr. Baton Rouge: Louisiana State University Press. 1969. Pp. ix, 98. \$3.95.

This volume is based on the Edward Douglass White Lectures delivered by the author at Louisiana State University in 1968. Charles L. Black is Professor of Jurisprudence at Yale Law School.

Professor Black argues that, in dealing with questions of constitutional law, courts have unduly "preferred the method of purported explication or exegesis of the particular textual passage considered as a directive of action."¹ He would prefer a greater use of "the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."²

In *Carrington v. Rash*³ the Supreme Court relied expressly and solely on the equal protection clause of the fourteenth amendment to invalidate a Texas statute which restricted the right of members of the armed forces to vote in that state. It is Professor Black's position that the decision could have been based more realistically and preferably on the structural ground that "no state may annex any disadvantage simply and solely to the performance of a federal duty."⁴ Professor Black then uses other cases, particularly *McCulloch v. Maryland*,⁵ to show that the structural method of interpretation he proposes has validity in the area of constitutional law. The author discusses the basic commerce clause cases and concludes: "I will, however, assert summarily that what sense the subject has finally received—and that is not total sense—has come precisely from its transmutation from a problem in textual construction and single-text implication into a problem about the economic structure of nationhood—about the implications of the fact that we are one people, commercially as otherwise. It seems to me the textual inference never was a very good one, and certainly it was not one which in any decisive way can be shown to have commended itself in early times. The sense of the matter seems to come from a concept of economic interdependence which is not so much implied logically or legally in the commerce clause as it is evidenced by that clause as well as by other things, including even the Preamble."⁶

Perhaps the greatest advantage which the author finds in the method of reasoning from structure and relation is that "it has to make sense—current, practical sense. The textual-explication method, operating on general language,

1. C. Black, *Structure and Relationship in Constitutional Law* 7 (1969) [hereinafter cited as Black].

2. *Id.*

3. 380 U.S. 89 (1965).

4. Black at 11.

5. 17 U.S. (4 Wheat.) 316 (1819).

6. Black at 20-21.

may often—perhaps more often than not—be made to make sense, by legitimate enough devices of interpretation. But it contains within itself no guarantee that it will make sense, for a court may always present itself or even see itself as being bound by the stated intent, however nonsensical, of somebody else.⁷⁷ Principal among the relations and structures which Professor Black urges for consideration by the courts is the national government itself. In various ways decisions can be rested on the inadmissibility of interference with national governmental functions where those decisions have heretofore been rested upon a somewhat tortured construction of particular clauses. *Crandall v. Nevada*,⁸ where the Court struck down a Nevada tax on the exit of persons from that state, provides one example. Professor Black views the *Crandall* decision as based upon relational concepts in an elementary sense. Membership in the national polity includes the right to travel unimpeded from state to state. *Edwards v. California*⁹ on the other hand involved the invalidation of a California statute prohibiting the introduction into that state of indigent persons. The Court relied on narrow commerce clause grounds. Professor Black naturally disagrees with this rationale and suggests a broader relational approach.

It should be noted that Professor Black does not advocate the use of structural and relational reasoning in any open-ended and unlimited way. On the contrary, he notes that the relational technique would be no less precise than the technique of interpretation of particular texts. The illusion of certainty in the interpretation of particular texts he believes to be merely that—illusion. On the other hand, he does not advocate that the relational and structural method of interpretation be allowed to supplant entirely the method of textual explication. Rather there is a “close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.”¹⁰

In the second lecture of the series the author enumerates some constitutional guarantees which he would find in the Constitution even if the Bill of Rights and fourteenth amendment had never been enacted. The constitutional protection of free speech, for example, he would infer from the basic constitutional relations between the federal and state governments and from the relations of citizens to those governments. The rights of petition and assembly for the discussion of national governmental measures “are rights founded on the very nature of a national government running on public opinion.”¹¹

In *New York Times Co. v. Sullivan*¹² the author finds the application of the first amendment provides only an illusion of precision and certainty. He would prefer that the decision, requiring that actual malice be shown before a

7. *Id.* at 22.

8. 73 U.S. (6 Wall.) 35 (1868).

9. 314 U.S. 160 (1941).

10. Black at 31.

11. *Id.* at 41.

12. 376 U.S. 254 (1964).

public official can recover for libelous statements concerning his official conduct, should be based on the structural proposition that, where matters of high national political interest are involved, no state court can penalize free expression. Professor Black would prefer this rationale because it would force us to confront the basic issue of whether the federal-state structure requires that such criticism be insulated from liability. With references to cases such as *New York Times Co. v. Sullivan*, "it is idle to pretend that the text really dictates these decisions, or even helps in arriving at them. Nothing but a possible gain in predictability could come from selection of a ground which forces one to talk about, and only about, realistic factors of national political involvement."¹³

Professor Black is not suggesting that his structural and relational concepts overshadow the first amendment. He does not desire the first amendment to be diminished in any way. Rather, he would urge the use of structural and relational considerations to a greater degree in solving problems of freedom of expression which are not really determined by the language or legislative intent of the first amendment.

The concept of citizenship Professor Black finds to be another which could well be imported into the Constitution without reliance upon the fourteenth amendment. Indeed, he finds that the idea of citizenship, with its insulation from arbitrary abridgment, is an essential part of our governmental pattern. He criticizes the tendency to discuss this problem simply as a matter of explicating the crucial fifty-two words in the fourteenth amendment. Professor Black, for example, would clearly prefer a reliance upon citizenship as the basis for such things as public accommodations statutes rather than the commerce clause. Racial problems, religious problems, issues of criminal procedure and questions of aliens' rights, the author would find better discussed under the concept of citizenship rather than simply as a matter of textual interpretation.

In the third of the three lectures, Professor Black finds fault with the judicial tendency to regard the acts of minor administrators or the scarcely considered actions of the legislature as if they were considered and deliberate actions of the executive branch of the federal government or of state governments or of Congress itself. He would urge a more realistic view so that less judicial deference would be paid to actions of administrators or to statutes containing provisions which were hardly considered by the legislature. It is significant that the author describes himself "as a judicial activist proudly self-confessed."¹⁴ If one accepts the activist rationale of constitutional interpretation then the arguments of Professor Black are quite sensible and useful. If a court is going to undertake an activist role it does make sense to carry out that role in a way which requires discussion and consideration of the very basic political and structural factors involved. It is misleading for courts to undertake an activist role and at the same time to pretend that this role is forced upon them by some command hidden within the language of a particular provision, where no court before has found that meaning in the provision and where the present court can offer nothing but its own presupposition as a basis

13. Black at 49.

14. Id. at 72.

for finding it now. If the court is going to be activist it makes sense to be such realistically and with an eye to what is really involved. There is considerable unreality involved in activist Supreme Court decisions which rely falsely upon specific constitutional interpretations. The Supreme Court's reliance upon art. I, § 2 of the Constitution in *Wesberry v. Sanders*¹⁵ is a case in point. In *Wesberry*, the Supreme Court majority, speaking through Justice Black, held that art. I, § 2, providing that representatives be chosen "by the people of the several states" requires that congressional districts be equally apportioned on population grounds. This was conclusively demonstrated by Justice Harlan in his dissent to be a sophistical fabrication. It does the court no good when basic decisions are rendered on grounds which involve either faulty scholarship or outright manipulation of constitutional provisions.

It also should be said, however, that the adoption of Professor Black's rationale would not merely harmonize activist decisions with common sense. It would ensure an increasingly activist tone in future decisions. Professor Black refers to the works of Judge Learned Hand¹⁶ and Alexander Bickel.¹⁷ Professor Black disagrees with the views of Judge Hand and Professor Bickel because they are "passivist in tendency,"¹⁸ but it is fair to say that the passivist approach offers a greater promise of containing the Supreme Court within boundaries as a coordinate, but not truly supreme, branch of government. The answer to such decisions as *Wesberry v. Sanders*, and to the faulty judicial technique used there, is not to be found in conceding to the courts the power to decide basic issues such as apportionment simply according to the court's conceptions of the structure and relation of the Constitution. On the contrary the proper approach should be to bind the court to some conception of legislative intent. The court should not be set free to decide cases according to its random judgment as to what the structure and relation of the constitutional provisions should be. Rather the effort should be to bind the court by specific restrictions, founded on textual interpretations even if we accept thereby a certain artificiality in results. This approach necessarily involves the application of structural and relational considerations where necessary to explicate the text. But it would do so within the context of a judiciary viewing its role in an essentially passivist light. What we should strive to attain is a middle ground—but a middle ground which does not regard activism in the judiciary as a necessary or desirable thing.

CHARLES E. RICE*

15. 376 U.S. 1 (1964).

16. L. Hand, *The Bill of Rights* (1958).

17. A. Bickel, *The Least Dangerous Branch* (1962).

18. Black at 72.

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The Trouble with Lawyers. By Murray Teigh Bloom. New York: Simon and Schuster. 1968. Pp. 351. \$6.50.

This is an "unbalanced" book. Mr. Bloom concedes as much. At the outset, he states that his "main purpose is to show how the American middle class is victimized by the American legal profession."¹

To fulfill his "purpose," Mr. Bloom covers, by illustrative examples, situations involving: conversion of clients' funds; inadequacy of the Bar's Client Security Fund arrangements; the high cost of obtaining divorces; lawyers' malpractice cases; operation of inequitable garnishment and attachment statutes; actions the Bar has taken to prevent realtors from engaging in the unauthorized practice of law; over-reaching by practitioners in the personal injury field; inadequacy of Bar committees charged with uncovering attorneys' misdeeds; lack of effective discipline over attorneys by the Bar; the high cost of probating estates, including the evils in the surrogate court patronage system involving special guardianships; and over-reaching by attorneys appointed for persons adjudged incompetent.

Much of the ground that Mr. Bloom covers is familiar. For responsible attorneys who are keenly aware of the shortcomings of segments of the Bar—and who are actively seeking ways to correct existing deficiencies—Mr. Bloom's book adds little. I imagine Mr. Bloom's cataloguing of instances meriting investigation and appropriate remedial reform by the Bar can be useful. But for the average layman, who has had little or no professional contact with attorneys, Mr. Bloom's indictment of attorneys will probably be a "shocker." This is precisely the impression that Mr. Bloom wants to convey to his self-styled "victimized" middle class. Mr. Bloom's work, for many laymen, will probably only reinforce their generalized attitudes toward lawyers. And, we know all too well that attorneys do not enjoy the highest reputation and esteem with the average layman.

Mr. Bloom leaves unsaid much that could have added some "balance" to his book. These additions probably would enhance the receptiveness of the book to all practicing lawyers and would afford the layman with a more accurate picture of lawyers. For example, the public service work that many attorneys do in the areas of legal aid, neighborhood law offices and other poverty work, crime prevention and control programs, adoption of minimum standards of criminal justice, improvements in housing and urban development law, conservation, environmental and other ecological reforms, presidential inability and Electoral College reforms and, indeed, in automobile accident reparations, are either just flitted at by Mr. Bloom or not mentioned at all. No doubt a compelling case can be made that attorneys should devote more of their time and effort in public service work. As most attorneys are now aware, the winds of change are upon us—both in the law schools and at the Bar.

BARRY H. GARFINKEL*

1. M. Bloom, *The Trouble with Lawyers* 9 (1968).

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Law Making in the International Civil Aviation Organization. By Thomas Buergenthal. Syracuse: Syracuse University Press. 1969. Pp. vii, 247. \$10.50.

This volume is the seventh in The Procedural Aspects of International Law Series published by the Syracuse University Press. The present reviewer had occasion to review the fourth book in this series.¹ This most recent sibling is the elaborated Harvard S.J.D. dissertation of Thomas Buergenthal, Professor of Law at the State University of New York at Buffalo School of Law. In the author's words, "This book explores the extent to which law affects the decision-making process of the International Civil Aviation Organization, what the nature of this law is, and how it is developed."² He further accurately characterizes his product as a study of "all possible legal ramifications of a limited number of legal problems."³ A Note on Documentation, a substantial bibliography and a useful index embellish the book.

An introduction traces the development and organization of ICAO. (Whether the resultant phonetics of the contraction "ICAO" is euphonious or cacophonous is a matter of personal taste). ICAO evolved from the Chicago International Civil Aviation Convention of 1944. The Convention is not only the constitutive organ of ICAO, but at the same time is a multilateral agreement defining the civil aviation rights and obligations of contracting states and their obligations to facilitate international air transportation and to improve air navigation services and installations. Inability to agree upon a general formula to exploit commercial international air transport resulted in the separate International Air Services Transit Agreement and the International Air Transport Agreement. Under the former, some seventy contracting states reciprocally extend the "Two Freedoms" in respect to scheduled international air services to fly across state territory without landing and to land for non-traffic purposes. Under the latter Transport Agreement, a dozen Contracting States reciprocally exchange the "Five Freedoms." These embrace the two stated above plus privileges to take on and discharge passengers, mail and cargo in the territory of each Contracting State destined to or arriving from the territory of another Contracting State. The Netherlands and Sweden are the most important of the twelve states adhering to this latter agreement.

Professor Buergenthal points out that as an ICAO constitution the Chicago Convention, due to hasty drafting in this respect, left much to be desired. He says, "Over the years, ICAO has demonstrated an unusual capacity for re-shaping many provisions of the Convention without formally amending them."⁴ He then characterizes this as "the single most important conclusion that has emerged from this study."⁵ This might be irreverently paraphrased to read:

1. Wurfel, Book Review, 41 Wash. L. Rev. 197 (1966) (reviewing G. White, *The Use of Experts by International Tribunals* (1965)).

2. T. Buergenthal, *Law Making in the International Civil Aviation Organization* ix (1969).

3. *Id.* at 3.

4. *Id.* at 226.

5. *Id.* at 229.

In bad weather, ICAO has frequently been compelled to fly by the seat of its pants in the absence of effective (constitutional) instruments. Successfully, it should be added.

ICAO, Montreal based, now consists of 116 states each with one vote in its Assembly which meets at least once in every three years. A majority constitutes a quorum and most decisions may be reached by a majority of a quorum, thus conceivably as few as thirty members. The Assembly elects the Council, approves the budget and establishes policy guidelines. The Council, a permanent body, composed of twenty-seven Contracting States serving three year terms, is chosen to represent major geographical areas and states important in air transport and in providing facilities for international civil air navigation. The Council President, an international official, is ICAO's most influential individual. Five subsidiary bodies are the Air Navigation Commission, the Air Transport Committee, the ICAO Legal Committee, the Committee on Joint Support of Air Navigation Services and the Finance Committee. The first two stem from the Convention itself, the last three were established by the ICAO Assembly. ICAO's chief administrative officer, its Secretary General, directs a Secretariat of 600 international civil servants. Regional offices are maintained in Bangkok, Cairo, Dakar, Lima, Mexico City and Paris.

The book is divided into four parts. Part I treats in detail problems of ICAO membership. The author states that the treatment given to membership questions tends to be characteristic of the general constitutional procedures of an organization. The membership policy is to be all inclusive. In practice, any member of the United Nations may become an ICAO member by adhering to the Chicago Convention. Only former enemy states must have United Nations approval and run the risk of an affirmatively declared veto in the ICAO Assembly by a Contracting State invaded or attacked by the applicant. No State has been rejected. Membership has been granted to Finland, Japan, the Federal Republic of Germany, Austria, Romania, and Yugoslavia. This result has been accomplished by adroit detouring of Conventional language that could readily have been otherwise construed. Russia has not applied for membership, nor has the People's Republic of China.

The Convention is silent regarding adherence with reservations. When Yugoslavia sought to adhere with reservations both the ICAO Council and Assembly deemed the reservations rejected since they had not been accepted by *all* Contracting States. Later Yugoslavia acquired membership by depositing a new instrument of ratification without reservation. Cuba did likewise. No reservations have yet been accepted. Reservations could be permitted if all Contracting States consented. With a present membership of 116, reservation concessions appear to be unnecessary.

A renunciation of membership by the Nationalist Government of China was tacitly accepted and its later reratification of the Convention and resumption of membership permitted. A denunciation by Guatemala and its withdrawal before it became effective was allowed. Constitutional provisions for expulsion have not in fact been invoked and their use is unlikely. Suspension of member-

ship and voting rights has been sparingly exercised against members two years in arrears in discharging financial obligations to ICAO and even then only when the State has made no effort to negotiate settlement.

The author concludes that due to its highly technical substantive functions, and the relative political homogeneity of its membership, ICAO has evaded most Cold War problems. In membership matters it has discreetly decided no more than absolutely necessary, adopted the legally most unobjectionable solution, or on occasion, left the matter formally unresolved.

Part II deals with the technical legislative function of ICAO. This derives primarily from Article 37 of the Convention and is exercised by the Council in formulating and adopting International Standards and Recommended Practices (SARPS). Fifteen such ICAO Annexes to the Convention were promulgated by 1953 and each has been and continues to be, substantially amended. This work is conducted by the Air Navigation Commission, by air navigation conferences and panels of experts convened by it, and also by the Air Transport Committee. Only SARPS were expressly contemplated by the Convention. In addition to SARPS, ICAO enacts Procedures for Air Navigation Services (PANS) containing material too detailed or too transient to be incorporated into an Annex; Regional Supplementary Procedures (SUPPS) which are regional supplements to PANS; and Regional Air Navigation Plans.

This aggregate sophisticated ICAO code comprises an integrated body of international aviation legislation comparable to comprehensive domestic air navigation codes. Some member States enact this ICAO legislation directly into national legislation, others issue the material as operating instruction manuals under formal enabling legislation and others simply distribute ICAO texts for use in their installations. However, Article 38 of the Convention has been construed so that a State which has not given affirmative notice of compliance is not bound by any regulation or amendment thereto. This permissiveness has been found necessary because many member States lack the economic and technical means to comply. Moreover, some do not yet have sufficient technical and administrative personnel to discharge the duty to report "notifiable differences," indicating non-compliance. Thus there are circumstances under which a Contracting State may disregard the provisions of an ICAO Annex or amendment thereto.

ICAO Annexes do not enjoy the status of comprising an integral part of the Chicago Convention and are not binding on a member State until accepted by it. The technical annexes to the Paris Convention of 1919 had the same force and effect as the Paris Convention itself and amendments to annexes became binding on all Contracting States when approved by three-fourths of the membership. Answering the assertion of some commentators that this change constitutes retrogression, the author states, "the real genius of the Organization's regulatory system lies in its non-compulsory character."⁶ The philosophy is that substantial compliance with constantly improving standards is much preferable to no compliance at all.

6. *Id.* at 121.

Part III considers the disputes settlement function of ICAO. Such powers are conferred by the Convention itself as to its interpretation and application, and by many international aeronautical agreements giving arbitral jurisdiction thereunder to the ICAO Council. This jurisdiction has been seldom invoked and the Council has been most reluctant to exercise it. In disputes arising under the Chicago Convention and the Transit and Transport Agreements, the Council favors political and diplomatic settlements rather than adjudication. Since the Council possesses broad adjudicatory powers, it is in a strong position to compel negotiated settlements since an uncompromising position by a party might affect a Council decision. The Council consistently discourages litigation and encourages settlement. The Council usually succeeds in reestablishing the status quo ante thereby creating an atmosphere conducive to compromise. This solution by administrative action rather than formal judicial decision is much more prevalent in civil law countries than in common law jurisdictions.

Only a Contracting State "concerned in the disagreement" may invoke Council jurisdiction and then only after diplomatic negotiations with the other Contracting State have failed. A dispute is decided by a majority vote of all Council Members not a party to the dispute. The decision is appealable either to an ad hoc arbitral tribunal or to the International Court of Justice upon notice given within sixty days of receipt of the Council decision. Appellate procedure is left up to the ad hoc tribunal or the International Court. The mechanics of appeal have not been tested and are uncertain.

The Convention provides that an airline may not appeal from an ICAO Council final determination under Article 87 that it is in default of an obligation. All Contracting States are then bound to bar the airline from operating through their territorial airspace. Article 88 of the Convention requires that "[t]he Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under . . . this Chapter."⁷ These powers have not been used.

The author expresses the view that disputes relating to the Convention and the Transit and Transport Agreements can probably be resolved more effectively by the Organization without litigation by utilizing its other available procedures. He does believe, however, that with regard to disputes arising under aeronautical agreements, other than the Chicago Acts, that the ICAO Council should establish arbitral tribunals to exercise the jurisdiction conferred upon it in such matters, since here the practice of leaving the underlying legal issues unresolved is unsatisfactory.

Part IV discusses the law governing amendments to the Chicago Convention. Article 94 of the Convention which states the amendment process is poorly drafted. Several efforts to amend it have failed, yet the modifications sought by amendment have now been read into the original article by the Organization. As presently construed, a proposed amendment may be approved by two-thirds of the total number of Contracting States represented at the Assembly and qualified to vote at the time the vote is taken, excluding Contracting States

7. Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 61 Stat. 1205 (1947), 15 U.N.T.S. 354 (1948).

whose Delegations gave notice of departure before the vote was taken, whose Delegations' credentials expressly deprived them of the right to vote on the amendment or whose voting power was under suspension. Since a majority constitutes a quorum, 34% of the membership at the time the vote is taken, two-thirds of 51%, could possibly approve an amendment.

Once approved by the Assembly an amendment must be ratified by two-thirds of the number of Contracting States at the time of the approval before it comes into effect. The Assembly may specify a larger number but has not yet done so. This number is not increased by the addition of new Contracting States during the ratification period. The interpretation of Article 94(a) is that an amendment so ratified enters into force at once as to all Contracting States if it relates to the institutional framework of the Organization. However, an amendment to the Convention that affects the rights and obligations of the Contracting States *inter se* binds only those states which have ratified it. Inherent difficulties in classification of a given amendment provision for this purpose are manifest.

Rule 10(d) of the Assembly's Standing Rules of Procedure requires that proposed amendments be communicated by the Council to Contracting States at least ninety days before the opening of the Assembly session. This rule can be and has been suspended. Thus the Assembly may hastily consider an amendment if it so desires. The author believes this practice is most regrettable.

The Chicago Convention has been amended on five separate occasions. The Assembly in each instance designated the Organization as the depositary for amendment ratifications. The United States Government is the depositary for instruments of ratification or adherence to the Convention itself. Thus a new Contracting party must deposit an adherence with both in order to embrace the Convention as amended. The ICAO Secretariat now informs new Contracting States that the Convention has been amended and invites, but does not require, ratification of the amendments.

The author states "that very few lawyers serve on the ICAO Council or on national delegations to the ICAO Assembly."⁸ He concludes that the "much slower process of law making by precedent-setting practice has proved to be more effective than formal amendment in resolving many of the constitutional problems"⁹

Initially this reviewer had hoped to find in this volume an account of recent ICAO efforts to cope with international aircraft piracy (hijacking). The latest resort to ICAO for this purpose occurred early in 1969¹⁰ after Professor Buergenthal had completed his work. Moreover, the function of ICAO in promoting multilateral aviation conventions, for example the Tokyo Convention, was not one chosen by the author for treatment. Possibly he may later direct his expertise to this facet of ICAO activity.

If an apology for the length of this review is necessary, and one probably is, two reasons are submitted. First, this is a complex book and once past the simple

8. Buergenthal, *supra* note 2, at 227.

9. *Id.* at 228.

10. Wurfel, *Aircraft Piracy-Crime or Fun?*, 10 *Wm. & Mary L. Rev.* 820, 868-72 (1969)

injunction "Read it," it became difficult to determine where to stop and yet do justice to the author. Second, it is hoped the review may stimulate readers with even a casual international law interest to pursue this in depth study of ICAO law-making.

SEYMOUR W. WUREL*

Economic Aspects of Anti-Trust: Readings and Cases. By Henry Adler Einhorn and William Paul Smith. New York: Random House. 1968. Pp. xiii, 461. \$4.95.

Antitrust is concerned with economic activities affecting interstate or foreign commerce. As such, it is a matter of concern not only to the businessman and his legal advisors but to numerous business consultants and students of the economy who make it their business to evaluate past performance and future plans in terms of their possible conflict with the aims of federal antitrust legislation.

The economist is a member of one of the few professions making a substantial effort to understand the economy and the impact of particular business and government actions upon its evolution. It is natural that the courts have come to rely more and more upon the opinions of economists in the enforcement of the antitrust laws. Not that economists are the only persons practicing the art of judging the possible effect of present actions upon future developments, but they are among the few willing to articulate their views publicly and to accept whatever criticism comes in the way of one engaging in such a speculative practice. Having taken the pains to master the tools needed for such studies, it is not surprising that economists are offended when the courts fail to show sufficient deference to their views.

This book, intended more for the student of economics than of law, pairs extracts from leading antitrust cases with articles containing critical assessments by economists. The objective is ambitious: "the resuscitation of economic truth, the substitution of economic relevance for social fiction."¹ The authors plead for the reexamination of the antitrust laws, decisions and consequences, without, however, taking a particular position as to what remedies should be adopted other than a more careful attention to economic principles. Antitrust enforcement is deemed good if "based on economic principles or reasoning designed to counter deviations and to restore competitive conditions and performance."² Whatever merit there might be in the noneconomic values of antitrust, the courts engage in "sophisticated hypocrisy"³ when they use eco-

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1. H. Einhorn & W. Smith, *Economic Aspects of Antitrust* vii (1968) [hereinafter cited as Einhorn & Smith].

2. *Id.* at viii.

3. *Id.*

conomic concepts, arguments and terminology to provide rationalization for non-economic motivation.

The authors begin with economists' definitions of monopoly, competition and workable competition. This they contrast with legal concepts. Law and economics, they observe, find a common ground when the court is concerned with problems of market structure and behavior, whether there is monopoly or competition, or when the court is looking at the economic effects of a per se violation. The differences arise in situations where the economists are concerned with effects while the law deals with activities, practices or courses of action which may adversely affect competition. The law is concerned in criminal cases with intent,⁴ which has no counterpart in economics. The court is concerned with the particular facts in the case before it, rather than with generalized concepts of economics. The authors note that as our society is "increasingly typified by industries whose structures are either oligopolistic or monopolistically competitive,"⁵ the reconciliation of economic theory and law becomes more difficult.

This discussion serves as prelude to an extensive extract from Chief Justice White's 1911 opinion in *Standard Oil*.⁶ The case is treated by the authors as one of monopoly, in which only the practice of selective price cutting appears to be an economic evil as such. Standard Oil Company's other activities are categorized as criminal or tortious in nature or against society's mores. Considered in that context, an article by Professor John S. McGee on whether predatory price cutting was actually used by Standard Oil to achieve or maintain its monopoly provides a natural follow-up. As Professor McGee arrives at a negative conclusion, one is left with the vague apprehension that economists would not condemn the Standard Oil trust which was dissolved after 1911 with the approval of the Supreme Court.

The *Alcoa* decision⁷ is the next focal point of the consideration of monopoly. This case rates very high with the authors because of the care with which Judge Learned Hand defined the line of commerce and the market involved, issues which an economist would consider in determining whether a monopoly existed. It will be remembered that the Department of Justice, after winning its case against Alcoa, was unable to persuade the court to effect its dissolution. The United States Government had constructed several aluminum plants during World War II. These were disposed of after the war in such a way as to create competition for Alcoa. This action was deemed sufficient to make the break-up of Alcoa unnecessary.⁸ The authors present a very interesting article by John

4. Section 2 of the Sherman Anti-Trust Act, 15 U.S.C. § 2 (1964), forbids monopolization, not monopoly, a distinction the economist does not ordinarily recognize.

5. Einhorn & Smith at 31.

6. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

7. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

8. See the opinion of Chief Judge Knox in *United States v. Aluminum Co. of America*, 91 F. Supp. 333 (S.D.N.Y. 1950).

V. Krutilla which criticizes the government's method of disposing of the surplus aluminum plants on the grounds that it did not serve to obtain the maximum amount of competition which might have been possible in the circumstances.

The last case presented under the monopoly section of the book is *Cellophane*.⁹ After a very short quote from the opinion of Justice Reed, the authors present an illuminating evaluation by George W. Stocking and Willard F. Mueller of the evidence presented before the trial court indicating that the court might have just as easily determined that du Pont enjoyed an unlawful monopoly. Emphasizing the significance of business strategy and product differentiation as bases for classifying an industry as monopolistic, these well-known antitrust commentators conclude that du Pont's profits on cellophane were simply too large and lasted too long, a monopolistic condition which they assert was the logical consequence of business decisions made by the company.

Oligopoly is the next antitrust issue presented. It is discussed in the context of the 1946 decision of the Supreme Court in *American Tobacco*.¹⁰ Several firms which had become independent when the American Tobacco trust was broken up after 1911¹¹ were convicted of conspiracy to monopolize and monopolization, although there was no evidence of a formal agreement. The three defendants produced over two-thirds of all cigarettes and eighty percent of comparable cigarettes. The Supreme Court made it plain that evidence of the abuse of monopoly power was not essential to a Sherman Act Section 2 violation. The case is considered significant by William H. Nicholls, whose article "The Tobacco Case of 1946" is quoted at length, because it placed oligopolistic industries within the reach of successful prosecution under the antitrust laws. The authors remark that the possibilities Mr. Nicholls saw in the decision never materialized for two reasons. Eventually it was recognized that the Court did not say that an illegal conspiracy could be inferred from parallel behavior alone. Further, the Court did not provide relief which was economically meaningful. The oligopoly was not dissolved and the defendants went on to obtain an even larger share of the market.

Oligopoly has proven to be one of the most difficult regulatory problems of our economy. Absent proof of agreement, conspiracy or combination, oligopolies have largely escaped the reach of the antitrust laws. The significance of this is apparent from an article by Jesse W. Markham on price leadership, a practice which so far is lawful. This extract is followed by an essay by Professor Louis B. Schwartz on new approaches to oligopoly. After discussing the evolving nature of the problem, and the inconsistent and unpredictable reactions of the courts to it, he expresses a mild preference for supplementing Section 2 of the Sherman Act with a legislative program of reorganizing firms exceeding a certain size: "The test should be whether they are larger than can be justified by

9. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

10. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

11. On the same day that it announced its decision in the Standard Oil case, the Supreme Court affirmed a finding that American Tobacco violated the Sherman Act and should be dissolved. *American Tobacco Co. v. United States*, 221 U.S. 106 (1911).

economies of scale in production and distribution, with the burden of proof placed on the firm"¹²

Mergers are taken up next. Noting the ineffectiveness of the Sherman Act and the 1914 text of Section 7 of the Clayton Act in controlling the merger movements of the 1890's and the 1920's, the authors focus first on the *du Pont-General Motors*¹³ case in which the Supreme Court belatedly acknowledged that the original text of Section 7 might be used effectively against mergers threatening to restrain trade. An optimistic evaluation of the decision is presented through an essay by Robert W. Harbeson entitled "The Clayton Act: sleeping giant of antitrust?"

Judge Weinfeld's decision enjoining the merger of Bethlehem Steel and Youngstown Sheet and Tube¹⁴ is set forth as the first important application of the Celler-Kefauver Act of 1950 which strengthened Section 7 of the Clayton Act. This is followed by Dr. Lucile Sheppard Keyes' criticism of the standards employed by Judge Weinfeld. Dr. Keyes fears that a concentration level or market share rather than a competitive standard is being adopted:

Although there seems to be no economic case for a policy of merger regulation aimed at limitation of the share of a given market accounted for by one firm, there is an alternative basis which appears to be more promising. This rationale is based on the general economic case against practices restricting the choices open to sellers or buyers: that is, against activities by which a seller (or buyer) makes it more difficult—or impossible—for buyers (or sellers) to obtain access to the products of (or to sell to) his independent competitors.¹⁵

The *Brown Shoe*¹⁶ case is followed by an article by David Dale Martin who views the decision in an optimistic vein. Recognizing the value of a court-developed policy of deterrence which induces business firms to make only those acquisitions which are clearly lawful, Mr. Martin observes that if "partial divestment becomes the rule, then business will have little to lose by making acquisitions and waiting for government action to be brought."¹⁷ Mr. Martin is pained by the ability of the Supreme Court to accept as evidence, and to make conclusions based upon, inadequate data. He concludes that the new policy implicit in *Brown Shoe* means that both vertical and horizontal mergers are likely to be held illegal unless the companies can clearly demonstrate that the merger is likely to increase competition and thus promote the public interest.

In the next part of their book, the authors take up exclusive dealings and tying contracts. Here the courts are charged with being unable to see the forest for the trees—that is, concerned more with behavior patterns than with resultant market performance. The case law has drifted from a "rule of reason" evaluation to a per se approach. The courts are asked to abjure use of the robe

12. Einhorn & Smith at 193.

13. *United States v. E. I. du Pont de Nemours & Co.* 353 U.S. 586 (1957).

14. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958).

15. Einhorn & Smith at 271-72.

16. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

17. Einhorn & Smith at 308.

of economics in opinions which, for social or other reasons, enjoin activities regardless of their social effect. *Standard Stations*¹⁸ is the first case presented, followed by *American Can*.¹⁹ An extract from an article by Professor James W. McKie serves to show the decline of monopoly in the metal container industry as a result of the decision of the court in the latter case to prohibit annual cumulative discounts in the sale of cans to canners, to limit requirements contracts to one year, and to enjoin ties between leases of can-closing machines manufactured by American Can and the sale of cans to lessees. Criticism of the courts' activities in outlawing tying contracts is focused through an article by Ward S. Bowman, Jr. which indicates that the courts may have been protecting competitors more than competition because few tying agreements give the seller leverage which extends a monopoly position. The authors indicate a lack of sympathy with the per se approach to tying agreements which the courts have employed for over fifty years in patent cases.

The concluding chapter is entitled "Recent Developments." It reflects the perennial problem of antitrust authors. Significant decisions have a way of being announced about the time a manuscript is due at the publishers, so as to require an addendum. The authors suggest that recent Supreme Court decisions in merger cases indicate the development of a hard line enforcement and a decline in the use of sophisticated analysis to support decisions. Where per se standards are not employed, the authors observe that criteria must be developed which permit the courts to distinguish between permissible and nonpermissible mergers. This requires an understanding of the effects of various types of mergers and evidence enabling the decision maker to appraise the effects of a particular merger. "Only when one rigorously examines these complex factors can analytical standards be high; the use of ambiguous proxy measures is indicative of low analytical standards, which can easily result in inapt conclusions."²⁰ The authors then continue their discussions of the substantive issues in terms of market definition, market structure, and potential competition.

The Supreme Court's decision in the *Alcoa-Rome Cable* case²¹ is criticized because of its handling of the evidence regarding the existence of a market. The Court was analytically naive in appraising price differences between aluminum and copper cable, as a consequence of which its conclusions as to the unresponsiveness of prices is based upon a non sequitur. The decision in the *Pabst* case²² that the Government need only prove that a contested merger has a substantial anticompetitive effect somewhere in the United States (in any section) is unacceptable. The authors assert that until that opinion is repudiated, "the Court will be without criteria for determining where and a fortiori how a contested merger may affect competition."²³ The Court is criticized for its reliance upon a trend toward concentration in its handling of the *Von's*

18. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

19. *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949).

20. Einhorn & Smith at 403.

21. *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964).

22. *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

23. Einhorn & Smith at 421.

*Grocery*²⁴ and *Pabst* merger cases. In the former case, the authors base their position on a reading of the District Court's opinion that there was no increase in concentration in the retail grocery business in the Los Angeles Metropolitan Area, only 7.5 percent of sales in the market were involved, and the decrease in number of separate competitors affected competition no more than does the drop-out of competitors caused by technological changes.

In *Penn-Olin*²⁵ the Court is credited with using more sophisticated economic analysis regarding potential competition in a joint venture situation. The authors consider the development of the law on potential competition significant because the concept "may constitute the only effective basis on which courts can hold conglomerate mergers in violation of the antitrust statutes."²⁶ This conclusion appears to reflect in part the failure of the authors to consider the implications of the developing case law on reciprocity.²⁷

The complaint of economists that their art is not given adequate consideration by courts in antitrust cases is familiar and one which probably never can be fully reconciled. There are several reasons for this. Applied economics is an art, not a science. Economists do not agree among themselves as to what competitive consequences will or should follow from a given factual situation. One need only sit through hours of testimony by economists supporting contrary views as to the future impact on prices or competition of a recommended course of action to realize that a fundamental reason for the limited influence of the economist springs from the fact that he is dealing with the future which cannot be known with certainty, and there is no ultimate authority in the world of the economist capable of choosing the right from among the contradictory views being argued. The authors recognize these realities in some of their observations: "There are no objective criteria of workable competition, and such criteria as are proffered are at best intuitively reasonable modifications of the rigorous and abstract criteria of perfect competition."²⁸ Economists are, consequently, often in a better position to criticize effectively and devastatingly the opinions of their colleagues, as well as those of the courts, than they are to prepare and defend an unassailable case in a forum where controversy is an avenue to decision.

Some of the antitrust problems now before the courts seem so complex as to defy meaningful economic analysis.²⁹ Conglomerate mergers between billion dollar corporations are of this character. Threads of the new corporate tapestry created by a large conglomerate merger may be analyzed, but overall inter-

24. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

25. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

26. *Einhorn & Smith* at 433.

27. See *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

28. *Einhorn & Smith* at 23.

29. See *Ways*, *Antitrust in an Era of Radical Change*, *Fortune*, March 1966, 128, 221 (emphasis deleted) where it is asserted that "economic analysis cannot handle more than a small fraction of all the variables and contingencies needed for a sound legal judgment on changing market structure in any particular 'monopoly' case. And the analysis tends to ignore the element around which competition in fact increasingly centers—managerial brains."

reactions and relationships may be beyond the ability of economists to analyze and assess within the time frame required by effective antitrust enforcement. To insist upon rigorous economic analysis in such situations is the counsel of paralysis and of nullification of the antitrust laws. It is significant in this connection, I think, that the more rigorous enforcement of Section 7 of the Clayton Act in recent years by the Supreme Court is at one and the same time valued by the authors for being "hard line" and criticized for neglecting careful economic analysis.

While economists cannot contribute certitude, their role is essential in antitrust enforcement. They are needed to assist the court in understanding the nature of the industry involved in an antitrust case and the probable competitive consequence of the activity being examined. Scholarly postmortem criticisms of specific applications of the antitrust laws—a most difficult task—are very important in advising the courts as to the nature of problem areas in our economy and the kinds of effective relief which might be ordered in future cases. For experience has shown, particularly in the merger field, that the courts must accept a good part of the blame for being ineffectual at critical times in the course of significant evolutions in the economy. To be effective, the courts must work quickly. This requires frequent reliance upon court-created general rules which, on the one hand, can be easily understood by the business community and, on the other, effectively applied by the courts.

The authors' matching of leading case and economists' evaluation is very helpful to the lawyer in formulating a better understanding of the economist's role in antitrust enforcement. As a lawyer, I would like to have seen more of the economists' views of the effect on competition of oligopolies and conglomerate mergers, problems which dominate the antitrust scene today.

JOHN T. MILLER, JR.*

State and Local Tax Problems. Edited by Harry L. Johnson. Knoxville, Tenn.: The University of Tennessee Press. 1969. Pp. v, 190. \$7.50.

This book is essentially an intellectual bouquet for Professor Charles W. White of the University of Tennessee. However, rather than being a mere collection of personal tributes to Dr. White, which he so well deserves, this testimonial takes the form of eleven essays by outstanding authorities in the field of state and local tax problems. Thus, it is an interesting and wholly challenging collection and, at the same time, a fitting tribute to this eminent scholar.

The introduction by Professor James M. Buchanan of the University of Virginia is a penetrating analysis of the fiscal plight of our federal system and sets the stage for what is to come. Pointing out that the federal income tax now siphons off a lion's share of revenue, leaving the states and their localities poorly resourced to meet their needs, he suggests that the viability of a con-

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structive fiscal federalism could be restored through programmed federal tax reductions, tax sharing or equalized block grants. As secondary alternatives, he discusses nonprogrammed reductions in federal tax rates and tax credits. Conditional grants-in-aid are false alternatives.

Three major essay groupings follow. The first, consisting of essays by Professor Arthur D. Lynn, Jr. of Ohio State University, Professor Arthur P. Becker of the University of Wisconsin and Professor C. H. Donovan of the University of Florida, concentrates on property taxation. Professor Lynn, in suggesting that property tax reform is still an option open to state and local governments as they adjust to changing circumstances, reviews administrative adjustments, shifts in the locus of administrative responsibility, base and rate adjustments, alternative ways of taxing property and proposed substitutes for realty taxation. Professor Becker identifies the major challenges facing property taxation—administratively, to professionalize the practice of assessing and to put it in a pay-as-you-go basis; substantively, to stop the continued erosion of the property tax base by proliferating exemptions and to bring more economic neutrality to the tax. Professor Donovan's essay highlights these discussions by a case history analysis of Florida property taxation.

The second group of essays is concerned with tax sharing. Professor Deil S. Wright of the University of North Carolina presents an impressive analysis of the existing structure of federal grants and how they could be improved by a transition from the increasingly fragmented categorical grants to the consolidated grant, conditional, yet more generalized. Alternatively, he discusses federal assumption of responsibility for programs, federal tax reduction, tax credits and revenue sharing. Professor Netzer of New York University views federal tax sharing as absolutely necessary to fiscal federalism, even if the property tax were a far better revenue instrument than it is. His case is strengthened by a recitation of the inherent defects of the property tax and the faint hope of their material correction.

Within this same grouping of essays, Doctor John Shannon, assistant director, Advisory Committee on Intergovernmental Relations, points out that a greater use of the personal income tax by the states (stimulated, perhaps, by the allowance of a credit against the federal income tax) would provide a revenue source with growth potential, lessening the need for sales and property tax dollars and preventing a regressive system from getting worse. He suggests, however, that positive and negative state income tax credits for sales and property tax payments may be a more promising method for combating these evils. This would permit an allowance of sales or property taxes against state income tax liability, and if there were no such liability, a negative tax credit would result in a refund. In essence, what results here is a sort of "circuit-breaker" to prevent tax overloads, with the refund costs borne partially by the federal government.

Lastly, in this category, Elsie M. Watters, director of State-Local Research, Tax Foundation, Inc., reviewing rather intricate studies made in this area, estimates an 89% rise in public outlays in the next decade. Optimistically, this allows for mandated increases in service needs, while perhaps permitting even

a higher rate of improvement in the level of services offered. This suggests a rather brighter outlook for the future than is commonly supposed.

The final selection of essays in the book is concerned with special financial problems of state and local governments. Dean Ross of Louisiana State University and Professor Bonin of Auburn University call attention to the need for a review of the economic criteria for sound debt financing in an era marked by increased pressure for state borrowing. After giving first consideration to their own debt management structure, the states should then turn to coordination of and assistance to their localities in this regard. Professor Martin, of the University of Kentucky, investigates new dimensions of the capitalization of earnings in appraising public utility property. He highlights two questions: What earnings should be employed? At what rate should they be capitalized?

Lastly, Professor Kafoglis provides an interesting evaluation of service charges as a source of municipal revenue. While they are necessarily regressive, a strict application of the service charge principle, rather than considering them as a revenue device, helps to maintain a better fiscal perspective.

Of necessity, the opportunity for a critical and in-depth review of so many facets of a complex field is impossible within the space limitations of this review. Experts in the field of state and local fiscal problems will regard this book as a must. For others it will provide a valuable excursion into problems which are rapidly assuming formidable dimensions and have become matters of universal concern.

JOSEPH H. MURPHY*

The Victims. By Bernard Lefkowitz and Kenneth G. Gross. New York: G.P. Putnam's Sons. 1969. Pp. 510. \$6.95.

In 1965 Truman Capote wrote *In Cold Blood*. The title of that vivid and moving work referred not to the brutal eradication of the Clutter family, but rather to the execution of their murderers, Richard Hickock and Perry Smith. Attempting to pattern their book after the Capote work, Messrs. Gross and Lefkowitz suggest that "the Victims" of what occurred on August 28, 1963 at 57 East 88th Street in Manhattan¹ were not victims Janice Wylie and Emily Hoffert, but suspects George Whitmore and Richard Robles.

On that fateful Wednesday, those two young women were savagely assaulted and, then murdered, in their apartment on Manhattan's fashionable east side. This volume recounts the investigation into the killings, the arrest of George Whitmore for these murders and other unrelated crimes, Whitmore's exoneration of the Wylie-Hoffert homicides and the arrest and conviction of Richard Robles for the murders.

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1. See N.Y. Times, Aug. 29, 1963, at 1, col. 3.

The book indiscriminately attacks or criticizes all law enforcement officials involved in the case.

This reviewer was the Assistant District Attorney who acted as trial prosecutor of the first degree murder indictment against Richard Robles. Robles was convicted, after a two months trial of murder in the first degree for each of these murders.² The appellate division unanimously affirmed the conviction without opinion.³ With this as background in mind, it is understandable that the author's hostile approach to law enforcement in general, and the prosecution of Robles in particular, cannot be favorably looked upon by this reviewer.

The authors set forth in great detail the facts and circumstances leading up to the false confession of George Whitmore to the Wylie-Hoffert slayings. That confession was obtained because of overreaching by a handful of misguided police officers. The fact that Whitmore's false confession did not result in a tragic miscarriage of justice is directly attributable to the efforts of other law enforcement officials. The authors of *The Victims* conveniently ignore the fact that it was law enforcement that cleared Whitmore and that, without the efforts of highly principled and dedicated policemen and Assistant District Attorneys, Whitmore might have become an American Dreyfus.

The efforts of the New York County District Attorney's Office to clear Whitmore are largely ignored. Instead of praising Assistant District Attorney Melvin Glass who, more than any other human being, was responsible for Whitmore's exoneration, the authors castigate and criticize him unfairly. Before the police had ever heard of Richard Robles, Mr. Glass had come to doubt the veracity of Whitmore's confession. He carefully analyzed each answer by Whitmore and came to the conclusion that there was a substantial possibility that the police had fed information to Whitmore prior to the arrival of the Assistant District Attorney who questioned him. The crucial piece of objective evidence concerning Whitmore was a photograph which was found in his possession when he was arrested. The police initially thought that this was a photograph of the deceased Janice Wylie and, perhaps with some prompting, he stated that he had taken the photograph from the apartment where the murders occurred. An exhaustive and extensive investigation was conducted to ascertain the origin of the photograph. Ultimately, through the efforts of Mr. Glass and dedicated police officers, the identity of the girl in the photograph was learned. She had no connection at all with Janice Wylie or Emily Hoffert or the apartment in which they were murdered on East 88th Street. In fact it was a photograph that had been discarded near Whitmore's home many years before and which Whitmore had innocently picked up in a garbage dump.

While Whitmore was still under indictment and when the public at large had no reason to doubt the case against Whitmore, Nathan Delaney, an admitted drug addict, who had been arrested on an unrelated homicide charge, came to the authorities and accused Robles of the killings. A few law enforcement officials knew at that time that Whitmore might be innocent of the Wylie-Hoffert killings so when Delaney came forward, law enforcement listened. The authors,

2. See N.Y. Times, Dec. 2, 1965, at 1, cols. 2-3.

3. *People v. Robles*, 32 App. Div. 2d 741 (1st Dep't 1969) (mem.).

who urge as their main thesis that Robles, like Whitmore, is innocent, failed to explain or even suggest why Delaney elected to supply information on an apparently solved case.

The book, reading like defense counsel's summation, goes on to give the defense version of the trial of Robles. In an amazing bit of journalistic irresponsibility the authors write the following:

Robles was alone in the pen for an hour before Hoffinger [the defense attorney] saw him. It was in that hour that Robles grew desperate. At 7:30 p.m., Glass said later, Robles sent for him. "I went into the detention pen and I said to the defendant, 'Ricky, I understand you want to speak to me.' He said, "That's correct."

I said, "What's on your mind?" He said, "What can you do for me?" I said, "It's what you can do for yourself. You've obviously been living with this thing for a long time, so you might just as well get it off your chest. I understand that you've asked for a lawyer, so until you see a lawyer, anything you say can't be used against you."

He said, "What about psychiatric help?" I said, "Right now, it's a black and white situation. They say you did it. You say you didn't do it. If you give a full statement from which a court and a psychiatrist could analyze and determine whether you need psychiatric help, that would be one thing." I said, "It appeared to me that you panicked in that apartment." He said, "It wasn't panic—something went wrong."

I said, "Do you want to tell me the whole story?"

He said, "I'd rather speak to my lawyer first."

At that point I left the detention pen.

Not only did Glass attempt to elicit a confession with the zeal of a policeman; he also promised that what Robles said could not be used against him. Then he repeated under oath in court every syllable that could be helpful to the prosecution. That is, he repeated this conversation.⁴

What the authors do not tell the reader is that it was the defense that called Mr. Glass to the witness stand and asked him to repeat the conversation, not the prosecution. Further, the authors conveniently neglect to inform the reader that the Glass testimony took place during a closed-to-the-public pre-trial hearing, that the trial jury never heard about the conversation and that Mr. Glass did not testify during the trial proper.

In their zealotry to criticize law enforcement, the authors lost their objectivity and resultantly, what otherwise might have been an interesting and engaging piece on the judicial process, degenerated into a scatter shot attack on the whole system of the administration of criminal justice.

JOHN F. KEENAN*

4. B. Lefkowitz & K. Gross, *The Victims* 434-35 (1969).

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Presidential Lottery: The Reckless Gamble in our Electoral System. By James Michener. New York: Random House. 1969. Pp. vii, 240. \$5.95.

On election day 1968 the United States once again played a reckless game with its destiny. Acting as if we were immune to catastrophe, we conducted one more Presidential election in accordance with rules that are outmoded and inane. This time we were lucky. Next time we might not be. Next time we could wreck our country.¹

So begins James Michener's *Presidential Lottery*. This is an interesting and worthwhile book about our electoral college system of choosing a President and Vice President. The book traces the historical development of the electoral college, showing how the Founding Fathers' design that the college consist of men of high principle convening to pass upon the credentials of various candidates quickly degenerated into the "practical maneuver of party hacks meeting to confirm the choice their party had already made."² Michener vividly relates the politicking which took place on the two occasions when the House of Representatives chose the President—in 1800, when Hamilton swallowed his personal hatred for Jefferson and led the fight against Burr, and in 1824, when Clay threw his support to Adams and was rewarded by being made Secretary of State. He also describes the "stolen election" of 1876, in which Samuel J. Tilden won a majority of the popular vote but lost the election by one electoral vote. Tilden graciously accepted that incredible loss:

I can return to private life with the consciousness that I shall receive from posterity the credit of having been elected to the highest position in the gift of the people without any of the cares and responsibilities of the office.³

In *Presidential Lottery*, Michener points out the defects and dangers of the present system, in particular, the ever-present possibility of electors frustrating the will of the people or of Congress designating the President and Vice President under archaic and undemocratic rules. Michener examines the major proposals of reform and sets forth his own views as to how the President and Vice President ought to be elected.

One of the most interesting sections of the book is Michener's relating how close to disaster our nation came in the 1968 election. Had Nixon lost California or Ohio and Missouri, the election would have become vulnerable to dictatorship by George Wallace, whose forty-five electors would have held the balance of power in the electoral college. During the forty-day period between election day in November and the meeting of the electors in December, Wallace unquestionably would have sought to bargain away his electoral votes in exchange for certain promises and concessions. Even if the major candidates had refused to strike a bargain with him, it seems clear that, if he had held the balance of power, Wallace would have directed his electors to vote for either Nixon or Humphrey so as to earn the accolade of having chosen a President.

Michener, who himself served in 1968 as a Democratic elector in Pennsyl-

1. J. Michener, *Presidential Lottery* 3 (1969) [hereinafter cited as Michener].

2. *Id.* at 74.

3. *Id.* at 88-89.

vania,⁴ tells of his deep concern about the Wallace threat and the harm it could have brought to our country and the Presidency. Michener then reveals that prior to the 1968 election, he secretly had developed a plan to deal with the situation where neither Nixon nor Humphrey obtained the required electoral vote majority. If that happened, Michener planned to take the following action after the November voting and before the electors met in December to choose a President and Vice President:

I intended to inform all Republican and Democratic electors that I was interested in a plan whereby we would decide the election in the College between Nixon and Humphrey and not risk domination by Wallace. . . . I thought it better for the nation that the two parties decide between themselves what an honorable compromise might be and then encourage their Electoral College members to swing enough votes to either Nixon or Humphrey to secure his election.⁵

As for the details of his plan, Michener states:

If Nixon won the popular vote and led in electoral votes by a clear margin, I would recommend to my party leadership that they arrange a compromise with the Republicans and direct enough Democratic electors to swing to the Republican column to ensure Nixon's election; I would volunteer to be a member of that group and to absorb whatever opprobrium fell upon us. If the Democratic leadership showed no interest in trying to achieve such a compromise with the Republicans, I would have been willing to try myself, backed up by the electors who I felt sure would feel as I did. If such a plan were achieved, I would vote in accordance with it. If Humphrey clearly won the popular vote and the electoral votes to go with it, I would propose that the Republican high command meet with the Democratic to work out a compromise, and . . . direct enough of their electors to vote for Humphrey to elect him.⁶

Although the occasion did not arise for Michener to implement his plan, he subsequently discovered that other members of Pennsylvania's electoral college had also secretly harbored such views.

The only disappointing aspect of Michener's book is his proposal for improving our system of electing a President and Vice President. While he strongly believes that our existing system is in need of urgent repair, he proposes merely that the office of presidential elector be abolished and the contingent election be changed in favor of an electoral vote run-off between the top two contenders. He advocates continuing the method of allocating electoral votes to the states in accordance with their total representation in Congress, continuing the winner-take-all feature of our present system whereby the plurality winner in a state receives all of that state's electoral votes, and awarding the Presidency to the winner of a majority of the electoral vote, whether or not he is the popular vote winner. In advancing this proposal, Michener states that he has been guided by three basic principles, *i.e.*, legitimacy, two-partyism, and federalism.

Yet, the application of Michener's three principles should have led him to a

4. He states that his "finest credentials were that each year I contributed what money I could to the party." *Id.* at 9.

5. *Id.* at 16.

6. *Id.* at 19-20.

different conclusion. Under Michener's proposal, commonly referred to as the automatic vote plan, the candidate having the greatest number of popular votes—indeed, a majority of the popular votes—could be denied the Presidency. Theoretically, a person could capture a majority of the electoral votes with as little as twenty-five percent of the popular vote. Surely, the "visible legitimacy" of our government would not be enhanced one iota by the election of a popular vote loser. On the contrary, such a result would seriously detract from the legitimacy of a President's rule, if not cause tremendous turmoil in the country. Of all the plans of reform, direct popular vote is the only one that can assure the election of the popular vote winner. For that reason, it is, in my opinion, the proposal that would *best* enhance the legitimacy of our government.

As for furthering our two-party system, I suggest that the automatic vote plan has features which militate against a strong two-party system. For example, the winner-take-all system of awarding electoral votes wipes out at an intermediate stage all popular votes cast in a state for candidates other than the plurality winner, and it prevents voters of similar persuasions in different states from pooling their popular votes on a national basis. This feature of our existing system, which Michener's plan would freeze into the Constitution, tends to discourage voter turnout and to perpetuate one-party control in areas of the country. In addition, under the automatic vote plan, the value of a person's vote depends solely on his state of residence. While small state voters enjoy a more favorable ratio of electors to population, large state voters influence a greater number of electoral votes. In contrast to the inequities of the automatic vote, direct election eliminates the disenfranchisement of state minorities and equalizes all votes throughout the nation. It would strengthen the functioning of the two-party system in all areas of the country, particularly in traditional one-party states, since every vote would count and none would be magnified or contracted.

As for the principle of Federalism, I quote Senator Mike Mansfield:

[T]he Federal system is not strengthened through an antiquated device which has not worked as it was intended to work when it was included in the Constitution and which, if anything, has become a divisive force in the Federal system by pitting groups of States against groups of States. As I see the Federal system in contemporary practice, the House of Representatives is the key to the protection of district interests as district interests, just as the Senate is the key to the protection of State interests as State interests. These instrumentalities, and particularly the Senate, are the principal constitutional safeguards of the Federal system, but the Presidency has evolved, out of necessity, into the principal political office, as the courts have become the principal legal bulwark beyond districts, beyond States, for safeguarding the interests of all the people in all the States. And since such is the case, in my opinion, the Presidency should be subject to the direct and equal control of all the people.⁷

In objecting to our going to a popular vote system, Michener says such a vote "would be vulnerable to demagoguery, to wild fluctuations of public reaction, to hysteria generated by television;" "would hand too much leverage to

7. 107 Cong. Rec. 350 (1961).

the cities;" would be difficult to administer; and would abolish "[the] voting by states and allowing regions to exercise advantages which mere numbers would not give them."⁸ After voicing these objections, he says that there is "much merit" in the direct vote plan and that, in fact, it is his "second choice."⁹

Michener's objections to direct election remind me of the arguments advanced against the proposal at the Constitutional Convention of 1787. Said delegate George Mason:

[I]t would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man.¹⁰

And Elbridge Gerry:

A popular election . . . is radically vicious. The ignorance of the people would put it in the power of some one set of men dispersed through the Union & acting in concert to delude them into any appointment.¹¹

I would have thought that the history of the past 180 years had eliminated these arguments for all time and demonstrated the wisdom and fairness of a government of and by the people. Surely, the principle of popular election has met the test of time so that today, in the United States, it is a cherished and firmly established principle of representative government. Michener's desire to retain the electoral vote because of history ignores history. People, not states, vote in presidential elections. In the ascendancy of "one-man, one vote," there can be no justification for a system based on voter inequality. The time surely has arrived when we should implement a direct vote.

While *Presidential Lottery* may not be in the tradition of Michener's *Tales of the South Pacific* and *Hawaii*, I believe it ought to be read by every interested observer of the workings of American government.

JOHN D. FEERICK*

The Rule of Law and the Role of Psychiatry. By Justine Wise Polier. Baltimore: The Johns Hopkins Press. 1968. Pp. vii, 176. \$7.95.

In a short preface, one hundred and seventy pages of text and a brief index, Judge Polier has presented a wealth of information and brought into view a number of the individual, social and moral problems which line the interface between law and psychiatry. The book is an expansion of her 1966 Isaac Ray

8. Michener at 164-65.

9. *Id.* at 165-66.

10. II The Records of the Federal Convention of 1787 at 31 (M. Farrand ed. 1937).

11. *Id.* at 114.

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Award lectures at the University of Maryland, and draws upon the author's extensive experiences as senior judge in the Family Court of the State of New York.

In her preface and introduction, Judge Polier decries today's lack of answers to the thought-provoking questions raised by Dr. Isaac Ray one hundred and thirty years ago, and traces the entrenched distrust and dissatisfaction of psychiatrists and lawyers with each others' approach to the mentally ill offender from M'Naghten to Durham. She quotes widely from such previous Isaac Ray Award recipients as Zilboorg, Biggs, Weihofen, Guttmacher and Roche, as well as from a wide variety of related legal and psychiatric writings in pointing to the larger roles which "law and psychiatry have both sought and had thrust upon them"¹ in the past half century. Toward the conclusion of her preface, Polier warns that:

Psychiatry must correct old abuses, improve its skills, and extend its services so that no one will be deprived of them by reason of his economic condition. It must also increase its efforts to apply its knowledge of the individual to the broader problems that affect the lives of many individuals in society. It must become an effective force for the prevention as well as treatment of mental illness. Law must remove the abuses that have denied equal justice to the poor, and it must go even further. It must discover how it can become an instrument through which the enlarged concept of what is essential to the dignity, freedom, and fulfillment of the individual can be made a portion to which every man is entitled as a matter of right.²

In her introduction, Judge Polier adds that, "Psychiatry cannot fulfill its responsibility to society by indulging in fantasies about what it may be able to do in the future. It has more to contribute to law than a diagnosis of defendant's mental condition or a description of his past life."³

This thinly veiled impatience with psychiatry, born no doubt of frustration, anger and despair over institutional and court psychiatric reports, sets only part of the tone of Judge Polier's book. Although she sees that, "medicine and psychiatry, long regarded as sciences directed toward the welfare of the individuals, must concern themselves with the welfare of society in far broader terms,"⁴ she goes on to ask, "If physicians are to remain physicians, should they be asked to do more than give the patient's history, the diagnosis, their opinion as to how the medical condition may affect his action, and prognosis for future behavior? If courts are to fulfill their role, have they the right to ask physicians to determine or give opinions on the question of legal responsibility which, as the cases show, changes from state to state, from county to county and, within the same geographical areas, from decade to decade?"⁵

The disparity between these two viewpoints in which she assigns broad social

1. J. Polier, *The Rule of Law and the Role of Psychiatry* xi (1968).

2. *Id.* at xi-xii.

3. *Id.* at 2.

4. *Id.* at 12.

5. *Id.* at 16.

responsibilities to disciplines "long regarded as sciences" on the one hand, and implies that physicians ought to remain physicians, on the other hand, is clearly established at the end of chapter one.

The ensuing five chapters attempt to resolve this disparity and conflict. These chapters are entitled "The Changing Role of the Law," "Chasms Between New Concepts and Present Practices," "Individualized Justice in Our Social Courts," "The War Against Poverty, the Role of Law, and Mental Health," "New Law for the Community and Community Psychiatry."

Judge Polier states that changes are needed; broad changes in practice, and not merely on paper. She spares neither psychiatry nor the law. Like a mother driven to distraction by the noisy bickering and arguments of the rival sibling off-spring of the deceased shaman who fathered both law and medicine, Judge Polier lays into both professions (my-son-the-doctor, and my-son-the-lawyer) with impartial vigor. Each is taken to task with a long recitation of past, present, and continuing failures—fully documented, carefully cited, and referenced.

There is considerable value in these criticisms—this list of shortcomings, of professional intransigence, neglect, incompetence, and foot dragging. Although not adequately organized and categorized, they represent a valuable contribution to anyone who would examine the relationship between law and behavioral science.

In her last chapter, Judge Polier reaches out toward newly popularized remedies and states that:

"Expanding legislative programs to meet the economic, social, and psychological needs of the individual, long submerged and obscured by the pressures of poverty and discrimination, have brought with them a vast enlargement of the role of law. At the same time recognition of the psychological and emotional problems of individuals has greatly expanded the role of the mental health professions."⁶

She goes on to cite the need for "closing the gaps that prevent joint planning and coordination of effort in these fields,"⁷ and the involvement of professional mental health personnel, lawyers and legislators. What could sound better? We have made and heard these pleas before, although never more clearly than Judge Polier's latest efforts. Unfortunately, they will need to be made again, quite likely for the next one hundred and thirty years as Isaac Ray might point out from the grave. Judge Polier has been honored, but her message will be largely ignored and resisted, as was Dr. Ray's. That is the sad prognosis which this reviewer fervently prays, but doubts will prove to be in error.

We need to begin with the up to date discussion of Judge Polier, harken back to the earlier pleas of Isaac Ray, and ask, "How come? How come these things are ignored and resisted?" Certainly there are reasons why society resists the message, and has shown little sustained interest in the plight of the

6. *Id.* at 153-54.

7. *Id.* at 154.

emotionally, socially, and economically disadvantaged. The law does not need psychiatry to enact and administer programs which would do away with poverty and its devastating effect upon family life and childrearing. A society which does not provide machinery for full employment consistent with ability, for opportunity and motivation for all of its peoples to acquire increasing skills, and which does not in return demand productivity and responsibility from each of its ablebodied citizens, will have neither the funds nor the inclination to care effectively for its mentally (or otherwise) disadvantaged population.

Perhaps part of the trouble with the remedies (joint planning, involvement, research, experimental projects, broad programs) advocated in *The Rule of Law and the Role of Psychiatry* is to be found in the very title of Judge Polier's book. What is this small, but perhaps significant innuendo which can be detected in assigning a *role* to psychiatry (or surgery, or internal medicine, or cardiology?). Psychiatry is a medical specialty. It is a clinical, hopefully scientific discipline. It cannot be assigned a role. At any given time, its knowledge extends just so far and no further. Beyond that, we have only theory and conjecture, but no science. Good intentions, research, crash programs; but no science. Medicine based on science, with a judicious bit of intuition and hope, is as far as any good physician can go. Similarly, the scientific skeletal structure of psychiatry will allow its body to stretch and contort just so far. Unless it is to court multiple fractures and dislocations, psychiatry cannot be racked by the law or any other master to conform to any other "role" than that of medical specialty.

Now psychiatrists are another matter. They, like surgeons, are people with varying natural abilities, quality of training, inclination, background, experience, and personal adjustment. Psychiatrists are willing to play a number of roles as individuals, and even as groups of individuals. Perhaps in these roles, they can bring to bear certain insights and findings of their scientific knowledge to a variety of related enterprises, studies, and inquiries. Beyond that, they are laymen. The roles of the psychiatrist (not the discipline or medical specialty of psychiatry) can be responsible, and constructively applied to a wide variety of social, educational, and interpersonal processes *provided* the psychiatrist is responsible and wise enough to keep the shoreline of his scientific knowledge in constant view.

Similarly, lawyers perform many and varied roles in society, having much to contribute to a wide variety of social, governmental, and economic enterprises by virtue of their legal training and experience. Unfortunately, neither the completion of psychiatric residency training, nor a law degree from a fine school, nor election to the bench confers instant wisdom or even consistent good judgement.

While on the subject of roles, little could be more fascinating nor important in the meeting place of law and psychiatry than the role of the judge. Here is an ideal illustration of a lawyer being assigned to a role for which he is at best partially equipped. What is there about being a lawyer, even a particularly

good one, that equips him to perform the role of judge in a Family Court? Why not a similarly gifted child psychiatrist, educator or parent? Certainly, one might expect the child psychiatrist to have had much more experience in problems of child development, in the significance and resolution of marital conflict, or in the implications for the child of custody decisions. But, traditionally, the role of judge is played by a lawyer in Juvenile and Family Court.

The roles of judge, like the roles of psychiatrist or doctor, are so natural and beckoning to assume (although frightening in their real responsibility) that they are, literally, child's play. As playing doctor is the pastime of every child, so playing judge is the pastime (role) of every parent.

Finally, if Judge Polier will indulge me a bit more in responding to her richly intriguing title, let us look at the phrase, "The Rule of the Law." What law? Gladly would I subject myself to the rule of law kept up to date by the people's elected representatives, or even of a leader chosen by an oligarchy—but to be ruled by a conglomeration of partly new, partly moldy, traditional, encrusted embodiments of wisdoms and blindspots euphemistically referred to as precedent—that is too much. There are laws on our books (admittedly rarely applied) that represent unnatural and perverted travesties.

Law is, at best, man's imperfect striving for justice, and we are never more than fifty years away from yesterday's unerased attempts at the suppression of yesteryear's vices. Would this accumulation of wormy, leatherbound books be the law which is to rule? Let the law first catch up, not only with its backlog of cases, but with the twentieth century—if it is to rule with justice.

There is much in Judge Polier's book from which both professions can profit. In her final chapter, she warns;

Extremely difficult times lie ahead for both law and psychiatry. A little hope, like a little freedom, cannot be contained: it must be either smothered or permitted to grow . . . the role of the law in providing the framework within which the individual can grow and the role of psychiatry in providing new insights and encouragement to healthy growth complement each other.⁸

The directions and goals indicated by Judge Polier stem from the wisdom which her years on the bench have provided, and the lessons which she has learned in her compassionate encounters with human lives in family court. A judge in juvenile or family court, like it or not, must function as a clinician. The final responsibility for evaluation, diagnosis, and disposition is his. In his awesome deliberations, he deserves the best medical and psychiatric consultation available. The court frequently has to make do with less than that, and struggles to learn about children and families the hard way. This is wasteful, for mistakes are inevitable and painful to both the judge and the judged. There is probably some pain that contributes to the writing of any good book such as this which seeks to right a part of what is wrong. Readers from both profes-

8. *Id.* at 155-56.

sions will quickly recognize that Judge Polier has not written from the thin air of theory, but rather from a depth of human feeling and a breadth of professional experience.

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