BOOK REVIEWS

LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE. By Esther Lucile Brown. Russell Sage Foundation, New York, 1948. Pp. 258. $3.00.

In this extraordinarily valuable report the Director of Studies in the Professions at the Russell Sage Foundation gives a clear picture of the relation between what lawyers do in the United States government and how law schools prepare them to do it. Official agencies provide one of the major careers open to talent, and especially to the talent molded or warped by the standard law schools. Miss Brown begins by reviewing the facts about lawyers in government and ends by evaluating the facts and fancies of legal instruction.

After a census of the numbers involved, the author makes a path-breaking report on the part played by lawyers in the policy process of all federal agencies where they are found. The record shows the many points at which the lawyer takes a hand in the making of decisions.

I suppose the most remarkable thing about the part of the book devoted to the theories and practices of legal education is the degree of unanimity among the schools. There are, to be sure, differences in the wording used by deans and professors. And yet, whether you look East, West, North or South, the same ferment is stirring. One by-product of the book is the breaking down of whatever stereotype has hitherto prevailed about the "great Eastern law schools" as monopolists of prophetic inspiration, ingenious experiment, or hard work in modernizing legal instruction.

In what does the agreement consist? The first item (and I draw this from the material assembled by Miss Brown) has to do with the distinctive skill of the lawyer, the mastery of appellate court opinions. The consensus is that this is not enough to equip the fledgling lawyer to seize the opportunities or to measure up to the needs of our world. The second item is that factual knowledge of the social process is essential. Or, to phrase this in a more sophisticated way, the traditional skills need supplementation by skill in data gathering and analysis. The third point is less easy to express because it comes out at the pores of much current self-criticism. There is some sense that something needs to be done to keep the lawyer feeling and behaving as a professional man conscious of community values, and equipped to aid all individuals and organizations in the task of correlating policies with values.

Diversities of view crop out when you look at the means by which the schools propose to accomplish the new goals. All sorts of bold new projects have been born, some of which have lived beyond the first year. But the mortality of initiative has been formidably great, and the gap between aim and performance is enormous. After recounting what she saw, heard and suspects, Miss Brown put her general prescription in these words:

> "For any considerable expansion of the intellectual horizon of legal education, at least three things are prerequisite: larger financial resources, teaching staffs, and research and clinical facilities; an overall Plan for each school; and a more affirmative attitude toward the task of law and government." (p. 246).

It is to be hoped that the Russell Sage Foundation will make provision for Miss Brown to re-survey the field of law and the public service from time to time in the next few years. Scholars and practitioners need the

mirror of fact held up to their faces, and Miss Brown is a candid, discriminating and sympathetic reporter. It is to be hoped, however, that in future surveys "public service" will be more clearly distinguished from "government service." Miss Brown is entirely justified in playing up the much neglected place of government in the careers open to law graduates. She knows, of course, that serving the aims of our society is not the same as being a government official, and that the task of the new legal education is not to substitute the training of Washington smarties for Wall Street slickies. The point can be more obvious when proportionate space is given to the policy impacts of the private practitioner in relation to his clients and to the organized activities of the bar and other associations. Miss Brown is fully cognizant of the point that the policies of a democratic *society* are made wherever significant choices are made, whether the chooser is conventionally called a legislator, a public official, a business owner, a business manager, a union official, or something else. Every choice needs the discipline of voluntary submission to the goal values of a society that aspires toward freedom. Many choices must be subject to compulsory review. The role of the lawyer, insofar as he lives up to the standards of a profession, is to aid in harmonizing all choices, voluntary and involuntary, with democratic values.

Harold D. Lasswell.†

A DECLARATION OF LEGAL FAITH. By Wiley Rutledge. University of Kansas Press, 1947. Pp. 82. $2.00.

A declaration of faith—legal or otherwise—ought to be exempt from a too probing logical analysis. Certainly Justice Rutledge's legal faith as here declared is not characterized by narrow adherence to a particular school. While at one point he says that ideas of justice "change with time and circumstance," he asserts elsewhere his belief in "abstract justice" "as the source from which conceptions of concrete and legally relevant justice arise." Plato and Darwin are thus brought into friendly association, and presently Bergson is added to the company by acceptance of the conception of law as "a purposeful striving in evolutionary processes."

Underlying all this is usually a substratum of optimism. There are times, however, when Justice Rutledge appears to take a rather dim view of the future. Having declared: ". . . law, freedom, and justice—this trinity is the object of my faith," he straightway adds a fourth tenet: ". . . the law is universal, if not in the sense that chaos cannot override it, then in the necessity for it now or soon to have universal application, unless justice under law is to perish from the earth"; and earlier he had voiced the opinion that "science and invention had made it no longer possible for a nation and its people attached to either view"—*i. e.,* totalitarianism or the tradition of individual freedom—"to hold assurance of continued life in contiguity with nations and peoples devoted to the contrary principle." But in the end cheerfulness breaks through again, and the Justice, taking courage from the achievment of the founders of our system in abolishing the Confederation and launching a nation in its stead, propounds a fifth article of faith, though somewhat faintly. The federal principle, he suggests, may make it possible to achieve "the same end" "on a broader scale, inclusive of the World."

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Most of the remainder of this small volume comprises two chapters dealing, for the most part, with the judicial history of the commerce clause. The first, titled perplexingly "The Pendulums of Power and Arcs Traversed," sets out effectively the various problems of interpretation which have arisen under the delusively simple phraseology of the clause and concludes with a brief sketch of the clause as a source of Congressional power. These are the best pages of the book. In the following chapter, a more elaborate account is attempted of the Court's application of the clause as a restraint on state power, which contains several misconceptions of the historical record. I shall point out some of these:

1. A point which Justice Rutledge constantly insists upon is that Marshall accepted the notion that Congress's power to regulate commerce was "exclusive," and he adds the contention that since Marshall's view of this power was very broad, his total position, "had it remained unmodified, would have played havoc with the power of the States to protect their vital interests and of commerce itself." The fact is that Marshall committed himself in *Gibbons v. Ogden,* to a strikingly generous view of state power, describing it as "that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government; all of which can be most advantageously exercised by the States themselves . . ."[1] The sentence which Justice Rutledge quotes (p. 49, note 2) as evidence of Marshall's adherence to the "exclusive power" doctrine was penned as part of his refutation of appellee's contention that the states possessed "a concurrent power" to regulate foreign and interstate commerce in the absence of conflicting legislation by Congress. Marshall's answer was the Scotch verdict "not proven"—the legislation instanced by defendant's counsel sprang from a different source, the state's taxing and police powers. To be sure, the Chief Justice gave a nod of approval to Webster's argument that Congress, having regulated commerce among the states as to the matter of navigation, must be deemed to have covered the subject, so that any *lacunae* in its system of legislation must be regarded as being intentional and hence as ruling out supplementary legislation by the states. In the final upshot, nevertheless, Marshall based his decision on neither of the above grounds. Conceding that the state of New York might have enacted the Fulton monopoly by virtue of its "own purely internal powers, whether of trading or police" (which he evidently regarded as *distinguishable from "a concurrent power" over interstate commerce*), he then posed the question whether there was an actual conflict between Fulton's monopoly and the Congressional legislation on which Gibbons relied. Answering this question in the affirmative, he decided the case in Gibbon's favor on the basis of the supremacy clause. Marshall's position concerning the relation of the police power to the commerce clause is further attested by his statement in *Brown v. Maryland* that "the power to direct the removal of gunpowder is a branch of the police power" (the first appearance of this exact expression, "which unquestionably remains and ought to remain with the States,"[2] and by his holding in *Willson v. Blackbird Creek Marsh Co.* that Delaware was entitled in the absence of conflicting legislation by Congress to authorize the construction of a dam across a small navigable creek in that state.[3] In the latter case, indeed, he concedes the doctrine of "concurrent power" to a limited extent.

1. 9 Wheat. 1, 203 (U. S. 1824).
2. 12 Wheat. 419, 443 (U. S. 1827).
3. 2 Pet. 245 (U. S. 1829).

The initial statement of the doctrine of exclusive Congressional power before the Supreme Court was by Daniel Webster in *Gibbons v. Ogden,* where it is the direct source of Curtis's opinion for the Court in *Cooley v. Board of Port Wardens.*[4] Webster's statement was as follows: "The words . . . 'to regulate commerce' are so very general and extensive that they might be construed to cover a vast field of legislation, part of which has always been occupied by the State laws; and therefore, the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress so far, and so far only, as the nature of the power requires." Justice Johnson, however, was not satisfied with this cautious preachment. Asserting in his concurring opinion that "the simple, classical, precise, yet comprehensive language" of the Constitution left "very little latitude for construction," he plumped unqualifiedly for the "exclusive power" doctrine. In short, it is not from Marshall, but from Johnson that this doctrine first received the judicial accolade.

2. From the doctrine of the exclusiveness of Congress's power, Justice Rutledge turns to the doctrine of "the silence of Congress." The latter, he explains, in contradistinction to the former, imputes the negation which it lays upon state power to the intention of Congress and not to that of the Constitution. As a logical proposition, this, no doubt, is true, but Justice Rutledge's inference that the two doctrines were originally thus discriminated is mistaken. Mistaken, too, is his attribution to Chief Justice Taney of the "silence of Congress" doctrine. Taney's position, as set forth in his opinion in the *License Cases,* was, first, that the police power was simply the all-embracing sovereign power of the state "to govern men and things within its dominion"; second, that the power to regulate commerce among the states when Congress had not done so, *i. e.,* concurrently, was part and parcel of this all-embracing power; third, that the Constitution does not draw the line between the states' police power, thus described, and Congress's paramount power over commerce; and since it does not, the question was, fourth, necessarily "one for judicial decision, and depending altogether upon the words of the Constitution."[5] In other words, the silence of Congress was to Taney's way of thinking, not a *restraint* on the states but a *license* to them to act.

The silence of Congress doctrine, like exclusive power, hails from Webster's fertile argument in *Gibbons v. Ogden.* However, it never emerged as a *distinct* doctrine with a *distinguishable* role till the *Bowman* case, which was decided in 1888. There a majority of the Court, bent upon overruling the holding in the *License Cases* that a state had the right in the absence at least of conflicting Congressional legislation to prohibit shipments of intoxicants from sister states—though whether by virtue of its police power or by virtue of a concurrent power over interstate commerce, or both, was a bit uncertain—found its way blocked by *stare decisis* and by Curtis's *dictum* in the *Cooley* case, that when its power over commerce is exclusive, Congress may not delegate it to the states. In this embarrassing situation the Court decided to divorce the silence of Congress concept from its erstwhile companion and to base its decision on the former. Instancing the many laws by which Congress had sought to promote interstate commerce, the Court held that they constituted a system of legislation with which, so long as Congress remained silent on the subject, state legislation interfering with the interstate liquor traffic was

4. 12 How. 299 (U. S. 1851).

5. 5 How. 504, 573, 583 (U. S. 1847).

in conflict. The holding naturally resulted in the heat being turned on Congress by the anti-liquor people, and presently that body "repealed" its silence, but only, the Court found, to the extent of banning sales in the original package. Stoppage by Congress of interstate liquor shipments had to await the enactment of the Webb-Kenyon Act in 1916. In sustaining this measure the Court virtually conceded that it delegated power to the state, but not unconstitutionally,[6] thereby throwing overboard the dictum in the *Cooley* case. It should be added that the Webb-Kenyon Act was passed over President Taft's veto, which vigorously urged that the distinction between Congress's exclusive power and its silence, was a constitutionally fundamental one, and that the proposed legislation was violative of the former. It is interesting to note, too, that Justice Rutledge's opinion last year in *Prudential Insurance Co. v. Benjamin,* sustaining the McCarran Act, extends Congress's right to delegate its exclusive power still further, even to the extent, indeed, of permitting it to subject interstate commerce in insurance to discriminatory taxation by the states.

3. Various references by Justice Rutledge to *Cooley v. Board of Port Wardens* convince me that he both misinterprets that case and exaggerates its importance for the later history of the commerce clause, although not more so than some others have done. The decision in this case was not intended to vindicate the right of the states to exercise their police powers in the absence of conflicting legislation by Congress; that was assumed. It only asserted the possession by the states of a concurrent power over interstate and foreign commerce *as such when the exercise of such power would benefit the commerce locally,* provided there was no conflicting legislation by Congress. And since the Civil War its importance has been *for the most part* restricted to state legislation affecting bridges, dams, and ferries operating in or over navigable streams.[7]

4. Justice Rutledge writes: "It has never been disputed, in any view, that when Congress has legislated to regulate matter falling in the field of Commerce which is interstate, its regulation nullifies any inconsistent local one."[8] If this means, however, that the Court's view as to what falls "in the field of commerce which is interstate" has never been influenced by its theory of the proper scope of the state's police power, then the statement is erroneous.[9]

One further point: Justice Rutledge writes: "The men of Annapolis and Philadelphia were not cowards. Nor were they above a little statesmanly deception in a good cause. They had not been taught that open covenants always should be openly arrived at. So they kept the arriving stage secret. At the beginning they also dissembled a bit in their purpose."[10] This seems to me quite unfair. The problem before "the men of . . . Philadelphia," who had been chosen by their fellows to exercise their own best judgment respecting a problem of immense complexity, was to determine what conditions were most favorable; and they decided unanimously in favor of secrecy. Jefferson, it is true, 3000 miles from the scene of action, condemned the decision of fifty of his distinguished compatriots in his characteristic off-hand way, just as he at first (till he had heard

6. Clark Distilling Co. v. W. Maryland Ry., 242 U. S. 311, 326 (1917).

7. *See* Escanaba Co. v. Chicago, 107 U. S. 678 (1882); Port Richmond Co. v. Board of Chosen Freeholders, 234 U. S. 317 (1914).

8. P. 53.

9. *See* New York v. Miln, 11 Pet. 102 (U. S. 1837); CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS 116 (1936).

10. P. 26.

from Madison) condemned the Constitution, saying that "three or four amendments" to the Articles of Confederation would have done better. But Mason, whose reputation for "democracy" fully equalled Jefferson's, urged secrecy at the time and Madison defended it unanswerably forty-three years later.[11] Nor did either of these men mention the obvious fact that owing to the slowness of communication in those days, publicity would have given the nearby states an unfair advantage in impressing their views on the Convention. And as to "open covenants openly arrived at," Justice Rutledge may perhaps recollect that the author of that phrase later abated his demand on the second point.

Edward S. Corwin.†

SEXUAL BEHAVIOR IN THE HUMAN MALE. By Alfred C. Kinsey, Wardell B. Pomeroy and Clyde E. Marcus. W. B. Saunders Co., Phila., 1948. Pp. 804. $6.50.

What impact will the Kinsey report have on law? The answer of the authors appears most clearly in the chapter on Social Level and Sexual Outlet, in the course of a discussion of the social implications of their findings:

> "It will be recalled that 85 per cent of the total male population has pre-marital intercourse (Table 136), 59 per cent has some experience in mouth-genital contacts (Table 94), nearly 70 per cent has relations with prostitutes (Table 138), something between 30 and 45 per cent has extra-marital intercourse (Tables 85, 111), 37 per cent has some homosexual experience (Table 139), 17 per cent of the farm boys have animal intercourse (Table 151). All of these, and still other types of sexual behavior (Chapter 8) are illicit activities, each performance of which is punishable as a crime under the law. The persons involved in these activities, taken as a whole, constitute more than 95 per cent of the total male population. Only a relatively small proportion of the males who are sent to penal institutions for sex offenses have been involved in behavior which is materially different from the behavior of most of the males in the population. But it is the total 95 per cent of the male population for which the judge, or board of public safety, or church, or civic group demands apprehension, arrest, and conviction, when they call for a clean-up of the sex offenders in a community. It is, in fine, a proposal that 5 per cent of the population should support the other 95 per cent in penal institutions."

The thesis is that the sex laws are absurd because they subject almost the entire population to corrective measures. Commentators have commended Professor Kinsey and his colleagues for showing "how unrealistic and even barbarous is the legalistic conception of sex relations." [1] These laws, thus characterized as absurd in their total effect, are also

11. VAN DOREN, GREAT REHEARSAL 28 (1948).

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1. Waldemar Kaempffert, Science in Review, New York Times, Sunday, Mar. 7, 1948, p. E-9. Compare Morris Ernst's review in SATURDAY REVIEW OF LITERATURE, Mar. 13, 1948, p. 19: "false symbols written into legal sanctions."

challenged as class legislation, foisting the sex taboos of the upper social levels, *e. g.,* intolerance of premarital intercourse (pp. 391-2), on the rest of the population.

In reading his data in favor of more understanding and less shock on the part of social workers, educators, military and legal authorities who encounter divergent sex practices, Kinsey is on firmer ground than when he suggests that the sex laws be repealed because so many men violate them. If the conduct proscribed by these laws is undesirable, evidence of promiscuous violation would, with greater logic, support an increase in penalties and more rigorous enforcement. The test of a criminal law is not its correlation with actual behavior, but its correspondence to behavior ideals and its efficiency in promoting those ideals. The report itself demonstrates that people who engage in forbidden practices nevertheless subscribe to the law and morality which condemn their conduct.[2] This is not hypocrisy, although hypocritical people may take such positions. This is only a recognition that there may be a better way of life than one is personally able to follow in every situation.

Do the sodomy laws, then, embody desirable standards of conduct? A very large proportion of our population will respond with an unhesitating affirmative, however irrational and superstitious this article of faith may seem to the anthropologist. Kinsey disclaims the desire or power to make moral evaluations and therefore must accept this popular hypothesis in evaluating the law. If we accept the hypothesis that sexual "perversion" is undesirable, the next question is whether the criminal law can effectively prevent it. The statistics seem to show that threat of imprisonment does not deter vast numbers of men from at least experimenting in heterodox sexuality. But it is important to bear in mind that the percentages stated in the quotation are *cumulative incidence* figures, *i. e.,* they denote the proportion of the male population which has *ever* had *any* of the named experiences. They do not represent proportions of the population currently engaged in forbidden sexual activity. A "cumulative incidence" of 95 per cent obviously includes a great majority whose sexual life exhibits fairly close conformity to the legal norm, despite occasional divagations. Overt homosexuality is an isolated or transitory experience in the lives of a very large proportion of the 37 per cent who have had it. Even in the age of greatest frequency of sexuality with animals—between adolescence and 20 years—only one per cent of total sexual outlet takes this form (p. 670). If the effectiveness of criminal laws is to be tested by conformity and non-conformity, one would have to say there was more evidence here of success than of failure.[3]

Even if it be assumed that the sex laws exert some influence in favor of desirable conduct, these laws could be justifiably criticized if they disserve other important objectives. If, for example, the effective deterrence of sexual non-conformity required the five per cent who are pure to support the rest of us in penal institutions, the pure would be the first to urge repeal. But that suggestion is nonsense. As well attack the criminal law in its entirety on the ground that the cumulative incidence

2. "The highest incidences of the homosexual, however, are in the group which most often verbalizes its disapproval of such activity," p. 384. The upper social levels, whose mores are supposed to be incorporated in the law, violate the sodomy taboos most often. Table 94, p. 351. *Cf.* p. 584 (adultery).

3. There is neither in Kinsey nor elsewhere any objective demonstration of the efficacy or failure of the criminal law as a deterrent. Cowan, *Relation of Law to Experimental Science,* 96 U. OF PA. L. REV. 484, 491 (1948); MICHAEL AND ADLER, CRIME, LAW AND SOCIAL SCIENCE, pp. 214-5, 224-5 (1933).

of violations would put, not 95 per cent, but everyone of us in jail. At the technical level, the statute of limitations would save most; and premarital intercourse, the most frequent violation, is usually punishable only by a small fine. Beyond this is the reality of life, that the criminal law is never more than fractionally enforced, and should not be in view of the ridiculously inconvenient consequences of 100 per cent enforcement. The criminal law serves its purpose by threatening punishment rather than by actual incarceration, except in the relatively few cases where incapacitation is the dominant purpose of the sentence. The actuality of imprisonment is an unfortunate incident to the necessity of maintaining the threat. Considering the frequency of sex violations there are extradordinarily few persons in jail on this account.

There are of course evils that can flow from the existence of unenforced or whimsically enforced laws. Statutes which are generally honored in the breach lend themselves to blackmail and political persecution if someone unexpectedly chooses to take them seriously.[4] A cynical attitude towards law enforcement in general may result from the presence of such laws. This danger, however, is gravest when violations are more or less public, as is often the case under liquor and gambling restraints. We are made uncomfortable by the glaring inconsistency between our ideals and our deeds. Sex crimes—especially those which are infrequently prosecuted—are for the most part secret. It is one of the paradoxes of social processes that Dr. Kinsey's *revelations* therefore may generate the very cynicism regarding law which might not have followed from the undocumented and unpublicised fact that our sex lives do not conform to our moral professions.

Now that Kinsey has let the cat out of the bag, shall we see major modifications of the sex laws comparable to the repeal of prohibition? I think not. Prohibition went out not merely because violation was frequent, but because of increasing doubts that the forbidden conduct was undesirable and much evidence that the cost and consequences of enforcement were intolerable. The situation of the sex laws is much more comparable to the perjury problem. If cumulative incidence figures were compiled on conscious sworn fabrications in court proceedings, tax returns, etc., they would no doubt lend apparent support to the proposition that the perjury laws were "unrealistic" and "barbarous" contradictions of "normal" human behavior. But not a voice would be raised for repeal, because we would all go on believing that perjury was an evil and the threat of punishment plus the subtle influence of penal sanctions on the general moral climate of the community do tend to restrain it to some extent. Accordingly, Kinsey has not disproved the basic postulates of the sex laws: that the forbidden conduct is undesirable, that it can be deterred, and that the social cost of the deterrence program is not excessive.

It is on morals rather than on criminal law that *Sexual Behavior in the Human Male* must have its initial impact. Despite the authors' anxious attempt, as good scientists, to make amoral social interpretation, their strictures against the criminal law impugn the prevailing sexual morality. To reveal that certain behavior patterns are widespread, that they are a product of environment, opportunity, age and other factors over which the individual has little control, that they are not objectively harmful except as a result of society's efforts at repression (pp. 385-6), to point out that

4. But with present social attitudes, blackmail by threat of publicity would be about as effective, if we repealed the sex laws, as threat of prosecution.

similar behavior is encountered among other animals than man, to suggest that the law ought not to punish and that psychiatrists might better devote themselves to reassuring the sexual deviate rather than attempting to "redirect behavior" (p. 660)—all these add up to a denial that sexual "perversion" is an evil. When this doctrine presents itself for public acceptance, it faces formidable opposition based on Holy Writ and immemorial folk-belief, precisely as did the revision of religious beliefs implicit in Darwin's *Origin of Species*. Not until this new morality triumphs, or the more distant day when Americans cease to regard minority morals as a legitimate object of social coercion, will it be time to say that the law, which can only define and implement generally accepted social objectives, is unrealistic and barbarous. Meanwhile changes in practice will accrete, perhaps faster than changes in doctrine. District attorneys in selecting cases for prosecution will make practical distinctions between commercial pandering to bizarre sex desires and the non-conformity of one married couple to the methods of physical gratification satisfactory to others; between homosexual relations voluntarily established among adult partners and aggressions or seductions that turn the inexperienced into unhappy byways of social conflict. Eventually, such distinctions ease themselves into the written law, especially if it can be done in the course of a general revision of the penal code. This avoids the appearance of outright repudiation of conservative moral standards, by presenting the changes in a context of merely technical improvements.

Divorce for adultery, that most venerable institution of family law, may have to be questioned in the light of the Kinsey data, unless divorce is regarded merely as a penalty for marital wrongdoing and so within the moral and criminological problem previously discussed. A rational divorce law, however, subordinates penal considerations to the objective of releasing married people from legal obligations which no longer promote the family and thereby the social welfare. It is in the interests of family and society to provide for dissolution of marriage upon the occurrence of events which demonstrate that the relationship is not viable; that one or both parties are unfit for marital or parental responsibilities. Most divorce laws assume that a single act of adultery is such an event. But if, as Kinsey tells us, half the married men are adulterers and another quarter acknowledge the inclination (pp. 584-5) this standard is plainly an impracticable test of marital fitness on which to rest the stability of unions, since it renders most marriages vulnerable. Furthermore, some of Kinsey's histories indicate that adultery has occasionally made positive contribution to the stability of particular unions. He reports that husbands have been known to acquire prowess or technique in extra-marital adventures, which help to solve domestic problems, and that others have had an opportunity to make comparisons favorable to their wives. Perhaps the most serious threat to marriage from adultery is the reaction of the aggrieved spouse to this wound to *amour propre*. Yet Kinsey found that there was a good deal of tolerance of occasional discreet infidelity. Moreover, it is notoriously easy to fabricate evidence of adultery, so that collusive divorces on this ground are common in jurisdictions which do not provide other easy escapes from the bond.[5] To the extent that this facilitates divorce, in effect, by mutual consent, the institution of permanent monogamous marriage is degraded.

5. *Collusive and Consent Divorce and the New York Anomaly*, Note, 36 COL. L. REV. 1121 (1936); Fox, *The Blonde in the Black Silk Pajamas*, ESQUIRE MAGAZINE, April, 1948.

The Kinsey data will be added to the mounting evidence of the need for basic revision of the divorce law. Merely to achieve a uniform set of divorce grounds or a national divorce law will not be enough, if we continue to rely on such crude measures of the viability of a marriage as a single act of extra-marital intercourse. Adultery may be the significant symptom of a hopelessly wrecked marriage, but so may religious differences or bad health. What is needed to replace the present system of divorce based on violations of a rigid and inadequate code of marital conduct is a system in which dissolution of marriage is keyed directly to a finding by some agency that the family in question is irreconcilable and that the welfare of all parties concerned, including children, will be promoted by terminating the relationship. The commission of adultery would be one item of evidence which such a tribunal would consider in arriving at this ultimate finding. An essential feature of this system also would be the power and duty of the tribunal to conduct independent investigations of the marital life of the parties, in order to end the scandal of collusive divorce which is inevitable so long as the factual inquiry is limited to the witnesses produced by the libellant. Finally, a society truly concerned with preserving the institution of permanent monogamous marriage will spend as much money in maintaining family counsel and mediation services as on divorce courts.

I have no quarrel with a zoologist's offer to interpret his statistical tables in readable human terms, especially since the popularity of this work of science is attributable to the palatable paragraphs rather than the columns and graphs. That lawyers, sociologists, ministers, psychiatrists may dispute the authors and each other regarding interpretation only testifies to the vitality of this contribution to man's knowledge of himself. In the fires of this controversy new truths may be forged.

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STUDIES IN AFRICAN NATIVE LAW. By Julius Lewin. The African Bookman, and University of Pennsylvania Press, Philadelphia, 1947. Pp. vii, 174.

This is a book to stir, bother, instruct and somewhat dismay a lawyer. The lawyer-reader will find it written for him, not for an ethnologist; it talks lawyer's talk, with lawyer's competent technique behind it; it shows internal evidence of accuracy in fact; its merely arguable positions are phrased temperately; its prejudices are restrained, and the material as presented allows one with contrary prejudices a reasonable wherewithal, in the very material presented, to back contrary prejudices of his own.

To be sure, the book adds little to the ordinary practitioner's wherewithal in handling the ordinary cases he will meet tomorrow or day after. But what it can add to the reader's understanding, as a lawyer, of the world we face, is to be calculated only in terms of the lawyer-readers' capacity for understanding.

These days, men have with some reason ceased to conceive of "World-Law" as divided merely between the Roman-Continental systems and the Anglo-American systems, with little interest in the former and none in any other. These days, men are being forced to think in terms of capitalist

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"democratic" systems in contrast to Soviet-model "democratic" systems, a sort of two party set-up for the world, involving two radically opposed ideas of "democracy." [1] What Lewin's book does is to present to the thinking lawyer a sampling of the problems, the *legal* problems (with all their political implications bubbling beneath the page) of that great independent vote whose support is vital to winning any world election: the "native" systems of law and thinking. What Lewin's book does, further, as its detail is absorbed, is to display a juristic ineptitude on the part even of willing capitalist-democratic governments in handling problems of "native" law and of "natives" which makes straight hair curl, or kink. And so to raise a question: behind the iron curtain, how is the Soviet type of law making out with the tribes in the Caucasus, or in Siberia, or in Mongolia, or in Korea?

The picture this reviewer gathers from the book is that of a humanitarian—"understanding"—set of laws, *implemented by a court system,* imposed upon the tribes in differential fashion by the various states of the South African Union at the end of an era of fairly outrageous exploitation and general disregard of the natives. If our own Indian population should compare in numbers with the negro population of our southern states, and should have retained enough of tribal custom and also have acquired among enough able members enough understanding of white economy and methods to give new enterprisers the same edge over old native conformists which we can observe in an occasional pueblo, and if there were in addition a heavy influx of the more sophisticated Indians into our cities—then we could roughly match the conditions Lewin is dealing with. Collier's job, so beautifully followed up by Brophy, of putting our own Indian governments on their own, would then resemble the South African, except that that job would then involve many men, shrewd men, men out-of-tribe-in-fact but trying to trade on tribal law, or on its limitations, whichever could serve them better. (Example: a loan is made in money to a brother; it is twenty years old. The brother, still tribal, does not know any statute of limitations; the borrower, a city man, invokes it because *money* is not known in tribal law.)

The picture further gathered is that of native courts manned by white lawyers, trained (give thanks at least for this) in case law, but instructed as to the relevant native law only by native "assessors." Given honest assessors—and the internal evidence suggests prevailing honesty—this could be good, if the white lawyers had sense enough to apply their own case law techniques to the assessors' statements of tribal law.

Thus, in an effort to codify the tribal law of one of our pueblos, I was met with the flat proposition from men who would be tops as assessors that "This Pueblo absolutely does not recognize divorce." But if one of your boys goes outside, and marries, and then decides to come back, but his wife won't come back with him, and he divorces her and then comes back, can't he remarry? "Of course. He married outside; he divorced outside; it is not our concern." This is typical *case law* technique applied by *natives*—a broad rule laid down flatly, but promptly modified or distinguished when the facts so require. My guess is that at least half of the native systems of law proceed thus; my guess is that literal adherence to the ruling as it stood in an older case is only a juristic aberration

1. Our "democratic" concept involves some real measure of political, legal, and economic freedom, and on-going, reversible, popular votes. The Soviet "democratic" idea, if I get it, centers on an ideal of distribution of product to benefit the whole population, with no indulgence whatever of political freedom—or of legal or economic freedom, if political questions are involved. One *won* election is final.

of some queerly conditioned legalistic society which has developed lawyers without developing juristic sense. As I read the growth of the legal art, such literal adherence is properly the lay and not the lawyer's way of going at things. A lawyer's job is to solve a case within the rules, but with a just result. On occasion (as in periods described by Pound as either a formal stage or a mature stage of legal history) the lawyers can, of course, forget their job.

But native law does not forget its job too often. Some of the African tribes whose law Lewin deals with have, as the literature shows, indeed developed formalistic legalism to the point at which even a technical lawyer must sometimes blush for his profession. There are reports which must be believed. What there are not, in the literature, are reports which say either that thirty or a hundred years of such pseudo-justice can give general satisfaction, or that the reporter was not reporting cases selectively. Between 1880 and 1910 our own courts showed thirty years of similar results; they have been neither satisfactory nor permanent.

It is thus very hard to confine oneself in regard to the implications of Lewin's book. It opens up all of Jurisprudence, and, as is observable, much of emotion. Only the immediately and relatively few implications of the material which Lewin had in mind for the Union of South Africa lie on the surface. But it is a clean job, done by a man who wants clarity in the law, who has a conscience even in advocacy, who has the kind of essential insight into problems which fertilizes.

For ethnologists, if any should read this, and for sociologists, let me add: Here is acculturation in a wholly novel aspect, with necessary material on each end documented with some reasonable chance also to meet the mediating personnel. Don't miss it, but do consult a live law man in your university or you won't fully understand it. He will grow, too, as you work with him. For lawyers: here are familiar problems curiously illuminated by an unfamiliar setting. They wake you up to what law is about.[2]

The bibliography offers much which is substantially unknown in these United States, and by which our study of primitive law will undoubtedly profit. But Lewin can also learn from the writings of Felix Cohen, Hoebel, Lips, and even me.

Karl N. Llewellyn.†

THE SUCCESSFUL PRACTICE OF LAW. By John Evarts Tracy. Prentice-Hall, Inc., New York, 1947. Pp. vii, 466. $5.75.

While a student in the Law School of the University of Wisconsin early in this century, Mr. Tracy felt he had been so helped by a lecture on practical hints to the young practitioner that he then and there resolved "to pass this message on to another group of students" at a subsequent time after appropriate experience. Not until twenty-six years later, during which period the author engaged in a varied, interesting and successful

2. A partial table of contents; 2. The Framework of Native Law; 4. Marriage by Native Christians in British Africa; 5. The Conflict of Native Law and Common Law; 6. The Conflict of Tribal Laws (Conflicts of Law Men: read this!); 7. Crime in Relation to Native Policy; 11 and 12. Some cases (good ones).

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law practice in four states (Wisconsin, Michigan, New York and Illinois), did he begin to carry his resolution into effect. Then, as a professor in the University of Michigan Law School, a position he still holds, he instituted a voluntary course of lectures on the same general subject. An earlier volume entitled *Hints on Entering the Practice of Law* first resulted; the present volume includes most of the "old material," but some subjects have been expanded and others added. In book form, the lecture material will have interest and value not only to senior law students and recent graduates but to young practitioners and, indeed, to some not so young.

As he opens the book with a discussion of how to obtain clients ("First, catch the hare"), Professor Tracy argues, and this reviewer thoroughly agrees, that the subject matter of securing some personal practice is quite important, too, for "the young men who are entering the large offices and who consider that this question is no problem of theirs." Agreeing that "legal ability and industry" are requisites, the author states that eventual partnership may depend also on the ability "to obtain and hold clients, which after all, are the necessary foundation of any law practice."

The various suggestions made regarding obtaining and holding clients are rather the usual ones "every young lawyer should know" or at least hear or read once. He will reject some as inconsistent with his personality, he will make variations upon others; that is why some are more successful than others in the art of legal "business-getting." In any event, every lawyer who reads the early chapters will recognize the simple step or series of actions which, coupled with legal ability and industry, led to his own firm establishment in practice or that of his contemporaries or colleagues. This material together with the chapter "How to Handle a Conference with a Client" includes many valuable and practical hints for the neophyte.

It will be necessary, however, for the young lawyer to exercise his own judgment and common sense before applying in all situations the advice given. "When you get ready to start your suit, have the defendant actually served with process, even though his counsel has [agreed to accept service]." That may be good advice for some sections of the country in some situations; in others it might needlessly antagonize, as well as involve a totally unnecessary, though small, cost item for the client. The reasoning, "That man will be much more likely to settle with us after he has awakened once or twice in the night remembering about the sheriff handing him those papers," is not too persuasive. This is, of course, an entirely different matter from relying on the other side's subpoena of a witness, dealt with later in the book.

In dealing with other problems of practice, Mr. Tracy frankly states: "I realize that some may not agree with me in the statement I have just made." Divorce cases are being discussed and "the statement" immediately preceding is: "There still remains, however, your duty to society to preserve the home and to keep the parties together, particularly where children are involved, especially if you have reason to believe that the differences between the parties are not fundamental." The advice Mr. Tracy gives regarding the handling of divorce cases, born as the result of his own experience, is sound because it is calculated to give the parties every opportunity to avoid the final operation of divorce. One wishes that Mr. Tracy might have suggested to young law practitioners the possibility that perhaps the best help to the situation (and his client) might be furnished, not by action or inaction on the part of the legal profession but through some other professional skill. Too few lawyers are aware of

their own limitations. In many domestic crises, letting nature take its course while the lawyer allows "the matter to simmer" may not be the most effective remedy.

A brief chapter on the "Use of Time While Waiting for Clients" contains interesting references for supplementing law school courses and specific recommendations for filling in the gaps in one's pre-legal training. The author then makes the sharp transition into the more pleasant (and difficult) activity of "The Fixing of Fees." The application of the five well-known factors in arriving at proper fees is indicated in a long list of legal matters; especially interesting and provocative is the discussion of the time spent factor and the various systems used by lawyers and law firms in recording the actual hours and minutes devoted to the client's business. Contingent fees are discussed in a practical way; the unwisdom of letting the client fix the fee is dramatically demonstrated.

"The Drafting of Legal Instruments," a subject to which the law schools have devoted all too little attention, is discussed and amply illustrated in Chapter 6 which is nearly as long as the preceding five chapters covering all of the topics mentioned above. Following general advice, including of course the usual caution against the use of forms, specific problems of drafting as involved in instruments of conveyance, contracts, wills, corporation papers, and pleadings are treated. A sample check list is given and how that device may be used to save time in future transactions is emphasized. This chapter is sufficiently explicit and detailed to be extremely helpful to the young practitioner. Nor is it confined to drafting problems for it deals, too, with such questions as the state under the laws of which one should incorporate.

The chapter on "How to Examine an Abstract of Title" is likely to be of greater practical use to the rural practitioner than to others, but much of the practical discussion contained in it, as, for example, when the client's deal should be turned down because of flaws discovered in the title, will benefit all. Professor Tracy next proceeds to discuss "Office Practice." He cites some of the earlier articles and books on the subject but fears "that the office systems they recommend would be too elaborate for successful use by a young man opening a small office." He assumes the risk "of arousing criticism from those to whom efficiency charts mean everything," and proceeds to give his "very simple suggestions" about "organizing your work and keeping track of your income and expenses." This reviewer, having practiced in a large firm (for Philadelphia) where happily such matters were handled for him most competently, is unable to pass judgment upon this material, but it seems sensible, simple, and sound.

The chapters on how to prepare and to try a case are unquestionably the most entertaining portions of the book and make delightful reading. I suppose I say this because, no longer immediately concerned with capturing and retaining clients or with details of running an office, the thrill of trial work still remains—even to read about it. I glean the same greater interest on the part of the author, and it is in these chapters that one comes fully to see why Mr. Tracy was a successful and able lawyer. He is speaking, however, not alone from his own experience but from the cumulative experience of others, including many of the country's great court figures, for he quotes liberally from them. The preparation of the brief of law, the brief on the facts, statements of witnesses (including their re-interviewing), their personal appearence in court, women and children as witnesses, are all fully discussed, illustrated, and in some cases charted.

While, as pointed out, there have been innumerable discussions of the preparation and trial of cases, Mr. Tracy makes his distinct contribution to the literature on the subjects. Here, especially, the present volume will be of interest and real aid to more than the beginning lawyer. Many will be intrigued by the fact that for a time the author had "most indifferent success" in jury cases but finally "my machinery began to click." He analyzes the reasons.

Some, who find difficulty in generalizations, will obtain particular help in "A Treatment of Testimony" from an actual case, included in the volume as an appendix. It is not complete but is sufficient to permit comment and question with respect to the manner in which the testimony was presented. The young trial lawyer, beginning to get into court frequently, can get many valuable hints and suggestions from reading these pages—a method of learning from the mistakes of *others*.

Brief treatment is given of "Problems of Legal Ethics" and a number of "Hints on Entering the Practice of Law." The style is easy and conversational.

I am sure Mr. Tracy has helpfully fulfilled the pledge he made so many years ago to give to finishing law students and beginning lawyers a few "helpful steers." No one of that large group can read this book without being, I am sure, much more grateful to Professor Tracy than he was after a two hour lecture in his law school days.

Earl G. Harrison.†

ADMINISTRATIVE LAW: Cases and Comments. Second Edition. By Walter Gellhorn. The Foundation Press, Inc., Brooklyn, 1947. Pp. lxxxix, 1138. $7.50.

CASES AND MATERIALS ON ADMINISTRATIVE LAW. By Milton Katz. West Publishing Co., St. Paul, 1947. Pp. xiii, 1108. $8.00.

CASES AND MATERIALS ON ADMINISTRATIVE LAW. By Carl McFarland and Arthur T. Vanderbilt. Matthew Bender & Co., Inc., Albany. Pp. ix, 1048.

CASES AND OTHER MATERIALS ON THE LAW OF ADMINISTRATIVE TRIBUNALS. Second Edition. By E. Blythe Stason. Callaghan, Chicago, 1947. Pp. xxxi, 731. $8.00.

This blossoming of case books on Administrative Law, two of them second editions, two of them brand new, attests the liveliness and growing maturity of our subject. Some time ago, reviewing the first edition of Gellhorn,[1] I called attention to the shift of emphasis over the course of the years. Freund took for granted the then situation respecting the relative roles in the law making process of legislator, administrator and court. He delimited the field in terms primarily of common law judicial control of the traditionally accepted scope of administrative powers. Frankfurter broke ground by reexamining the separation of powers doctrine. He sought to blast a way through its formal dogmas for the entrance of more dynamic and heterodox views of the distribution of law

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1. 54 HARV. L. REV. 367 (1940).

and policy making functions. In Stason and even more in Gellhorn, we saw the subject come of age. If Gellhorn explored the doctrine of separation in detail it was for the purpose of establishing the respective spheres of legislative and administrative activity. But the stress for the first time was on the administrative process itself. There was a striking diminution of attention to the problem of judicial control.

An examination of the four books reveals that the general pattern underlying the Gellhorn and Stason books continues. Each of them has its special interest but they all present a picture of the administrative process in terms of the relative contributions to law and policy making of legislator, administrator and court; and it is this picture of government wrestling with policy through all of the varied resources of its several organs which makes the subject so rich an opportunity for the general education of the lawyer. This observation, by the way, leads me to state my preference for teaching it in the third year where it may serve to integrate what has been learned of law making and law administering in all its phases.

Within the general pattern there are yet interesting contrasts among these books. The two newcomers warrant, of course, principal attention. Katz's is a book built more explicitly than any of the others around the guiding idea of law making as a continuing process, a constant creative movement. He limits his material to federal spheres, with primary attention to the Interstate Commerce Commission and the Securities and Exchange Commission. He opens with a series of statutes showing the legislative growth of policy in transportation and securities regulation. After setting out this material he presents administration as the task of manipulating the statute for the development of further policy. Two things are particularly good: the exploration of the practical and legal effects of different types of administrative action, *e. g.,* the rule, the interpretation, the order, *etc.;* and the wonderful series of decisions and orders in the *Chenery* case,[2] bearing, among so many other things, on the problem of the choice by the agency of the mode of action (rule or *ad hoc* order). I believe that the *Chenery* litigation is the greatest boon to teachers since the multitudinous *Morgan* litigation, and Professor Katz has my thanks for setting out a good deal of it, including the SEC's opinion between the first and second Supreme Court decisions.

Beyond that point I have some doubts. The book is curiously sketchy on the procedure of administrative hearings, as if it were a problem of detail that does not much interest the author. Gellhorn has over 400 pages on the right to hearing, the character and mental equipment of the tribunal, the pleadings, the evidence, and the adjudicating process; Katz possibly 100 pages. Gellhorn's material is perhaps too voluminous, but Katz slights for example, the problem of opportunity for hearing; and the evidentiary process; he has no consideration, as far as I can find, of the problem of bias and its relation to the larger issue of administrative law making. And yet it is not a short book. Rather interestingly it transpires that in this book judicial control has come once more into its glory with 500 pages of a 1000 page book, as against Gellhorn's 200, Vanderbilt and McFarland's 200, and Stason's 230 (out of 700). Professor Katz has made one other quite deliberate and interesting choice. He has printed most of his cases *in extenso,* has severely excluded footnotes,

2. The first decision is 318 U. S. 80 (1943). Unfortunately the second decision of the Supreme Court with Jackson's inflamed dissent had not appeared when the book was published.

digests of comparable and contrasting material, and extracts from the well known reports on administrative law. This emphasizes, no doubt, the intention of showing given statutory material in process rather than the abstract systematic entity "administrative law in the United States." A teacher concerned to provide orientation to state practice problems might insist on material bearing more directly on them. Professor Katz might argue, however, that the feeling for the subject may as well or even better be taught by dealing with a few specialties and that the practitioner must, when the case arises, secure exact information by his own research.

The cases and materials of Judge Vanderbilt and Mr. McFarland are precisely the systematic full coverage that Mr. Katz's is not. The book is remarkable both for the degree and thoroughness of its analysis and the wealth of its material. The book sets out to present material on every idea, conception, distinction or field which the authors believe to bear upon the subject as it comes up federally and in the states. In some cases they have gone rather far afield (at least from current teaching practice), as when they explore the relative spheres of state and federal administration, normally reserved for the constitutional law course. A rather interesting exploration concerns the authority of officers to commit the Government (Stason too has material on the problem). If I were to criticize, it would be that the analysis is unduly complex and over-concerned with all of the possible distinctions. One result is a confusing and unnecessary duplication and an occasional emphasis on formal classifications that are either obvious or functionally not important. And this concern for exhausting the conceptual content of the subject has led understandably to the neglect of just that sense for the coherent, dynamic process which so much concerns Katz. The splendid *Chenery* material, the very instructive *Assigned Car* case [3] (the latter printed by both Stason and Katz) are here mentioned casually in footnotes at odd points. There is, it is true, a good section on statutory interpretation but it does not have the vivid instructional effect of seeing some one statute working. In the field in which the authors have chosen to work, however, one must admire the splendid coverage of materials. There are new and novel cases from the states on a great variety of interesting technical problems. The authors have managed to print at the appropriate places not only a good part of the *Attorney General's Report,* the *Benjamin Report,* and the *Report on Ministers' Powers,* but also extracts from a great number of other less known government documents, state as well as federal. It is a notable source book.

Gellhorn's rich and useful book is well known. The present edition has the same pattern (already described above) as the first edition. Gellhorn falls midway between Katz's concern with process and Vanderbilt's and McFarland's concern with definition. He has added all of the "great" cases decided since the first edition; he has covered some of the subjects omitted in the first edition (*e. g., res judicata*). In his elaborate notes and summaries of case material he continues to offer the most comprehensive presentation of the very numerous fields and conceptions which he has chosen to explore. These include most of the important ones, at least up to the point of judicial review. In contrast to Vanderbilt and McFarland he does very little with the governmental reports and surveys. He focuses the field, in short, almost entirely through the lenses of the judicial decision.

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3. 274 U. S. 564 (1926).

Dean Stason's book is in many ways the most usable, particularly in the one semester three hours per week, presently allotted to the course. He has left coverage to others and has confined himself to 700 pages. This compares, for example, with Vanderbilt and McFarland's 1000 pages which with their confusing and unpleasant shuffling from standard to small type, and their compressed and crowded headings, probably amount to 1500 pages of a properly printed book. Within its 700 uncluttered pages, the Stason book presents a fair and well balanced, if somewhat sparse, cross-section of administrative law in its present day systematic form. This book, then, is stripped to the teaching material, whereas the Gellhorn and Vanderbilt-McFarland books in particular, provide this and a supplementary reading book. In these days of crowded libraries there is a great deal to be said for reading books. I suppose there is differing experience as to how much of such books is read, depending, no doubt, on the character of the teacher. In the end, which of these four worthy books is chosen will depend on the tastes and interests of the teacher, and some, no doubt, might like to give them all a try.

Louis L. Jaffe.†

ESTATE PLANNING AND ESTATE TAX SAVING, (2 vols). By Edward N. Polisher. Geo. T. Bisel Company, Philadelphia, 1948. $20.00.

If "estate planning" can be called a science, it must be admitted that it is but an infant one. Until relatively recently, an attorney who was consulted with reference to the testamentary intentions of a client contented himself with the explanation of the possible arrangements, and would then draw the appropriate instruments, generally consisting of a will and/or an *inter vivos* trust.

With the advent of the imposition of death transfer taxes and the complementary gift taxes, the somewhat passive role that the lawyer formerly played shows up as an inadequate one. The tax consequences attendant upon the lifetime or death transfers of property are significant enough to be responsible for the rise of this new field which we call "estate planning."

In recent years many professional journals, in addition to legal publications, have devoted space to articles on this subject. But the limitations upon a brief presentation are all too obvious if the reader is interested in the over-all picture of estate planning. Although a given article may suffice on any particular aspect of the subject, it does not afford the reader any perspective on the entire field. It is for this reason that the literature on the subject needs comprehensive studies embracing the entire sphere of estate planning.

Mr. Polisher's two volume work fills such a gap, and it is therefore most welcome as a contribution to the literature on the subject matter. While it is impossible to comment upon every topic of importance presented in the study, mention of a few will indicate both the breadth of the subject matter and the treatment accorded by Mr. Polisher.

One of the most vexing problems confronting the estate planner, or an attorney or accountant who is engaged in preparing an estate tax return or a gift tax return, is the question of valuation. It is all too simple

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to turn to the appropriate provision in the Internal Revenue Code to discover that property shall be considered at its "fair market value." And in such simplicity there lies many a pitfall for the unsuspecting. The author's text discussion on valuation for estate tax purposes covers more than fifty pages and an additional twenty pages are devoted to gift tax valuation. A mere citation of some of the problems will immediately suggest the importance of the study to all attorneys: What are the advantages, disadvantages, and limitations on the use of the optional valuation date? How is stock to be valued if it is not listed on any recognized exchange? What principles govern the valuation of income-producing real estate? Of leaseholds? How is the value determined for stock in a closely-held corporation, or for interests in an unincorporated business? This last mentioned question is one that should be considered by attorneys, even though they are not presently engaged in estate planning. Restrictions on alienability of stock, or "buy and sell" provisions in a partnership agreement may mean dollars to the heirs of a decedent shareholder or partner, rather than to the government.

The programming of life insurance is a technical job that requires great care and special knowledge. The ordinary practitioner will normally have great difficulty in this phase, without some comprehensive guide upon which to rely. Yet, the material should not be of such bulk and complexity as to frighten away all but the most intrepid. Mr. Polisher's discussion on this point is the happy combination of brevity and completeness and this section is especially recommended, not only to attorneys, but also to life underwriters who wish to understand the estate tax aspects of their work.

The discussion covers all phases of estate planning, yet it is not an encyclopedic treatment. Though the citations to statutory and decisional authority are ample, they are not exhaustive. To present all authorities would require a work of many volumes and would fail in the purpose of the author. The incorporation of the authorities in the text and the minimization of the number of citations make for a book that is readable, and not merely a reference book. Mention should also be made of a most useful feature of this edition: the appendix includes an outline of the Estate and Inheritance Tax Laws of the States, Territories and Possessions of the United States.

Though the volumes were completed early in 1948, and the type was set for the printing, the author and publishers purposely withheld publication. The delay was occasioned by the imminence of a new revenue bill, and wisely so, for the book now includes two additional chapters devoted exclusively to the changes in the estate and gift tax laws made by the Revenue Act of 1948. The first of the additional chapters describes in detail, with full discussion, the technical changes made by the Act, and the second chapter deals with the effect of these changes upon existing estate plans, wills, trusts and life insurance programs. Though it is regrettable that it was impossible to integrate into the text the discussion of the new law, the damage is slight. The changes leave the over-all pattern for the taxation of the gross estate undisturbed for two reasons: first, only the taxation of estates of married persons or gifts by married persons are affected; second, even after the changes made by the Act, at least one half of the gross estate continues to be subject to tax.

The book is recommended, not only to members of the bar, but also to trust officers, accountants, life underwriters and to all others who are concerned with estate planning. It is a work, complete in every sense of

the word, yet it remains a highly readable one. The author's broad experience in the field has long since made him a recognized authority on the subject, and it is only natural to expect that these volumes would reflect the summary of his knowledge, experience and effort.

Barton E. Ferst.†

VERGLEICHENDE RECHTSLEHRE. By Adolf F. Schnitzer. Verlag für Recht und Gesellschaft A. G., Basel, 1945, pp. xii, 497. $11.40.

DE LA DIVERSITÉ ET DE L'UNIFICATION DU DROIT. By Adolf F. Schnitzer. Publications de l'Institut Universitaire de Hautes Etudes Internationales, Genève, No. 24. Verlag für Recht und Gesellschaft A. G., Basel, 1946, pp. 111. $3.15.

Dr. Schnitzer, author of manuals on Swiss Private International Law [1] and International Commercial Law,[2] presents two new works: a treatise in German, *Comparative Law,* and lectures in French on *Diversity and Unification of the Law.* Both will find a receptive public.

The treatise is unusual in more than one respect. In three parts—"Theory," "History," "Institutions"—it covers territory which is not usually dealt with in a single work. "Theory" is an introduction to the comparative method of legal work, comparable in scope to Gutteridge's *Comparative Law* which appeared at about the same time.[3] Discussed are the development of comparative law, its relations to neighbor branches of the law, its object, purposes, and methods, and the materials and tools available. "History" is a collection of short legal essays on the legal systems, old and living, embracing within the short space of 200 pages: Primitive Peoples, the Ancient Cultures, the Civil Law, the Anglo-American Law, Religious Laws, and Asiatic Laws. In this "panorama of the world's legal systems," to use the title of Wigmore's classic work, the Civil Law is treated on some fifty pages, the Anglo-American on thirty-five, with six pages allocated to American law. "Institutions" is a comparative survey of the law, undertaking, in a mere 200 pages, to present on a comparative basis general principles of the law, law of persons, family law, succession, property, contracts, and commercial law.

Considering the space used, the whole is a *tour de force* of the first magnitude and one may perhaps question whether it is advisable to offer on a couple of pages the historical development of a great living legal system, or to discuss in a few sentences some important legal institution with its variations in the different systems. The author has, it is true, done excellent work in presenting a vast subject matter. The most salient facts have in general been clearly brought out, giving a balanced picture of the topics covered. Bibliographies tell the reader where he may find more detailed information.

For an author trained in the Civil Law, the coverage of common law material is of course the most difficult task. This task has become easier now because of the groundwork laid by the numerous publications in the

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1. Handbuch des Internationalen Privatrechts unter besonderer Berücksichtigung der Schweizerischen Gesetzgebung und Rechtsprechung (2d ed. 1944).

2. Handbuch des Internationalen Handels-, Wechsel- und Checkrechts (1938).

3. Book Review, 96 U. OF PA. L. REV. 448 (1948).

comparative law field. Dr. Schnitzer has made good use of the material available. The historical sketch on English law is well written. For American law, one might have liked more detailed treatment. The presentation of the case law system, as compared with the code system, is not quite satisfactory. Considering the importance of this topic for a work on comparative law, the reader should be given a clearer picture of the place of the precedent in the common law system. The existence of dissenting and concurring opinions should have been mentioned. The best source material in German, Llewellyn's guest lectures at the University of Leipzig on *Case Law and Precedent in the United States*,[4] is not even referred to. It may be good, in a new edition, to follow Gutteridge's example and devote a special chapter to this topic which now seems to get lost in the historical outline.

The third part of the treatise, the comparative discussion of legal institutions, is what may be called the new venture in the book. It was no doubt the most difficult to write. In recent years, the comparative study of legal institutions has made much headway in all parts of the world. Many topics have been well covered in monographs and law review articles. An enormous mass of information is accumulated in a monumental comparative law dictionary, the RECHTSVERGLEICHENDE HANDWÖRTERBUCH,[5] started in Germany under the Weimar Republic and almost completed. Dr. Schnitzer has used the material with a skill which is impressive. Account is given in summary form of differences in the legal systems for questions of major importance in many fields. Because of the summary treatment, the achievement of accuracy has presented a difficult problem which is of course unavoidable in such an undertaking. Bibliographies at the end of each chapter cite source material in German, French, and Anglo-American literature and make the book valuable also as a reference book. It is helpful for a first glance on legal institutions from the comparative viewpoint.

Dr. Schnitzer must be commended for the courage to have undertaken a difficult work, involving the hazards of hornbook summarization, and congratulated for the result achieved. A reader and reference book in English for comparative law, written with the American law as background, is much needed. Dr. Schnitzer's labor will help in planning such a book.

Dr. Schnitzer's lectures on the *Diversity and the Unification of the Law*, delivered at the Graduate Institute of International Studies in Geneva, are characterized by the wealth of material used for the presentation of the topic. A lawyer of the erudition of Dr. Schnitzer, at home in comparative law as well as the conflict of laws, has at his command a knowledge which must make his treatment of a topic like the unification of the law a masterpiece. An introduction deals with sociological aspects of the unification of the law. The next chapter is devoted to the examination of the ways—conquest, reception, political integration, uniform legislation—in which the unification of the law may be achieved. An interesting example is given for uniform legislation. Switzerland was faced during the war with the fact that it had become a "maritime power" but had no maritime law. It borrowed from other legal systems and introduced also

4. LLEWELLYN, PRÄJUDIZIENRECHT UND RECHTSPRECHUNG IN AMERIKA (Theodor Weichert: Leipzig, 1933). For American law, reference could be made also to Miss Schoch's *Uebersicht über das Recht der Vereinigten Staaten in seinen Besonderheiten* in HANDBUCH DER AMERIKAKUNDE (Frankfurt a. M., 1931).

5. RECHTSVERGLEICHENDES HANDWÖRTERBUCH FÜR DAS ZIVIL- UND HANDELSRECHT DES IN- UND AUSLANDES, 6 vol. (Franz Vahlen: Berlin, 1929-1938).

uniform rules from a number of international maritime conventions to which it had not been a partner (p. 41). Further chapters of the lectures discuss the possibilities for the unification of the law in the different branches of the law and give a careful account of the present status of unification. The lectures conclude with a discussion of the prospects for unification. The author's approach is realistic. The difficulties are explained which confront unification especially when legal systems are involved with no common origin. The chances for unification of the law in the Western Hemisphere are considered more optimistically by the author who refers to the many resolutions in favor of unification adopted at inter-American conferences. Unfortunately, the avalanche of resolutions is no proof that, for civil law and common law, unification is less difficult in the New World than it is in the Old World.

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THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES. Proceedings of an Institute Conducted by the New York University School of Law on February 1-8, 1947. New York University School of Law, New York, 1947. Pp. viii, 630. $7.50.

Given: the desire to promote analysis and evaluation of an occurrence, with access to alternative means for doing so. One solution: to solicit papers from persons who can be expected to contribute in the direction of the ambition and to provide facilities for the collection and publication of these papers—in short, to produce a "symposium." This solution is adopted by the New York University School of Law for the analysis and evaluation of the Federal Administrative Procedure Act. Twenty-one papers are presented, seven of them addressed generally to origin, doctrine and criticism, with those remaining treating the Act against the background of particular federal agencies, ranging from the Securities and Exchange Commission to the Post Office Department. These papers were all delivered orally at an institute held in early February, 1947, in New York City and recently made available in the present collection, which includes a transcript of the discussion which ensued after nearly every paper.

As a prologue, any solution of the problem ought to turn up a maximum number of issues for analysis and evaluation. When the subject of the problem is a statute with an effectiveness delayed considerably beyond its enactment date (see § 12 of the act), and when the assumption is that courts will for the most part be eventual arbiters,[1] the lag of the statute itself and the lag between incidence of issues and their litigation may combine to make the preparation of the prologue the end of practical contribution for the time being. Some issues remain, however, which can be treated beyond prologue. In the present instance, those raised are the need for simplification of federal administrative processes, the need for uniformity sought by the Act, and the beneficial role of the bar in obtaining passage of the Act. They have not been given post-prologue treatment in the symposium; the man from Mars would be unconvinced. Perhaps they were intentionally excluded on the ground that other literature

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1. But see Dean Vanderbilt's warning that Congress is "watching the agencies," ready to legislate further if necessary, p. 167.

provided the missing development or on the ground that, with the Act's passage, they had become less vital. The fact is they were not treated penetratingly; it might have been more efficient to channel the resources used superficially to indicate these issues elsewhere.

As to the issues raised which may necessarily have to be left at the prologue stage, however, the treatment seems to measure up to reasonable expectations. Most of the issues which have been treated in publications subsequent to the time of the institute seem to be covered by it and a number which the reviewer, at least, has not seen discussed elsewhere are raised. Some of these are whether § 4(c) of the Act requires that the hearing date after publication of a rule-making notice be normally put off until 30 days from the date of publication have elapsed, whether an agency is free under § 5(d) of the Act to decline as a matter of general policy to issue declaratory rulings under all circumstances, and whether parties may successfully stipulate away such "protections" of the Act as the separation of functions in adjudication. Discussion of § 6 of the Act, relating to such matters as issuance of subpoenas and prompt action by administrative agencies in denials, appears intentionally to have been slighted. The principal slight which does not affirmatively appear to have been intentional seems to be that of the Act's coverage through its definition of agency in § 2(a).

Thus, within the limitations imposed by the nature of the problem, a fairly complete dictionary of current issues has been prepared. The questions remain whether the choice of the symposium method defeated or improved the product over alternative methods and, if improvement be the judgment, whether the potentialities of the symposium method were fully realized.

One advantage of the symposium method is that results can be obtained more quickly by parceling out various aspects of the subject to individuals. Although speed of composition was thus realized for the institute at which these papers were read, the perhaps unavoidable delay in publication from the time of the institute until the latter part of 1947 failed to reap the full advantage of the method.

In addition to this advantage, experts are more likely to respond to invitations to produce portions of the final product than if the project requested of them were more imposing. In this respect, the collection under review has been eminently successful.[2] But speed and expertise are somewhat inconsistent with the editorial control necessary to avoid duplication, assure maximum coverage, and fertilization of ideas among contributors. Therefore, a preliminary outline must be prepared before the parceling out stage which, in its nature, is subject to imperfections, and is likely to leave incurable hiatuses and duplications. In this instance, it was apparently felt editorially that the bare bones of issues should be specificated by references to particular agencies. The 14 agency specialists, in reporting, duplicate each other interminably in restating the provisions of the Act under examination, although each contributes an interesting, if not always relevant, monograph on the agency of which he writes. The result veers somewhat from an examination of the Act to become, in part, a

2. Without reproducing the book's table of contents, it may be noted that there were at least 8 contributors of the associate general counsel and higher level, 3 participants in the promotion or drafting of the Act, and miscellaneous top administrators. The presence of 4 professors among the contributors was in all but one instance balanced by their extensive non-professorial interests. Those interested in the lacing administered the sole exception, Professor Blachly, by Mr. Carl McFarland, and *vice versa,* might examine pp. 57, 71.

collection of agency monographs which the editor may have intended to unify in the title of the work by the subjoined phrase "and the Administrative Agencies"—an expedient of fiat which hardly accomplishes unity.

The authoritativeness of the experts thus persuaded to contribute yields a correlative fear of commitment on their part which foreshortens some analyses before they are fairly under way. Counsel for the Bureau of Internal Revenue, for example, cannot be expected to go far in indicating his opinion as to whether the determinations of the Tax Court are reviewable under the Act.

The method of solicitation also produces manuscripts which differ unexplainably over fundamental issues, such as whether failure to comply with the Act itself constitutes reviewable error under the Act.[3] Promising points are raised which fail of development, although other contributors could certainly add to their presentation were they to be released from their cubicles.[4]

The editorial task of relating formal presentation to discussion, not a difficulty of all symposia, seems almost insurmountable under the institute method of presentation. In general, the longer the paper, the better in this particular work. The same is true of the discussions for the most part. Thus, the better papers have the weaker discussions—traceable, no doubt, to the endurance of the average group of auditors.

The whole suggests that the management of such a symposium might better realize the advantages of the method in analyzing and evaluating problems by not attempting directly to reproduce the results of institutes—particularly where, as here, no time seems thus to have been gained—but by holding the institute under conditions of greater cross-fertilization and re-presenting it in another form, if resources permit. Only the speculative advantage of speed would be lost by the editing, rewriting, and reconsulting. Such an attempt might produce a reference tool superior to a dictionary of issues and superior to the commonly known alternatives, such as one-man texts, isolated law review articles, or commercially produced syntheses. In effect, it could turn otherwise compartmentalized contributors into cooperating authors without any necessary loss of divergencies in view.

Lehan Kent Tunks.†

3. That it does not: Mr. C. A. Miller, General Counsel of the American Short Line Railroad Association, p. 341. *Contra:* Mr. John Dickinson, General Counsel, Pennsylvania Railroad, p. 598.

4. *E. g.:* that "initial licensing" may also be "rule-making" subject to the effective date lag provided by § 4(c) (Mr. Roger S. Foster, pp. 246-7); that § 3(a)(3) requires publication of trade correspondence in the Federal Register (Mr. Michael F. Markel, p. 401); that the separation of functions in adjudication under § 5(c) was unnecessary legislation in view of the behavior of the ordinary reasonable government employee stratified into organizational units (Mr. W. Carroll Hunter, Solicitor, Dept. of Agriculture, pp. 385-6); that prior custom in granting hearings, though not explicitly required by statute, signifies that a "hearing" is thus required by the statute which is "on the record" for purpose of the formal proceedings of the act (Mr. C. A. Miller, p. 343).

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