

## BOOK REVIEWS

OVERCHARGE. BY U. S. SENATOR LEE METCALF AND VIC REINEMER. New York: David McKay Company, Inc., 1967. Pp. ix, 338. \$5.95.

*Ralph S. Spritzer †\**

Back when the West was younger, it was not uncommon for senators from the far-flung areas beyond Official Territory to make their political careers by campaigning against those smoking black predators of the American plains, the Eastern-owned railroads. In time, the reformers and the conservationists turned their zeal upon the other "natural" monopolists—the suppliers of water, gas and electricity. But the roots of Populism have withered since World War I: legislators have made their fruitful peace with the "utilities"; the companies have organized Departments of Public Relations and have mastered the arts of institutional advertising; regulatory commissions have come to be known as "captive"; and bigness, if not universally beloved, is commonplace and has gained the acceptance which comes so surely with the look of polished and permanent invincibility.

In his quest for various political offices, Montana's Senator Metcalf has returned to an old trail, running regularly against the Montana Power Company. His book, written in conjunction with his assistant (a former newspaperman), now aims at a larger target—the country's investor-owned electric utilities (IOU's, as the authors term them). The central thesis is that, with few exceptions, the rates are too high (although electric rates have actually declined in the face of advances in the general price level<sup>1</sup>), and that the average householder has been lulled by artful publicity into believing that his electric bill is a comparative bargain, when, in fact, it reflects a gross failure to pass on to consumers the savings made possible in recent decades by economies of scale and improvements in technology. The corollary is that the state regulatory commissions, which exercise rate-making

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\* The views expressed reflect nothing more than the opinions of the reviewer.

<sup>1</sup> The parenthetical observation has not been made by the authors. Figures provided by the FEDERAL POWER COMMISSION, NATIONAL POWER SURVEY 1964, at 5, show, however, that the combined average retail price for all residential, commercial and industrial sales declined from 2.2 cents per kilowatt-hour in 1940 to 1.7 cents in 1962. This does not, of course, answer the question whether the decline should have been steeper or whether the small consumer got his fair share.

authority over sales at retail, almost universally have failed to curb the avarice of the franchised monopolies.<sup>2</sup>

The generation, transmission and distribution of electricity is, by a substantial margin, the country's biggest industry<sup>3</sup> and the questions raised by *Overcharge* are no small potatoes. One might wish that the authors' method of presentation had less of the style of the campaign speech and the feature story exposé, even as one acknowledges the desirability of reaching those who pay the bills and not merely the handful who admit to an interest in the "dismal science" of ratemaking. Be that as it may, the charges here leveled at the "monopolists" cannot be dismissed as utterly wild; there has been at least a modest effort to bring together some of the supporting data available in secondary sources (much of it drawn from various reports and studies published by the Federal Power Commission). If, oftentimes, the analysis is loose and the conclusions more sweeping than the documentation warrants, one is nonetheless left with the conviction that there is a good deal wrong with the rate picture and that the state commissions, although they may provide some insurance against the gross excesses characteristic, let us say, of the railroads of a century ago, have either proved incompetent or unwilling (or perhaps both) when it comes to the exercise of close oversight. And in this business, the difference between a commission which merely guards against spectacular skull-duggery and one which runs a tight ship may amount to many millions of consumer dollars.

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Drawing on the FPC's publication, *Typical Electric Bills, 1965*, the authors begin by noting the wide disparity in rates paid by the small customers of private distributors in various localities for comparable blocks of electricity: Portland, Ore., \$6.40; Reno, \$12.98; San Francisco, \$9.40; Bismarck, \$13.88; Cheyenne, \$8.70; Urbana, Ill., \$13.51; Chicago, \$9.98; Birmingham, \$8.73; Tampa, \$12.04; Atlanta, \$8.48; New York, \$14.82; Boston, \$13.44. The comparable rates for customers of publicly-owned or cooperatively-owned systems are generally lower: Seattle, \$5.00; Los Angeles, \$8.16; Gillette, Wyo., \$18.80; Kansas City, Kan., \$7.20; San Marcos, Tex., \$6.15; Chattanooga, \$6.03; Jacksonville, \$10.97; Holyoke, Mass., \$9.75. The authors' ready inference: in many places the rates are inflated.

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<sup>2</sup> The rate-making authority of the Federal Power Commission is confined to sales in interstate commerce at wholesale. Most electric companies are vertically integrated, *i.e.*, they generate much or all of the energy which they market at retail. Although inter-company wholesales are becoming more common with increased inter-connection and power pooling, the "big payoff" in electric rate regulation is still at the state level.

<sup>3</sup> The six largest industries in terms of gross assets in billions of dollars (1962 figures) are Electric Power, 69.0; Petroleum Refining, 40.6; Railroads, 35.6; Communications, 34.1; Metals, 27.5; Natural Gas, 23.4. NATIONAL POWER SURVEY, *supra* note 1, at 11.

This conclusion may well be correct, but our writers are too prone to accept as proof a smattering of facts which signals the need for thorough inquiry. Thomas Mann once observed, in a circuit many volts removed from this one, that the truth is only to be found in exhaustive detail—sparking, of course, the prompt rejoinder that his truths were too exhausting. One sympathizes with the instincts of a senator and a journalist to reach a wide constituency and to keep its members wakeful. But still one may wish to know . . . .

To what extent do the high rates charged by particular companies to residential users reflect inherent disadvantages (for example, high cost of fuel for steam generation, poor load factors)? To what extent are they the product of inefficiency or backward technology (for example, operation of "tea-kettle" generators, failure to exploit—or to secure access to—the economies available through interconnection and pooling)?<sup>4</sup> To what extent do they reflect a rate design which varies from the norm (the rates of any one company are different for different classes of customers and the charges to any one class are affected very materially, not only by the total cost of service, but by the method of allocation employed; there may, for example, be a strong temptation to tilt rates unduly in favor of industrial users, who are in a better position to switch to competitive forms of energy and to exert effective bargaining power)?

There are many other relevant questions. For example, to what extent do the cheap rates to small users in Portland, Oregon, and Chattanooga reflect the ability of the local companies to purchase cheap hydro from Bonneville and TVA? What adjustments does one have to make in comparing the rates of private distributors, on the one hand, and public agencies and electric co-ops on the other? Differences in cost of capital and tax liability are undeniably significant, even though the Edison Institute may greatly overstate them. There are also great differences among distributors within the latter segment. One municipal system (or co-op) may generate its own power; a second, with no generating facilities of its own, may secure its requirements from a federal dam; a third (note the rates in Gillette, Wyoming) may purchase all or most of its energy at wholesale from a private company.

The most meaningful comparisons require study in depth, the marshalling of extensive data (not all of it, to be sure, easily come by),

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<sup>4</sup> Smaller companies—particularly those in the public segment of the industry—may experience difficulty in gaining access to extra-high-voltage (ehv) transmission lines constructed by the larger private companies. These inerties, costly to construct but often productive of large economies, are essential to the transmission of large blocks of power over substantial distances.

Another question of growing import for the smaller companies is whether they will be able to participate extensively in the technology of producing electric energy from nuclear fuel. The Atomic Energy Commission recently estimated that, by 1980, nuclear power plants will be producing enough electricity to satisfy the needs of approximately 150 million Americans. *N.Y. Times*, July 23, 1967, § F, at 14, col. 6.

a thorough knowledge of the industry and the regulatory context and, not least of all, a mastery of the tools of the statistician and the economist. The questions are hard. Few lend themselves immediately to the journalistic mode—to a summing up in a telling lead paragraph that the reader can swallow whole with the last swig of his morning coffee.

It would be a different matter if the preliminary work already had been done by scholars, and Metcalf and Reinemer were merely seeking to simplify and popularize the more important findings (surely a useful task). The truth is that the yield of information from electric rate investigations has often been meagre; there are serious deficiencies in available data; many areas of the field have not been combed; the materials are not fully ordered and the ultimate findings are not ready for the plucking. The Senator and his colleague have neither taken full advantage of that which is fairly available nor dug deeply in their own explorations. More often, they appear content to gather a few colorful bits and pieces which have been thrown to the surface and to thread them with the rhetoric of Capitol Hill.

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In a chapter more meaty than the remainder, the authors do come fairly to grips with one of the important elements of ratemaking—the matter of the appropriate return on investment—concluding that the state commissions, by and large, have allowed an excessive rate of return. Here, fortunately, they have been able to obtain data in convenient form, principally from the FPC and from a study by *Fortune* magazine. They report that, in 1963, of the 188 largest IOU's, 111 earned a rate of more than 7 per cent on investment, and 55 of these a return of more than 8 per cent. A check by this reviewer shows that during that same period the FPC was allowing natural gas pipelines within its jurisdiction 6.5 per cent or less.<sup>5</sup> There seems little basis for suggesting either that the pipelines are undernourished or that the electric business involves a higher element of risk. Indeed, one can say with assurance that the financial history of recent years demonstrates that a return of 7 per cent or 8 per cent or more on total investment is substantially in excess of the amount required by public utilities to attract venture capital and to service debt, when one takes into account that a substantial portion of their capital (approximately 50 per cent in the case of electric utilities) is represented by long-term bonds.<sup>6</sup>

<sup>5</sup> This mode of comparison was chosen because the FPC has conducted far more gas rate cases than electric rate cases. See note 2 *supra*.

<sup>6</sup> The electric power industry requires heavy investment and is characterized by a high ratio between fixed assets and gross proceeds. For example, TVA's annual report for 1966 shows fixed assets of over 2.1 billion dollars and gross proceeds from power of 326 million. As the example shows, a reduction, let us say, of one percent in an electric company's rate of return may permit a substantially greater percentage reduction in rates.

To be sure, not all of the state commissions which have in fact permitted such a high rate of return on investment acknowledge in their opinions that this is the consequence of their determinations. Some of them adopt what appears to be a modest *rate*, but apply it to a *base* which greatly exceeds prudent investment. Thus, a fair number of the states adhere to the mystique of *Smyth v. Ames*,<sup>7</sup> and undertake to place a "fair value" on the company's properties, instead of confining themselves to a determination of what it cost to acquire and build them. Metcalf and Reinemer fail to offer the uninitiated a satisfactory critique of that approach; they would have done well to borrow from Justice Brandeis, who performed the task so brilliantly for an earlier generation.<sup>8</sup>

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Metcalf and Reinemer are less successful in treating other elements making up the cost-of-service claimed by regulated companies. Thus, they advance the proposition that the IOU's, in their dealings with rate commissions, frequently succeed in obtaining allowances for taxes which exceed their actual liabilities—a point which certainly has substance—but the authors repeatedly fail to give an adequate statement or explanation of the various underlying tax issues. The subject is not an impenetrable mystery on which nothing has been said or written. To focus on one aspect of the matter involving very substantial sums, there has been a widespread debate, reflected in numerous reports of state and federal commissions and opinions of state and federal courts, on the question whether utilities can and should be required to "flow through" to the ratepayers the immediate tax benefits realized by taking accelerated depreciation, or rather should be permitted to retain those sums as a reserve against what is asserted to be a potentially higher liability in future years. The reader of *Overcharge* will find no references to these materials and no inkling of the arguments advanced by the respective advocates of "normalization" and "flow-through."<sup>9</sup>

<sup>7</sup> 169 U.S. 466 (1898).

<sup>8</sup> See his separate opinion in *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 289 (1923).

<sup>9</sup> When a company takes straight-line or "normal" depreciation, depreciable property is written off in equal installments over the course of its useful life. The Internal Revenue Code, however, authorizes methods of depreciation whereby a disproportionately high share of the deductions is taken during the early years of each asset's life. Regulated companies taking accelerated depreciation for tax purposes have claimed that the regulatory commissions should, nonetheless, permit them to "normalize," *i.e.*, to collect from their customers, each year, sufficient revenues to cover the tax obligation which would have been incurred if they had deducted on their tax returns the "normal" depreciation shown by their regulatory accounts. To oversimplify the matter, they have argued (1) that this will enable them to accumulate a reserve against potentially higher tax liabilities falling due in later years when deductions are decelerating; and (2) that if Congress' authorization of accelerated depreciation is to serve its intended purpose of stimulating investment, the companies' stockholders should be the principal beneficiaries of the tax savings realized. The proponents of "flow-through" have answered, to again oversimplify, (1) that the alleged need for reserves is a fiction because the industry will continue to grow apace for the foreseeable future and, so long as it continues to grow, accelerated depreciation will continue to yield

Nor is there so much as a passing reference to the issues which arise when a regulated company files a consolidated tax return with corporate affiliates—a common practice among major utilities. Must or should the regulatory commission allow as a cost of service the amount of federal income taxes the utility would have paid if it had filed a separate tax return, when in fact it has filed a consolidated return with affiliates, resulting in a net tax saving for the group? If the answer is “no,” how are the savings to be allocated among the various profit and loss members of the group? Again, the subject is one of large import in dollar terms and one which has provoked heavy debate. Indeed, a major case was pending before the Supreme Court when *Overcharge* was published.<sup>10</sup>

There are sweeping pronouncements as well as conspicuous omissions. The following paragraph—addressed, in this instance, not to the tax liabilities of the regulated companies, but to those of their suppliers, the manufacturers of electric generators who were caught *flagrante* in the act of price-fixing—is not untypical:

Many electric consumers are still absorbing the cost of the great electric conspiracy whenever they pay their light bill. And they pay for it again when they pay their tax bill. The tax bite results from a 1964 ruling by the Internal Revenue Service that permits the antitrust violators to deduct the damage payments for tax purposes as a necessary business expense! That ruling will cost the U.S. Treasury about \$150 million a year. (Pp. 71-72.)

Let us pause to peel a few leaves from that artichoke.

By the summer of 1966 virtually all of the electric cases had gone to judgment or had been settled. The plaintiffs had considerable leverage and there is little reason to believe that any of their treble-damage suits resulted in a recovery of less than actual damages. Accordingly, if consumers of electricity are not being made whole, it must be because the regulatory commissions have failed to take adequate measures to require the distribution companies to pass on the benefits obtained as a result of their recoveries (which reportedly aggregate well over 400 million dollars). If that is the case, the facts should be loudly trumpeted. But it is not clear that this is the authors' meaning and they certainly provide no documentation.

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larger tax deductions than would be available under the straight-line method; and (2) that “flow-through” is consistent with Congress' generalized purpose to stimulate investment in the economy, because the decreased rates which it makes possible should tend to generate increased sales and an expansion of productive facilities. For a fuller introduction to the debate, see Judge Wisdom's opinion in *Alabama-Tennessee Natural Gas Co. v. FPC*, 359 F.2d 318 (5th Cir. 1966), *cert. denied*, 385 U.S. 847, upholding the FPC's authority to require “flow-through.”

<sup>10</sup> The FPC had given a negative answer to the first question posed in the text and had proceeded to a method of allocation which I shall spare the reader. Its order was ultimately sustained. *FPC v. United Gas Pipe Line Co.*, 386 U.S. 237 (1967).

The balance of the quoted paragraph seems to say: (1) that anti-trust violators, in computing their taxes, should not be permitted to deduct the amount of their damage payments from gross income; and (2) that, if this is permitted, the dollars represented by those deductions will go untaxed with consequent added burdens for ordinary taxpayers like you and me.

Turning to the second proposition first, the truth of the matter is that, when Company "A" pays antitrust damages to Company "B," the amount which "A" is deducting from its gross is being added to "B's". Assuming that both companies are profitable and are paying taxes at the same rate, the yield to the U.S. Treasury is precisely the same as if the violation had never occurred.<sup>11</sup>

There is still room to argue that, as a matter of policy, a company which has engaged in a violation should not be allowed a deduction for damages which were the direct consequence of its wrongful conduct, even though this means that it will be taxed on money of which it does not have the use or enjoyment. Whatever the merits of this argument, the issue is not whether the violator shall escape the normal taxes imposed upon annual accretions to net income; rather, it is whether the taxing statutes should be read to add discrete sanctions to those laws which authorize the award of damages and the assessment of penalties for the specified wrong.<sup>12</sup>

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*Overcharge* does have a spirited combativeness and, despite its shortcomings, a fair share of lively information. The difficulty is that it is so uneven in quality and performance as it moves from point to point—and it does careen about like a teenager on a go-kart course—that the best one can say is that it is a somewhat errant charger.

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<sup>11</sup> The exemplary or punitive share of treble damages is taxable to the antitrust plaintiff no less than the compensatory portion. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

<sup>12</sup> The Supreme Court's most recent brush with the matter of tax deductions and public policy was in *Commissioner v. Tellier*, 383 U.S. 687 (1966). *Tellier* had been convicted of fraud in the conduct of his securities business. The Commissioner, in auditing his tax return, had disallowed *Tellier's* legal expenses incurred in the unsuccessful defense of the criminal case on the theory that those expenses were an outgrowth of the violation and not within the concept of an ordinary and necessary business expense. The Court unanimously overruled the Commissioner in an opinion which remarked: "We start with the proposition that the federal income tax is a tax on net income, not a sanction against wrongdoing." *Id.* at 691. The Court concluded that, in the absence of legislative guidance, it should depart from this principle "only in extremely limited circumstances." *Id.* at 693-94.

LIABILITY OF THE STATE FOR ILLEGAL CONDUCT OF ITS ORGANS; NATIONAL REPORTS AND COMPARATIVE STUDIES. INTERNATIONAL COLLOQUIUM HELD BY THE MAX PLANCK INSTITUTE OF FOREIGN AND INTERNATIONAL PUBLIC LAW, Heidelberg, Germany. Verlag, Cologne and Berlin: C. Heymanns, 1967. Pp. xxiii, 899. \$28.75.

*Sidney B. Jacoby* †

The volume under review is the product of a most ambitious project in the field of legal research, and is an extremely valuable contribution. In July 1964, the Max Planck Institute of Foreign and International Public Law at Heidelberg, Germany, held a two-day colloquium on the "Liability of the State for Illegal Conduct of Its Organs." Prior thereto, twenty-one national reports had been submitted to the Institute by experts describing the laws of their respective countries. (Pp. 23-752.)<sup>1</sup> The colloquium sought to avoid articles not really susceptible of comparative analysis, in which each author merely would recount the law of his country from his own viewpoint, while disregarding any common factual or legal criteria. The colloquium worked out a detailed questionnaire to be followed by each reporter. (Pp. 1-21.)<sup>2</sup> The questionnaire was divided into nine subdivisions dealing with the concept of state liability in the particular country, conditions of governing substantive law, liability for certain typical administrative activities, exclusion or limitation of liability, nature and extent of compensation, procedural questions involved, liability for parliamentary activities, liability for judicial acts and personal liability of government employees. The comprehensive nature of the questionnaire can best be appreciated by the enumeration of some of the detailed questions asked in a specific area. For example, in the chapter on exclusion or limitation of liability, the questionnaire asked whether liability is excluded or limited for railroads, postal service or other technical branches, for the foreign service or for the military forces; whether it is excluded or limited because an act is of a political nature, is a regulatory measure or is a quasi-judicial act of an administrative authority; whether liability is excluded or limited because of the special status of the person acting, such as a head of state, a col-

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<sup>1</sup> As seen by the average length of each report—almost 35 pages—the chapters are of sufficient length to constitute informative contributions for each country.

<sup>2</sup> The questionnaire is reproduced in the book in the three different languages in which the colloquium was conducted (German, English and French). Unfortunately, this is the only portion of the colloquium which does appear in all three languages.

legiate body, an honorary or elective officer or a person not subject to directions; whether, and under what conditions, the state may be liable to foreigners; whether governmental liability is affected by the fact that the injured person can obtain damages from some other person; and finally, whether any other legal grounds exist by which governmental liability may be excluded.

When it is realized that the inquiry was equally as comprehensive in the other subdivisions of the questionnaire, it becomes clear that each contributor was faced with a formidable task. On the whole, that task was accomplished in a highly commendable manner, though there are, of course, differences in the quality of the material submitted and though some of the civil law contributions perhaps give inordinate attention to legal theories and doctrinal writings and insufficient weight to court decisions. The national reports appear only in the language in which they were submitted. This detracts from the usefulness of the volume, but, in view of its size (899 pages), translation of all the materials, though desirable, would have made the book unmanageable. Of the contributions submitted in English (covering Australia,<sup>3</sup> Great Britain,<sup>4</sup> India,<sup>5</sup> South Africa<sup>6</sup> and the U.S.A.<sup>7</sup>), the report on the law of the United States is most outstanding. Professor Van Alstyne treats in an admirable manner the varied development of governmental liability in tort in this country, dealing not only with the Federal Tort Claims Act, but also with many state laws, especially those of California and New York. The author considers in detail, with the aid of copious references (the article contains 257 footnotes), the manifold implications of the topic. For instance, concerning the question of liability for certain typical administrative activities, Professor Van Alstyne sets forth the rules of liability in the different federal and state jurisdictions for police and law enforcement activities; educational and cultural activities; hospital and medical activities; regulation of road, shipping and air traffic; construction and maintenance of roads and other traffic facilities; participation in public traffic; postal service; railways; tax assessment, levy and collection; regulation, control and planning of economic activities; placing or awarding of government contracts; state operated commercial enterprises; defense and military activities; administrative declarations as to future courses of action; and for the administration of parks and recreational activities. (Pp. 695-709.) Professor Van Alstyne probably has furnished the best discussion in one place of both American federal and state govern-

<sup>3</sup> Pp. 23-40, by Professor Geoffrey Sawer of the National University, Canberra.

<sup>4</sup> Pp. 229-48, by Professor Harry Street of the University of Manchester.

<sup>5</sup> Pp. 249-94, by Justice J. L. Kapur of the Indian Law Commission, New Delhi.

<sup>6</sup> Pp. 615-52, by Professor W. Morkel van der Westhuizen of the University of Stellenbosch.

<sup>7</sup> Pp. 675-722, by Professor Arvo Van Alstyne, then of the University of California at Los Angeles.

mental tort liability. The South African report also seems especially informative, since a large number of court decisions and other authorities is discussed.

The reports on Belgium,<sup>8</sup> France,<sup>9</sup> Italy<sup>10</sup> and Luxembourg<sup>11</sup> are in French. The Luxembourg report probably is the least instructive, a substantial portion thereof being devoted to direct quotations. While the inclusion of Luxembourg may not appear warranted from the general viewpoint of comparative law, consideration of that country apparently was necessary in view of the colloquium's purpose of dealing with practical problems in the legal administration of the Common Market.<sup>12</sup> The article on France, though comparatively lengthy (50 pages), is not excessive, since the French law of governmental tort liability has an extensive history and contains a most instructive number of judicial interpretations by the Council of State, the highest French administrative tribunal. French law has served as a model for many other countries and Professor Fromont's article succeeds in supplying detailed information on numerous decisions. The article on Italy by Professor Galeotti, though even slightly longer, is substantially restricted to theoretical discussions and expositions of statutory provisions.

All the other articles are in German. They are on the laws of West Germany,<sup>13</sup> Greece,<sup>14</sup> Japan,<sup>15</sup> Yugoslavia,<sup>16</sup> Latin America,<sup>17</sup> the Netherlands,<sup>18</sup> Austria,<sup>19</sup> Sweden,<sup>20</sup> Switzerland,<sup>21</sup> Spain,<sup>22</sup> Turkey<sup>23</sup> and the European Communities.<sup>24</sup> The most outstanding of these reports probably is that by Professor Jaenicke on the intricate laws of West Germany. The extent of information furnished by the other reports varies widely; for instance, as a result of the rather un-

<sup>8</sup> Pp. 41-67, by Professor Cyr Cambier of the University of Louvain.

<sup>9</sup> Pp. 135-85, by Professor Michel Fromont of the University of the Saar.

<sup>10</sup> Pp. 295-348, by Professor Serio Galeotti of the University of Pavia.

<sup>11</sup> Pp. 447-86, by Mr. Ernest Arendt, a Luxembourg lawyer and lecturer at the University of Nancy.

<sup>12</sup> See text accompanying note 26 *infra*.

<sup>13</sup> Pp. 69-134, by Professor Günther Jaenicke of the University of Frankfurt and a member of the Max Planck Institute.

<sup>14</sup> Pp. 187-227, by Mr. Dimitris Th. Tsatsos, an Assistant at the University of Mainz.

<sup>15</sup> Pp. 349-84, by Professor Ichiro Ogawa of the University of Tokyo.

<sup>16</sup> Pp. 385-407, by Professor Velimir Ivancevic of the University of Zagreb.

<sup>17</sup> Pp. 409-45, by Professor Leopoldo Uprimny of the University of Colombia and of the Catholic University of Bogotá.

<sup>18</sup> Pp. 487-503, by Professor W. F. Prins of the University of Utrecht.

<sup>19</sup> Pp. 505-42, by Professor Hans Spanner of the University of Munich.

<sup>20</sup> Pp. 543-54, by Mr. Gustaf Petré, Judge and Instructor, Stockholm.

<sup>21</sup> Pp. 555-84, by Judge Otto K. Kaufmann of the Swiss Supreme Court.

<sup>22</sup> Pp. 585-613, by Professor Eduardo García de Enterría of the University of Madrid.

<sup>23</sup> Pp. 653-74, by Professor Tahsin Bekir Balta of the University of Ankara.

<sup>24</sup> Pp. 723-52, by Mr. Walter Much, Legal Counselor of the European Coal and Steel Community, Luxembourg.

developed state of governmental tort liability in Sweden, little information is found in the report on that country.

In addition to providing a broad survey of each nation's laws, the study seeks to draw conclusions. On the basis of the numerous national contributions, extensive comparative reports were prepared by assistants of the Institute in an effort to categorize the manifold answers obtained. These six comprehensive papers (pp. 753-803), which contain copious cross-references to the national reports, serve to facilitate use of the volume. Though they are perhaps at times too literal, the comparative reports are extremely valuable and it is to be regretted that they are printed only in the German language. Extracts of the discussions at the colloquium of July 17 and 18, 1964, have also been included. (Pp. 805-58.)<sup>25</sup> Finally, Professor Jaenicke has attempted to formulate some conclusions, in the nature of general principles of law, as they flow from the individual national reports. (Pp. 859-78.) Such general principles necessarily must remain vague. For instance, in Professor Jaenicke's view, the reports justify the conclusion that (a) administrative decisions violative of laws lead to governmental liability when they interfere with private rights of the individual, but a mere violation of procedural forms warrants no liability; (b) as a rule, an unlawful administrative decision justifies tort liability without proof of special fault; and (c) failure to exhaust administrative remedies warrants denial of tort liability only if some legal provision so provides. These "general principles" may, in fact, not even be fully valid under our own Federal Tort Claims Act.

The colloquium had the practical purpose of supplying material for interpretation of the treaties establishing the European Economic Community and Euratom. According to these treaties, the communities shall be liable in tort for the damage caused by their institutions or employees in the performance of their duties "in accordance with the general principles common to the laws of Member States."<sup>26</sup> On a broader basis, the colloquium sought to develop the "general principles of law recognized by civilized nations," listed in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law. Aside from such broad international law purposes, the colloquium is likely to fill an important need in American domestic law by providing a useful tool in the drafting of legislative reforms. As is well known, the enactment of the Federal Tort Claims Act in 1946 owed a great deal to the tireless efforts of the late Professor Edwin Borchard of Yale Law School, who has properly been called the "Father of the Federal Tort Claims Act." In urging the desirability of federal governmental tort liability, Professor Borchard ex-

<sup>25</sup> Though rendered in different languages, the discussion is set forth in the volume only in the German language. In some respects the discussions seem to be the least satisfactory portion of the information supplied in connection with the colloquium.

<sup>26</sup> Articles 215 and 188 of the respective treaties.

tensively argued from the example of foreign, especially French, law.<sup>27</sup> In considering proposals to amend the substantive<sup>28</sup> provisions of the Federal Tort Claims Act, it may again be wise to examine the laws of some foreign countries. The volume here under review would seem to offer the most fruitful help in this regard.<sup>29</sup> Thus, the volume is apt to prove of great, if unexpected, value in the development of our federal legislation.

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<sup>27</sup> Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 757, 1039 (1926-27); Borchard, *Theories of Governmental Responsibility*, 28 COLUM. L. REV. 577, 734 (1928).

<sup>28</sup> Pub. L. 89-506, 80 Stat. 306, enacted July 18, 1966, amended many of the procedural provisions of the Federal Tort Claims Act, such as 28 U.S.C. §§ 2672, 2675 and 2677 (1964).

<sup>29</sup> This reviewer can personally attest to the value of the book, because he used it in preparing a speech on reforms of the Tort Claims Act for the National Convention of the Federal Bar Association, July 1967.

LAW AND SOCIAL CHANGE IN GHANA. BY WILLIAM BURNETT HARVEY. Princeton University Press, 1966. Pp. xiii+453. \$10.00.

*Alan Milner* †

Burnett Harvey was one of the first American law professors to become involved in African legal education under the auspices of the SAILER Project (Project for the Staffing of African Institutions of Legal Education and Research). From 1962 to 1964, he was the Dean of the Faculty of Law of the University of Ghana, only the second person to hold that office. Like his predecessor Professor Lang, Professor Harvey left Ghana prematurely, following unsubstantiated allegations of pro-American and anti-Ghanaian activities.

His hasty removal from the Ghanaian scene has not impaired Professor Harvey's judgment or led him in any apparent way to modify his carefully compiled selection of essays. His deportation finds only an incidental place in the book—to explain why he left the country in 1964. Far from showing any sign of rancour, the book radiates affection for the Ghanaian people and shows the author's obsessive concern with probing and analyzing the problems being encountered by a nation of only ten years' independent standing.

This of itself marks the book as a significant contribution to the literature of West African law. Of the eight books on the law of modern Ghana which come readily to mind, it is strikingly the best. There are probably two reasons for this: first, it is the book of a scholar of experience and repute; second, the legal orientation is made specific at the outset.

The first reason is particularly important in the African context. Few university teachers working there at the moment have the necessary experience and know-how to write good books. The principal recruitment of teachers is from the ranks of young African, English and American law graduates, all with reputations to make, all with course material to prepare for the first time and some with Master's or Doctor's dissertations which they wish to see published. More important, some are very good and some are very bad—the inevitable result of a recruitment system which is having the greatest difficulty in finding suitably qualified personnel and which often has to give preference to local nationals at a faster rate than it would ideally like. In short, Harvey is an established scholar: his writing must command more interest and attention than that of the novice.

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That he is an established scholar is the reason Harvey must articulate his legal philosophy at the outset. He is starting with clearly defined objectives and an established conceptual scheme of thought. He is not, as are so many less proficient writers on African law, setting out merely to describe and reconcile conflicting authorities or to champion logical consistency, as might an unconscious neo-Austinian; he is not satisfied to echo indiscriminating praise of customary law and strew his footnotes with general references to Von Savigny; yet neither is he the total European positivist for whom the common law is the word of God and the Colonial Office, the Almighty's chosen instrument of salvation.

Harvey accepts "a positivist position on the nature of law." (P. vii.) He is "concerned with the description and analysis of existing law" (p. viii), but, unlike other positivists, he is particularly concerned with "the pattern of claims or the demands in a particular society which have shaped the positive law and, insofar as this can be determined, the reciprocal effect of that law on the structure, processes and values of the society." (P. viii.) It is from this standpoint, and with these factors in mind, that Harvey writes.

Yet, on the whole he writes disappointingly. Perhaps I am disappointed because I believe that the social changes and legal developments which are most fascinating and significant in Africa today are not those taking place in the public sector, but rather those tucked away in the crannies of private law. I had expected to read of the impact of urbanization and the wage economy on polygamous marriage systems, of the effect of twentieth century commercial development on land tenure, financing and disposal, or of the stewpots of cities to which customary laws, English laws and local statutes have been added, with results that not even the most far-sighted legal cooks could foresee.

Instead, we read in *Law and Social Change in Ghana* about the allocation and control of public power, about the legal profession and about the judicial structure. We should not expect here, and we do not get, mere description; the child's guide to the laws of Ghana is left for others to attempt. Instead, we have fluent description and constructive comment, excellent in their own right, but not noticeably related to the problems of social change. In only one chapter is the theme of social change stressed, and that is where Professor Harvey analyzes the changes brought about in the traditional power-structure of the country by the social and political developments of the century.

I think this criticism is one which Professor Harvey probably anticipated. When speaking of the actual effects of legal norms on community behaviour in Ghana, he admits that the data he produces are "impressionistic and at best partial." (P. x.) That this is true is evidenced throughout the book; the impact of law on values, attitudes

and ideas is posited, but empirical and systematic examination of that impact is lacking.

This is probably to say that, like so many good books which are superior to those that have gone before, *Law and Social Change in Ghana* opens up new perspectives and whets the appetite for more information. It is more than likely that this information was not available to Professor Harvey at the time of writing and that, with his many other responsibilities and crowded schedule, he had not the time nor the opportunity to mount the necessary research projects. But he has at least shown the way to avoid arid conceptualism, and if African legal scholarship is to be saved from the merely descriptive, the uncritical, the prejudiced and the impressionistic, his way must be followed.