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# Formation of Contracts, by Rudolf B. Schlesinger

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## BOOK REVIEWS

THE CARELESS ATOM. By Sheldon Novick. Boston: Houghton Mifflin Co. 1969. Pp. x, 225. \$5.95.

Atomic energy as a source of electricity is invading America like the proverbial "mindless horde." "[A]s of September 30, 1968, there were 86 nuclear power plants under construction or in the planning stage in the United States."<sup>1</sup> By 1980, nuclear power is expected to provide 37 percent of our total electrical capacity and by the commencement of the 21st century it will provide over half our total capacity.<sup>2</sup> Our rivers, streams, and lakes, now choked with every imaginable form of pollution, will be further burdened with discharges of the myriad radioactive waste products as well as vast quantities of thermally polluted water.<sup>3</sup> In *The Careless Atom* Sheldon Novick deals primarily with the nuclear dangers of atomic powered generating plants, demonstrating that these plants are not safe, and that the utility industry is being allowed to profit by making the American people the victims of their experimental technology.

Initially, Mr. Novick<sup>4</sup> points out that nuclear generating plant accidents do occur, and that the effects of such incidents can be extremely dangerous. For example, the total radioactive release from the Windscale generator accident in England was one-tenth of that released at Hiroshima.<sup>5</sup> More frightening, however, are the accounts of how accidents that could have been major catastrophes have been averted by what can only be characterized as luck. As an increasing number of reactors are constructed, the law of probability can be expected to change this luck to disaster.

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<sup>1</sup> CITIZENS COMMITTEE TO SAVE CAYUGA LAKE, RADIOACTIVITY AND A PROPOSED POWER PLANT ON CAYUGA LAKE, Nov. 22, 1968, at 3, citing R. Lysterly & W. Mitchell, 1967, *Nuclear Power Plants*, U.S.A.E.C., Wash., D.C.

<sup>2</sup> *Id.*

<sup>3</sup> Nuclear plants are less heat efficient (largely because of operation at lower steam pressure for safety reasons), and thus produce about 40 percent more heat than an equivalent coal-fired plant. Economic considerations encourage large plants in the 1 million kilowatt or larger range. For a discussion of the effects of thermal pollution, see Reitze, *Wastes, Water, and Wishful Thinking: The Battle of Lake Erie*, 20 CASE W. RES. L. REV. 5, at 38 (1968). See also Di Luzio, *Water Use and Thermal Pollution*, POWER ENGINEERING, June 1968, at 44; Trembly, *Effects of Cooling Water From Steam-Electric Power Plants on Stream Biota*, in U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, BIOLOGICAL PROBLEMS IN WATER POLLUTION 334 (1962).

<sup>4</sup> Mr. Novick has been involved in the work of the Committee for Environmental Information of Washington University. This organization is responsible for the excellent magazine *Environment* formerly known as *Scientist and Citizen*.

<sup>5</sup> S. NOVICK, THE CARELESS ATOM 10 (1969).

The author presents a historical and scientific explanation of how the nuclear power industry achieved its present position, and the potential danger of these plants. Basic research, carried on by the government as part of its military program of World War II, combined with private power interests' fear that the government would enter the power business led the utility companies to fight for the right to use this technology for commercial power generation. The reader is impressed by the many parallels between atomic energy development and the program for universal dissemination of pesticides. The problems caused by both stem from government research and development which at the end of World War II left this country in possession of a nascent technology that could be used for beneficial nonmilitary purposes, but also had the potential for large scale harm. Ignorance of the fundamental dangers of this technology was compounded by the delay between the application of the technology and the much later discovery of irrevocable damage.<sup>6</sup>

The historical perspective is necessary to appreciate the power of the Atomic Energy Commission (AEC), and lack of effective governmental control over the agency. Created by the exigencies of war, the AEC has operated in secrecy and with virtually limitless power. After the war it continued to operate primarily as a research organization and as a promotion agent for the utility industry — often with a rakish disinterest in public welfare. Many of us still remember the pronouncements and publications of the AEC during the decade of the 50's when they assured the public that there was virtually no danger to humans from the fallout of nuclear testing.<sup>7</sup> The AEC's power to classify information was an effective method by which the public was kept in ignorance of the potential dangers of radioactive energy.<sup>8</sup> From Mr. Novick's discussion, their misrepresentation of nuclear dangers seems to have continued to the present. For example, the author examines the problems of geology as it affects the safety of nuclear reactors and shows that plans for nuclear facilities to be located along the San Andreas fault can be approved in California.<sup>9</sup> Additionally, and even more serious than the location, is the design of the reactor. Many reactor systems operate under high pressure and temperature. A variety of chemi-

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<sup>6</sup> See generally R. CARSON, *SILENT SPRING* (1964).

<sup>7</sup> See B. COMMONER, *SCIENCE & SURVIVAL* 16 (1966).

<sup>8</sup> *Id.* at 91.

<sup>9</sup> S. NOVICK, *supra* note 5, at 34.

cal reactions with other metals used in the construction of the reactor are possible, as is the danger that the properties of the metals coming in contact with radioactivity will change, often becoming brittle. The author indicates that there is simply a lack of technological knowledge in this area. The result could be devastating. It is interesting to note how often the limits of technology are used to justify inaction regarding air and water pollution abatement. Yet, regarding nuclear power generation, it is full steam ahead. Why?

The primary reason is that the public utilities industry has been given statutory authority to gamble with the lives of Americans without having any financial responsibilities for their errors beyond their insurance coverage. The Price-Anderson Act allows the taxpayer to subsidize the industry by providing low cost federal insurance not to exceed \$500 million beyond that available from private industry.<sup>10</sup> The facts are, however, that the combined insurance industry of the Western World has been willing to insure the nuclear generating industry for only \$74 million. They consider the activities of the power industry too dangerous.<sup>11</sup> An accident could easily produce property damage vastly in excess of insurance coverage and the cost in human lives would be incalculable. Further encouragement to the power companies' avoidance of safety precautions seems to flow from court decisions rejecting strict liability.<sup>12</sup> Thus, the health and safety of the citizenry is gambled, and the utilities can only win, for the taxpayer takes the risk. As long as he survives he continues to pay his electric bill.

This has led to two dangerous developments. First, the size of reactors has grown very rapidly. As the size is increased the technological problems related to safety are also increased. Thus, while a 100,000 kilowatt unit can be designed to contain an accidental explosion, it is very difficult, if not impossible, to do so in a 500,000 kilowatt plant — the approximate size necessary to economically compete with existing coal generating plants. Yet, a nuclear plant to be constructed for TVA will have a capacity of 2,196,000 kilowatts.<sup>13</sup> The modern nuclear generating facilities being constructed or designed are at least 10 years ahead of the ability to create safe plants, and little protection is provided by the government because

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<sup>10</sup> 42 U.S.C. § 2210 (1964).

<sup>11</sup> S. NOVICK, *supra* note 5, at 72.

<sup>12</sup> See Annot., 21 A.L.R.3d 1356 (1968).

<sup>13</sup> O'Hanlon, *An Atomic Bomb in the Land of Coal*, FORTUNE, Sept. 1966, at 132.

the federal agencies responsible for assuring the safety of the reactor program are themselves its architects.<sup>14</sup>

Secondly, the absence of financial responsibility for a nuclear accident has led electric utilities to seek locations close to population centers so as to minimize transmission costs. Consolidated Edison has made numerous proposals to place nuclear generating facilities in and around New York City.<sup>15</sup> An 800,000 kilowatt plant is planned for the shore of Lake Erie about 25 miles east of Toledo.<sup>16</sup> The inhabitants of these communities are the caged mice. These experiments will show whether nuclear power plants can be operated so as not to destroy the population. The proposed Ohio plant will be only a short distance from the Enrico Fermi plant at Lagoona Beach, Michigan. That plant, the only commercial fast breeder,<sup>17</sup> after years of malfunctioning, had a serious accident on October 5, 1966. The accident put the reactor out of commission but could have easily killed a large portion of the population of Detroit.<sup>18</sup>

In spite of the danger, the federal government continues to spend money to encourage the construction of nuclear reactors. Why any reasonable man would want a nuclear reactor anywhere on this earth is one of those mysteries that perhaps will be answered only by whatever species replaces man. A single 1,000,000 kilowatt reactor, after 1-year of operation, contains more radioactive strontium, cesium, and iodine than was released in all the nuclear weapons tests conducted in the world until the present.<sup>19</sup> There exists little reason for hope that this radiation will remain isolated from man's ecosystem. Discharges of radioactive materials into the air and water can be expected from even normal operations, and small discharges can cause great harm since radioactive material, like pesticides, is concentrated in the body of those living things occupying the contaminated environment. Each creature receives the lifetime accumulation of those life forms comprising its diet thereby producing a biological magnification of the contaminant. Because of this, soft parts of oysters and scallops have been shown to concen-

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<sup>14</sup> S. NOVICK, *supra* note 5, at 89.

<sup>15</sup> See, e.g., N.Y. Times, Jan. 8, 1969, § 2, at 88, col. 3; *id.*, Jan. 11, 1968, § 1, at 17, col. 1.

<sup>16</sup> 12 GREAT LAKES NEWS LETTER No. 3, Jan.-Feb. 1968.

<sup>17</sup> Fast breeders burn plutonium which they also produce thus obviating the need for enriched uranium 235.

<sup>18</sup> S. NOVICK, *supra* note 5, at 156-58.

<sup>19</sup> *Id.* at 94.

trate radioactive zinc 65 to levels as much as 100 times those in their sea water environment within several days after exposure.<sup>20</sup> In the bones of fish, radioactive strontium can increase to a level 2,000 times greater than that of the surrounding water.<sup>21</sup> This radioactivity is getting into our habitat. The radionuclides are discharged into the cooling water and then into our rivers and lakes. There it is concentrated in the bodies of the indigenous fish, plants, and animals. With the help of birds and the wind the radioactivity can be disseminated around the world. This discharge is considered normal. Any serious accident can add much greater quantities of long-lived radioactive material to our environment. As the number and size of the nuclear plants increase — so does the risk.

We can only anticipate a constantly increasing level of radioactivity and commensurate harm to humans. Moreover, this radioactivity is not rendered harmless except after many years of slow deterioration. The half-life of the cesium 137 released to our waters is 30 years. Hydrogen 3 released to the air by nuclear reactor operations has a half-life of 12.26 years.<sup>22</sup> Unless it can be stopped, the utility industry can be expected to produce a pollution problem which will be impossible to abate. Present safety plans will not prevent radioactivity from contaminating the earth, but rather are designed to spread the radioactivity evenly so all people can be subjected to a constantly increasing low level exposure. The industry hopes that only long term statistical evidence of the incidence of cancer or genetic change would indicate the harm which they will inflict upon mankind. It seems ironic that atomic energy is sold to the public as a panacea for air pollution control, when what really is planned is to substitute deadly radioactive wastes for the less deadly, though certainly harmful, sulfur oxides and particulate matter.

Perhaps man will come to his senses and halt his insane drive toward extinction. His lemming-like behavior makes it unlikely that man will change, but the urge to survive seems to create enough optimism to have knowledgeable people try to sound the alarm. The same technocrats who brought us air and water pollution as the price for our highly consumptive society are now trying to force nuclear power on the country. With effort this can be prevented or

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<sup>20</sup> W. Brungs, *Distribution of Cobalt 60, Zinc 65, Strontium 85, and Cesium 137 in a Freshwater Pond*, in U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, Pub. No. 999 RH 24, at 29 (1967).

<sup>21</sup> S. NOVICK, *supra* note 5, at 97.

<sup>22</sup> CITIZENS COMMITTEE TO SAVE CAYUGA LAKE, *supra* note 1, at 7.

at least controlled so as to insure basic environmental protection. The nuclear station at Easton, on the Hudson River in New York was cancelled.<sup>23</sup> The Cayuga Lake, New York plant was cancelled at least temporarily — hopefully forever.<sup>24</sup> Now our abused Lake Erie is to be subjected to another serious source of pollution for Toledo Edison plans to build a large nuclear power plant northeast of Oak Harbor on the shore of Lake Erie near the mouth of the Toussaint River.

With many other plants now being planned for the Great Lakes Basin as well as all other areas of the Nation, Mr. Novick's book is especially timely and its contents should be known by all citizens. His contribution is particularly valuable for he presents a complex subject in a manner that any reader can comprehend. If we, by default, allow the AEC and the utility industry to make the decision for us, then, all mankind will suffer. The tyranny of our technology can only be controlled by a citizenry that understands the issues involved in the decisions of modern government and industry. For too long we have lived with a society that allows these complex decisions affecting our environment to be made by the "experts," and these experts have generally been wrong.

ARNOLD W. REITZE, JR.\*

FORMATION OF CONTRACTS. By Rudolf B. Schlesinger. Dobbs Ferry, New York: Oceana 1968. Pp. xv, 1727, 2 vols. \$35.00.

Abstracting universals from written opinions is a familiar and entrenched characteristic of the common law system. Despite the familiarity of its presence, abstractionism has proved to be a demanding and a frustrating exercise, capable of evoking uneven responses from the legal community. It has been over-absorbed, as in the mechanical jurisprudence of the early part of the century, and it has been the object of sharp criticism, particularly by the realists. Regardless of the accompanying tensions, the abstractive process, by furnishing a unifying ground of comprehension, constitutes the pre-creant essence of the decision-making process. The establishment of coherent perimeters of comprehension has a consequence that is relevant to comparative law. Abstractionism furnishes the com-

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<sup>23</sup> N.Y. Times, Aug. 8, 1968, § C, at 26, col. 1.

<sup>24</sup> Wall Street Journal, Apr. 14, 1969, at 7, col. 1.

\* Associate Professor of Law, Case Western Reserve University.

parativist with a framework within which legal systems can be analyzed.

There are at least two methods by which legal systems can be abstracted and compared. One method identifies the styles and techniques that each of the systems invokes in the problem solving process, and the other, by establishing and defining an equivalency of rules and standards, focuses on the solutions to specific problems. Professor Schlesinger and his eight project colleagues have applied the latter approach to the field of contracts. Encompassing 10 legal systems, the study is an ambitious undertaking with a wide range of objectives. Not only does the project envision the determination of a common core of contract solutions, but it is also designed to develop research methodology, to serve as a basis for curriculum changes, to provide norms for use by international tribunals, to be used as an aid in international arbitration and international trade and investment, and to serve as a source of reforms for new countries creating systems of law.

A threshold question concerns the choice of subject area. Why contracts, and why formation of contracts? As to the initial question the reasons given are two: First, contracts is both a distinct and universal field; secondly, it is an area of "great practical importance."<sup>1</sup> Formation was chosen because of its relative immunity from the excluding thrust of the ubiquitous standardized contract and because "the legal rules embodied in diverse legal systems are much less likely to be displaced by the parties' autonomous arrangements than in other areas of contract law."<sup>2</sup>

Those engaged in teaching contracts are particularly sensitive to the implications raised by these assumptions. The relevance of the overall field of contract law to the commercial scene is at present the subject of concern and dispute. There is argument to the effect that contract doctrine exerts only a minimal impact on business decision-making.<sup>3</sup> The advocates of this view contend that exigencies of trade do not permit the accommodation of business negotiations and transactions to contract dogma. Moreover, even assuming that some degree of relevance does exist, how, to what extent, and in what areas, is it manifested?

The major obstacle to reasonably accurate answers to these questions is to be found in the dearth of extant empirical research. A

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<sup>1</sup> 1 R. SCHLESINGER, *FORMATION OF CONTRACTS* 18 (1968).

<sup>2</sup> *Id.* at 20.

<sup>3</sup> See Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805.

paucity that is not, it might be added, necessarily restricted to the field of contracts.<sup>4</sup> Primary research is still oriented around appellate decisions. The West Reporter system serves as the focal point of inquiry. Unfortunately, published opinions reflect at best a minute and perhaps inaccurate portion of the adversary drama. Industry pressures, goodwill factors, and custom may make litigation unattractive. Many conflicts are, therefore, channeled into arbitration. Moreover, if and when the litigation process begins, this new environment reshapes the problem so as to make it conform with patterns already recognizable by courts. Even the recent surge of realism into jurisprudential cognition has effected minimal change in the appellate syndrome.

In addition to the difficulty of ascertaining the quality of the nexus between contract dogma and commercial reality there is also the question of sphere of influence. It has been suggested that the reach of the field of contracts has been greatly diluted.<sup>5</sup> When areas such as antitrust law, labor law, and insurance law<sup>6</sup> have become sufficiently important in terms of social impact, they have been chopped off from contracts and given independent recognition.<sup>7</sup>

The above comments are by no means fatal to the decision by the authors of *Formation of Contracts* to focus on contracts. In the absence of more empirical data it would be imprudent to summarily dismiss the relevance of written opinions. They do, as a matter of fact, contain measurable vibrations of commercial reality. Not infrequently, changes in relationships and patterns of business dealing are anticipated or precipitated by the appellate decision. The saturation of the marketplace with standardized transactional forms reflects an effort to connect contract doctrine with business practices.

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<sup>4</sup> It is interesting to note that the *Uniform Commercial Code*, which is keyed to a Mansfieldian philosophy of accommodation to the marketplace, is unsupported by systematic research of the Schlesinger variety. On the other hand, it has been suggested that the *Code's* particularistic flexibility furnishes the courts with the opportunity to resolve conflicts "in a way that comports with what [the judge] finds to be the needs and problems of that transaction context." Spiedel, *Contract Law: Some Reflections Upon Commercial Contract and the Judicial Process*, 20 J. LEGAL ED. 474, 479 (1968). See also Patterson & Schlesinger, *Problems of Codification of Commercial Law*, New York Law Revision Commission Leg. Doc. No. 65A, 51-56, 57-74 (1955), reprinted in H. READ, J. MACDONALD & J. FORDHAM, *LEGISLATION* 254-59 (2d ed. 1959).

<sup>5</sup> L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 23-24 (1965).

<sup>6</sup> At least in the insurance law area the separation has not been complete — contract doctrine is frequently invoked.

<sup>7</sup> Macaulay notes that legislative pre-emption may be temporary since "some of the traditional ideas upon which old-fashioned classroom contract law is based, re-emerge to govern these new statutes and their applicatons." S. MACAULAY, *LAW AND THE BALANCE OF POWER* 4 (1966).

Many standardized forms have been developed by trade associations that presumably are in touch with industry custom and which could be expected to produce a product that is relevant to commercial reality.<sup>8</sup>

The utility of the contract has not been overlooked by contemporary capitalists. Large amounts of resources can be tied up by contract.<sup>9</sup> For example, the franchise, a complex and highly innovative product distribution system, relies heavily on contract as a control device. Further, the conceptual and philosophical importance of contract has remained undiluted. Thus, while there appears to be evidential substance behind the sphere of influence theory, it loses much of its force when related to this study. It is doubtful if contract doctrine has lost its influence in international trade or investment.

In arriving at a common core of contract formation the authors adopted what they describe as "factual methodology." Fact situations, taken mainly from United States opinions, were distributed among participants who were expected, within the framework of the respective legal systems, to answer these three questions: Would the verdict be for the plaintiff or defendant? What would be the form of relief? What is the doctrinal basis for the decision? Conclusions were reached through four levels of analysis. First, overall understanding of the fact situations was reached. Each participant then responded in terms of his legal system. The responses — individual or national reports — were then subjected to group scrutiny and analysis. At this point the results were abstracted and organized into a common core of contract formation. Finally, the national reports were revised to conform to common core conclusions.

The cornerstone of the factual approach is the universality of the fact situations. The different shades of meaning and commercial effects that facts might take on in the various nations can render uniform comprehension difficult and, hence, conclusions meaningless. The authors feel that by intra-group discussions and with probing cross-examinations they have avoided this problem. Whether they have succeeded depends upon several factors. First,

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<sup>8</sup> This does not mean that the provisions in the standardized forms are always utilized. H. JONES, E. FARNSWORTH & W. YOUNG, *CONTRACTS* 160 (1965). Apparently the prime motivating force behind the use of standardized contracts was to avoid "judicial risks." Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629, 631-32 (1943).

<sup>9</sup> Of course, control by contract can reach the point where antitrust proscription appears on the scene. See, e.g., *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

the project commentators must possess a high degree of expertise and familiarity with commercial practices in their countries. This is, of course, a heavy burden. Secondly, variations in the effects of facts from nation to nation must not prevail to the point that meaningful abstraction is precluded. Finally, there is the problem of whether the participant can relate the fact situation posed in the working paper with a like fact situation in the appellate cases of the individual legal systems.

Nevertheless, the authors are justified in their enthusiasm for the factual method. It is an effective means of making readily discernible the substantial differences in procedure, in legal philosophy, and in decision-rendering style, which exists among nations. Problems of classification are exposed, making it possible to "cut right through the conceptual cubicles in which each legal system stores its law of contracts."<sup>10</sup>

Because of the use of factual methodology and comparative techniques, the authors contend that the individual reports do not duplicate in style, form, or substance the traditional Corbin-Williston treatise or law review article treatment of contracts. The give and take of discussions designed to establish patterns of agreement and disagreement among 10 legal systems allegedly prompted illuminating questions that would not normally have been raised had one commentator channelled his analytical energies toward a single system.

If the authors mean that unanticipated questions were evoked that shed new light on comparison techniques, they are perhaps correct. Moreover, there is no doubt as to the thoroughness and reach of the reports, particularly the series of American reports. Scholarship and competence of the highest level is clearly evident. But, in overall substance and import the American reports are cast in the classical treatise-law review article mold.<sup>11</sup> Little appears that is not already a familiar part of the literature of formation of contracts.<sup>12</sup> This does not, however, detract from the quality of the project. The individual reports were intended to establish a foundation that would ultimately culminate in a useful common core of

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<sup>10</sup> 1 R. SCHLESINGER, *supra* note 1, at 57.

<sup>11</sup> A law review article, MacNeil, *Time of Acceptance: Too Many Problems For a Single Rule*, 112 U. PA. L. REV. 947 (1964), was reprinted as substantially the entire American report on "When Acceptance Becomes Effective." 2 R. SCHLESINGER, *supra* note 1, at 1395.

<sup>12</sup> An interesting exception is the analysis of the contractual overtones of self-service systems and vending machine transactions. 1 R. SCHLESINGER, *supra* note 1, at 336-42.

abstractive conclusions. The foundation was established, the common core was extracted, and the product represents a meaningful and significant contribution to contract law and the field of comparative law.

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THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN. By Richard A. Watson and Rondal G. Downing. New York, New York: John Wiley and Sons, Inc. 1969. Pp. xx, 393. \$10.00.

The Nonpartisan Court Plan, first adopted by Missouri in 1940, was developed by the American Bar Association and the American Judicature Society for the purpose of improving the quality of state judiciaries through introduction into the selection process of individuals who were acquainted with the criteria required for a "good judge."<sup>1</sup> Under the Plan, a commission composed of laymen, lawyers, and judges nominates three candidates for each judicial vacancy. The governor then appoints one of the nominees to the position. After a year's service each judge so selected is required to run on his record (without opposition) for approval by the electorate. Proponents have argued that the Plan removes the choice of judges from politics. Opponents have charged that it results in conservative elitism on the bench. Glendon Schubert, leading judicial behavioralist, calls the Plan a means by which "the effective selection of judges is made through what amounts to guild control by organizations run by lawyers."<sup>2</sup> Watson and Downing in *The Politics of the Bench and the Bar*, now provide the facts of the Plan's operation in one state political system, with a powerful analysis of the selection process and its consequences.

As in all indirect representative processes, the essential question is: Who selects the selectors? In Missouri, there are three groups of selectors: the judicial commissions for the circuit courts of Jackson County (Kansas City) and St. Louis respectively, and an appellate commission for the courts of appeals and the state supreme court. For all three commissions, the lawyer members are chosen by the organized Bar within the jurisdiction of the respective courts; the lay members are appointed by the governor; and the judicial member, who acts as chairman of the nominating com-

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mission, is the presiding judge of the court of appeals in the area, or, in the case of the appellate commission, the chief justice of the state supreme court.

The principal characteristic of the Bar elections is the keen competition of a two-party subsystem operating within the legal community. Social, economic, and professional differences have led to political conflict over the lawyers' seats on the nominating commissions so that rival bar associations in Kansas City and St. Louis, representing different types of practices, have competed for getting "their" kind of judges on the bench: "persons . . . who will be sympathetic, or at least not hostile, to their clients' interests."<sup>3</sup> The primary division among the members of the Bar in Missouri is between plaintiffs' and defendants' lawyers. The authors distinguish this competition from mere factionalism, because the opposing sides represent distinct interests in society, and both parties are at various times successful.

Although the presence of lay members on the nominating commissions is meant to signify public participation in the selection process, citizens generally are too remote from the judicial process to create pressures on the governor's array of choices. Instead, the governor tends to pay attention to the "attentive publics" of the courts, principally lawyers, businesses affected by a large volume of litigation, and his political party. With few exceptions, the lay members have been businessmen with close ties to the local community, members of the governor's party, and often his close personal friends.

Once selected, the nominating commissions utilize a variety of consensual techniques. Perhaps the most significant are the variations of the "panel-stacking game," whereby the final choice of the judge is predetermined. For example, "rigging" provides a combination of nominees which leaves the governor virtually no choice: the commission simply nominates one political friend of the governor, one political enemy within his own party, and a

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<sup>1</sup> The Plan has arisen from dissatisfaction with traditional methods of judicial selection such as direct election of judges by partisan ballot or gubernatorial appointment. Both of these methods not only minimize the "good judge" criteria, but result in judiciaries that may be responsive to those groups with whom the judges have been associated. For a discussion of the potential effects of judicial affiliation with power groups, see Comment, *Partisan Values in the Lower Courts: Reapportionment in Ohio and Michigan*, 20 CASE W. RES. L. REV. 401 (1969).

<sup>2</sup> G. SCHUBERT, *JUDICIAL POLICY-MAKING* 27 (1965).

<sup>3</sup> R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 39 (1969).

member of the other major party. Loading may force the governor to appoint someone he does not want, as in the rare instance when the appellate commission presented a Democratic governor, known for his belief in rewarding the party faithful, with a panel of three Republicans. Finally, "wiring" occurs when the governor lets his choice be known, directly or indirectly, to the commission, which proceeds to name his candidate along with two others whose selection is implicitly meaningless.<sup>4</sup>

To reach their conclusions the authors combined numerous empirical methods of data collection<sup>5</sup> to gather basic factual material to which they applied the insights of the contemporary study of political culture, systems analysis, and role theory. The significant findings of the authors contradict the expectations of both opponents and proponents of this method of judicial selection. The judges selected did not reflect elite characteristics or produce more consistently conservative decisions than those selected in a previous period by partisan election. Instead, Missouri Plan judges tended to have been born in the state, to have received their legal education there, often in local night law schools, and to be open-minded and willing to listen to both sides of a case. Moreover, the process did not remove politics from judicial selection, but changed its nature in significant ways. First, the locus of political power now lies with the governor, and his faction or party, rather than with the party's county chairmen and local bosses who previously made the decisions of the judicial nominating process. Secondly, the Nonpartisan Plan appears to reflect the partisan composition of the state, and its political culture. The proportion of judges of the majority party of the state increased at both the circuit and appellate levels during the operation of the Plan.<sup>6</sup>

Furthermore, the Plan does not appear to prevent representation of social, economic, and political values in the judiciary. The "birthright" characteristics of commission members and judges are not presented here, probably because of the difficulty of assembling racial, ethnic, and religious data for a period reaching back into the 1940's. For comparative purposes, these characteristics of elective judges in a previous time span would have been desirable to test the hypothesis of critics that the elite-oriented processes of

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<sup>4</sup> *Id.* at 107-08.

<sup>5</sup> Over 200 personal interviews were conducted with judges, lawyers, and politicians. A sample survey included 1200 members of the Missouri Bar. Additionally, court decisions were analyzed, and the statistics of Bar polls and judicial elections tabulated.

<sup>6</sup> *Id.* at 219.

choice would tend to exclude minority group members from the judiciary. However, if the dominant political culture of Missouri is white, Democratic, Protestant, and traditionalistic,<sup>7</sup> a pluralistic judiciary would not tend to emerge from any method of selection. In a more pluralistic political culture, where ethnic, racial, and religious minorities are significant participants in the politics of gubernatorial elections, this study would lead us to predict that such groups would secure representation in the judicial nominating and appointing processes.

Watson and Downing have provided a vast mine of information in *The Politics of the Bench and the Bar*. Nevertheless, their study is more heuristic than definitive. The authors' impressive achievement points the way to further comparative judicial studies as well as to a more realistic assessment of the potential effect of adoption of the Nonpartisan Court Plan in presently elective states.

KATHLEEN L. BARBER\*

SOVIET INTERNATIONAL LAW: AN EXEMPLAR FOR OPTIMAL DECISION THEORY ANALYSIS. By James L. Hildebrand. Buffalo, New York: William S. Hein & Co. 1969. Pp. xx, 130. \$10.00.

This study of international law in the Soviet style represents an excellent experiment in interdisciplinary analysis by James L. Hildebrand of Washington, D.C., a former student of mine. I first reviewed this work, which delineates Soviet international legal policy from the Bolshevik revolution in 1917 through the most recent Czechoslovakian crisis, when it appeared in the November 1968 issue of the *Case Western Reserve Law Review*. [See 55 A.B.A.J. 373 (1969)] Since then it has been published in book form with a challenging introduction entitled "Law and the Idea of Mankind" by Harry W. Jones of Columbia University's School of Law.

By applying modern decision theory and traditional political science, an understandable pattern is derived from the allegedly most enigmatic Soviet policy moves. The Soviet heritage found in Czar-

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<sup>7</sup> *Id.* at 343.

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ist Russia's minimal contributions to traditional international law is briefly discussed. The author then attacks the theoretical concepts which give rise to the Soviet dilemma of reconciling Marxist doctrine with the predominantly Western-oriented body of international jurisprudence. The attempts of the various Soviet legal spokesmen (Korovin, Pashukanis, Vyshinski, and Tunkin) to shorten the horns of this dilemma are outlined.

In 1956, with Khrushchev backing the theme of peaceful coexistence, a compromise of the divergent legal systems was acknowledged by the Soviet international legal policy-makers. The shift, from Khrushchev's coexistence theme to Brezhnev and Kosygin's theme of cooperation, is discussed as a significant change not only in terminology but in approach as well. "Indeed," the author points out after a detailed, comprehensive analysis, "the current East-West *détente* era has created a 'new' international law made up of *consensually-based* rules." This analysis provides ground for suggesting an operational sociological approach based on a transcultural consensus as a potential solution to the dilemmas in international jurisprudence which have been created by a world of polarized ideological beliefs.

Before espousing the concept of a transcultural consensus, the author interjects a brief critical comparison "between the Soviet 'hang-ups' in effectuating a valid theory of international law and the inconsistency between the United States democratic ideals and American international relations," as evidenced by our commitment to the "rationally deductive" domino theory and our refusal to sign the international human rights treaties. The transcultural consensus, coupled with the policy-evaluation strategy of disjointed incrementalism, is then posited as a means for averting annihilation of the human species because of misguided intraspecific aggression (*à la* Lorenz) and the territorial imperative behavior pattern (*à la* Ardrey), both of which appear to be phylogenetically programmed into man's basically aggressive nature. The author stresses the necessity for a mankind perspective transcending national values and prejudices.

This book appears to be on the forefront of new approaches to international law for "this spaceship we call Earth." Its eclectic coverage integrates game theory, modern optimal decision theory and traditional concepts of political science and international law. Not only is it authoritative political history and an outstanding contribution to the growing legal literature on judicial behaviorism, it

is also an important and comprehensive study of the crucial issues that face mankind in the twentieth century.

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