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## Book Reviews

EMORY BUCKNER. By Martin Mayer. New York: Harper & Row, 1968. Pp. xiv, 304. Cloth: \$7.95.

Professor Edward H. "Bull" Warren of the Harvard Law School, in the 1920's, would introduce first year students to the law with the statement that "the Daniel Webster type of lawyer is dead as a door nail." Emory R. Buckner, who at that time was certainly one of the best trial lawyers in New York City (Martin Mayer's first thought of a title for his Buckner biography was the "Best Trial Lawyer in New York," which was Justice Frankfurter's description of Buckner), was the exemplar of the Warren thesis as a positive contrast to the Webster manner.

Not that Buckner wasn't eloquent and forceful in his way; he was both, with directness and no tricks, but his method was not oratorical and he did not play by ear. Thorough preparation based on exhaustive research into facts and law was the foundation of his trial theory and practice. A young assistant spoke to Buckner one day of a contemplated excursion in search of evidence as a "wild goose chase." Buckner responded, "Sure, that's the way you catch a wild goose."

Of inspiration there was plenty, both in Buckner's conception of a case and trial adaptations, but perspiration underlay the trial product. He was both architect and builder. A case was built block by block, according to well laid plans, and it was also made as clear, concise and understandable as possible to the trier of the facts. Cross-examination was as thoughtfully and thoroughly prepared as direct examination, with the general rule: "Don't ask a question on cross-examination you don't know the answer to."

The base of any Buckner operation was staff work. His genius was in the recruitment, organization and use of staff. He had an exceptional knack in picking young men, attracting them and working with them, giving them responsibility and credit, and developing a team spirit which made not only for effective effort but gave relish to the task. This wonderful relationship with young men went beyond the working day and night, it was carried into after hours play with delightful zest. Buckner enjoyed nothing more than bull sessions and weekend golf with his young colleagues.

Buckner's interest in and affection for his juniors did not end, however, with such a working and playing association. He was ever interested in their future and alert for opportunities to promote their professional progress. He knew more young lawyers, where they were and what they were doing and could do than did any dozen lawyers in the City. Both private and public law offices were always looking to him for recommendations to fill key places, and there is hardly a large office in New York City today that does not number a Buckner man among its senior partners. Harlan, Lumbard and Friendly are Buckner gifts to the judiciary.

Martin Mayer's *Emory Buckner* tells the Buckner story and tells it well—youth and early schooling in the Middle West, a remarkable family devotion, the mastering of

stenography and then court reporting to pay his way through law school, the years of prosecuting in both state and federal offices, the organization of a new law firm that became in short time one of the largest and best in New York City, a notable two years as United States Attorney for the Southern District of New York, the return to private practice, a running correspondence between Buckner and Frankfurter that was continuous from their law school days to Buckner's death. Civil and criminal cases of exceptional interest are covered with insight. Through all, Buckner, the lawyer and man, shines through.

It is very much worth while for law students and lawyers to pause occasionally in the day's occupation to read of the lives of their predecessors who as practicing lawyers and individuals have not only made their mark but left a heritage of precept, example and personal greatness. Emory Buckner was a truly great trial lawyer and magnificent human being. Reading of his life is rewarding in learning and enjoyment.

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CONCERNING DISSENT AND CIVIL DISOBEDIENCE. By Abe Fortas. New York: The New American Library, Inc., 1968. Pp. vii, 128. Cloth: .....; paper: \$.50.

One is tempted to begin a review of this book with a speculation: Why was it written? Any answer must necessarily take into consideration not only the author's own statement<sup>1</sup> but the pressures of the time as they bear down upon him. Perhaps in the light of later developments,<sup>2</sup> it is best to pretermit the question and to proceed to a review of the work.

In Part One, the author lays out in summary fashion the constitutional right to dissent and to protest. The limitations on this right are derived from the obvious fact that there are other people in the world besides dissenters and these, too, have rights, and from the existence of the state, which has the right to "defend its existence and its functions, not against words or argument or criticism, however vigorous or ill-advised, but against *action* . . ." aimed at damaging the state or its citizens in their work and normal pursuits. (p. 48)

Since neither the right of the state to protect itself nor the individual's right to protest, dissent and oppose is absolute, some agency must exist to determine when

1. P. vii:

I have written this little book because I think it is important that as many people as possible should understand the basic principles governing dissent and civil disobedience in our democracy.

In part, this book tries to present a statement of basic legal principles. In part, it is frankly a statement of a moral, ethical, or philosophical point of view about dissent and how it may properly—and effectively—be expressed.

2. The Senate hearings on the nomination of Justice Fortas to serve as Chief Justice of the United States.

the right to dissent no longer exists because to recognize its continued existence would pose an intolerable threat to the rest of society. That function is entrusted to the courts, which must strike "the balance in individual cases, on the basis of principles stated in the Constitution in terms which are necessarily general and which leave room for differences of opinion—even among Justices of the Supreme Court." (p. 49)

It is obvious that if this is our system—and there is no doubt that it is—its efficacy in the last analysis depends upon the judges who administer it. Are they "good" men or "bad" men? Are they intelligent or dull? What are their societal goals? And what presuppositions do they bring to the task of applying the "necessarily general" principles of the Constitution to the resolution of individual cases? These questions are as important as the author's legal paradigm and necessarily lead one into the realm of values. This is not surprising. Surely the author must have his own philosophical retreat whence this book derives its substantive impetus.<sup>3</sup>

Part Two is concerned with civil disobedience. This is a form of dissent which, unlike speech, is not entitled to constitutional protection (unless the law violated is ultimately adjudged unconstitutional). The term is "used to apply to a person's refusal to obey a law which the person believes to be immoral or unconstitutional." (p. 59) It is to be distinguished from "revolution," which involves attempt to "overthrow the government or to seize control of areas or parts of it by force . . ." (p. 59) That the author espouses civil disobedience as an acceptable form of protest is clear from the statement on the first page of his text: "If I had been a Negro living in Birmingham or Little Rock or Plaquemines Parish, Louisiana, I hope I would have disobeyed the state laws that said that I might not enter the public waiting room in the bus station reserved for 'Whites.'" (p. 18)

However laudable this aspiration may be, it is not proper for a Justice of the Supreme Court to make such an avowal in view of the fact that it could be construed as an invitation to break the law in related sensitive areas. There are many efficient advocates on the national scene extending such invitations. And, thankfully, they are not charged with judging their own cases. My own sense of propriety, which I am sure is shared by a few others, tells me that a judge should not be a social activist. To the extent he is, he may come dangerously close to prejudging cases. Far better for the judge to remain dispassionate and detached even in recounting the liberal desires he entertained before assuming the bench. This is not to say that judges should not be responsive to social needs but only that they should do so as judges after listening to advocates for different goals. By definition a judge is not an advocate.

The question remains, how is approval of civil disobedience to be reconciled with the general belief that laws should be obeyed? The answer is found in the "rule of law" which requires the citizen who intentionally disobeys the law to accept "the result of procedures by which the courts, and ultimately the Supreme Court, decide that the law is such and such, and not so and so; that the law has or has not been violated in a particular situation, and that it is or is not constitutional; and that the individual

3. "Whoever uses words philosophizes, will he nill he; for language is the vehicle of conscious reason." J. BROWN, KIERKEGAARD, HEIDEGGER, BUBER & BARTH 16 (1967).

defendant has or has not been properly convicted and sentenced." (p. 58) Here, as in the author's discussion of the exercise of dissent through the use of speech, the reviewer finds himself more concerned with the administrators of the system than with the system itself. The system is easily grasped but judges frequently elude us.

Part Three is concerned with the revolt of youth with regard to the draft and the war in Vietnam, but since the discussion here adds nothing new to the author's views on dissent and civil disobedience, we may proceed to the final few pages entitled "Conclusion."<sup>4</sup> A puzzling passage in these final pages leads the reader to wish that he could interrogate the author about its ultimate meaning, in a word ask him to lift the darkness from the philosophical corner in which he has been working. The passage is:

[T]he critical question is one of method, of procedure. The definition of objectives and the selection of those which will triumph are of fundamental importance to the quality of our society, of our own lives, and those of our descendants. But the survival of our society as a free, open, democratic community, will be determined not so much by the specific points achieved by the Negroes and the youth-generation as by the procedures—the rules of conduct, the methods, the practices—which survive the confrontations.

Procedure is the bone structure of a democratic society; and the quality of procedural standards which meet general acceptance—the quality of what is tolerable and permissible and acceptable conduct—determines the durability of the society and the survival possibilities of freedom within the society. (pp. 119-20)

This passage is susceptible of the interpretation that the survival of our society is more closely linked to the maintenance of a system of procedure which permits *any* objectives to be adopted than to those objectives which a society *actually* adopts. Which is more important: a procedural system which permits *any* values to be advocated or a mechanism for the sifting of values competing for procedural protection? In a word, do we need philosophy more or less than we need procedure? This is the question which the book leaves unanswered.<sup>5</sup> But the question needs answering. Perhaps Justice Fortas will write another book. Of course this reviewer cannot recommend this course since he has taken the view that judges should not be social activists. Nevertheless, it leaves one not quite satisfied to have a jurist's views on procedure without having his views on values. Lacking any such illumination, one is tempted to conclude that for Justice Fortas procedure is the ultimate value.

PHILIP A. RYAN\*

4. The author states at p. 85: "The principles that I've discussed apply, of course, to the revolt of the youth-generation—of the sixteen-to twenty-five-year-olds—as well as to the social revolution. They apply to the white collegian as well as to the Negro resident of the ghetto."

5. It is beyond question that the author did not set out to answer this question but one can suppose that it occurred to him.

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USES OF THE SEAS. Edited by Edmund A. Gullion. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1968. Pp. xv, 202. Cloth: \$4.95; paper: \$2.45.

This book is a collection of chapters written by distinguished authorities in ocean-related fields,<sup>1</sup> and was designed as a background volume on ocean policy for the American Assembly of Columbia University. It brings together in a readable form current analyses of the United States' major national interests in the ocean and policy alternatives for the future. The lack of a bibliography, except for chapter five, is probably an oversight.

The authors share a common view: that the United States has opportunities to make bold efforts toward bringing about rational resource management in the ocean, and to avoid extension of existing patterns of nationalism and sovereignty to the seas. They emphasize how the impact of emerging technologies requires new international institutions and machinery, and that cooperation of many nations will be needed if the benefit of these technologies are to be realized. Several authors stress our need to meet the challenge of world poverty and to effect some redistribution of wealth among nations. (e.g., p. 96) Unlike some visionary proponents of world government, however, they do not lose sight of either our vital national interests in security and economic welfare, or the sacrifices of assumed national rights which the world community may find acceptable in the foreseeable future.

Heightened expectations of mineral wealth beneath the ocean have been a primary catalyst in causing the current reexamination of ocean policy which inspired this volume. Ambassador Pardo of Malta caught the world's attention when he predicted that by 1975 the United Nations could realize \$6 billion of gross annual income from undersea mineral development if it controlled development over the ocean floor.<sup>2</sup> But proposals to create an international seabed regime place in issue the location of national/international boundaries, which turns on one's interpretation of the 200-meter-or-exploitability criterion of the Convention on the Continental Shelf. Ambassador Pardo's estimates of revenues assumed, among other things, that this boundary would be drawn close to shore (200-meter isobath or 12 miles, whichever is farther from shore) so as to maximize the area of international control.

The Department of State, guided by former President Johnson's admonition to

1. In addition to an Introduction by Dean Gullion, Fletcher School of Law and Diplomacy, Tufts University, the volume contains: ch. 1, *Ocean Science and Marine Resources*, by Paul M. Fye et al. of Woods Hole Oceanographic Institution; ch. 2, *Changing Law for the Changing Seas*, by Louis Henkin of Columbia University; ch. 3, *National and International Organizations for the Seas*, by Eugene B. Skolnikoff of Massachusetts Institute of Technology; ch. 4, *The Strategic Consequences of Britain's Revised Naval Role*, by L. W. Martin of King's College, London, and Hedley Bull of Australian National University; ch. 5, *The Soviet Turn to the Sea*, by Marshall D. Shulman of Columbia University; and ch. 6, *An American Strategy for the Oceans*, by Gordon J. F. MacDonald, University of California at Santa Barbara.

2. Ambassador Pardo's statement of November 1, 1967, is reprinted in HOUSE COMM. ON FOREIGN AFFAIRS. INTERIM REPORT ON THE UNITED NATIONS AND THE ISSUE OF DEEP OCEAN RESOURCES, H.R. REP. NO. 999, 90th Cong., 1st Sess. 267 (1967).

avoid a land grab or new form of colonial competition (p. 82), has been struggling to come up with a national position. Taking the President's words to heart, and inspired by the belief that man's future lies in strong international organization, some argue for a "narrow shelf" and the immediate dedication of the greater part of the seabed, and mineral royalties therefrom, to international authority. Others, guided by their conceptions of political realities and national self interest, advocate a "wide shelf" encompassing the whole submerged portion of the continental land mass. This approach would assure that the income from offshore petroleum development would accrue to the adjacent coastal nation.

It is unfortunate that arguments concerning the location of the offshore boundary have so often focused on the supposed mineral riches of the sea. Few subjects arouse irrational feelings more easily than the acquisition and development of mineral resources. The need for minerals has inspired innumerable colonial ventures throughout history. Minerals conjure up visions of power and wealth, and once discovered are held to be inalienable and irreplaceable national birthrights. Collaboration with foreigners in their development raises sensitive political issues, even in such politically stable countries as Canada and Australia.

There is evidence offshore to support the politicians' visions of mineral wealth. Petroleum development off our coasts has yielded \$4.3 billion in revenue to the U. S. Treasury, and seemingly fantastic sums are bid for offshore acreage. During the period June 1967—May 1968 the revenue accruing to the Treasury from offshore petroleum exceeded total federal income from all onshore minerals since 1920.<sup>3</sup> With our petroleum industry now operating beyond the 200-meter isobath, the pressure from that industry for official recognition of U.S. jurisdiction to more seaward limits has become strong.<sup>4</sup>

The catch is that there are other important uses of the seas, and any change in generally accepted conceptions applicable to the seabed may have important implications for defense, fisheries and navigation among other important uses of the seas. The first chapter of *Uses of the Seas* serves as a sound foundation for further consideration of these uses. It summarizes the known resources of the oceans, their economic values and the new technologies available for their exploitation. It dispels visions of great revenues accruing to national or international governments from ocean mining other than petroleum, and turns the reader's attention to the potential for greater harvests of the living resources of the sea.

Professor Henkin summarizes the status of ocean law, chiefly as it relates to extraction of the sea's resources, in the second chapter. Professor Henkin holds strong and provocative opinions on current issues of ocean law, and has recently characterized the arguments of proponents of a "wide shelf" as short-sighted, narrow in focus and parochial in concern.<sup>5</sup> His summary of ocean law, however, is generally objective in ap-

3. Figures from Interior Department sources.

4. See NATIONAL PETROLEUM COUNCIL, REPORT ON PETROLEUM RESOURCES UNDER THE OCEAN FLOOR (1968).

5. See his Dissenting Statement in the Interim Report of the Committee on Deep Sea Mineral Resources of the American Branch of the International Law Association, at XXI (July 19, 1968).

proach. His identification of issues and conflicting interests and the variety of ways and means possible to achieve man's aims in the seas is complete. He describes the tangled web of treaties, conventions, established industry practices and historic national rights which place significant constraints on our national and international policy makers. On the issue of the national/international boundary, Professor Henkin mentions his controversial buffer-zone solution only in passing. (pp. 88-89) This solution would earmark revenues from mineral production beyond the 200-meter isobath or 50 miles, which ever is greater, for international purposes.

In chapter three Professor Skolnikoff reviews existing organizations concerned with ocean resources and outlines the problems of fabricating new institutions and machinery to match technological advances and to implement the hoped-for political and legal agreements on ocean resource development. The social, economic, institutional and political restraints on change which he identifies have close counterparts in international river basin development, an analogous field which deserves more study by ocean policy architects.

Chapters four, five and six concern primarily the changing role of military sea-power, the implications of Soviet ocean activities and the British retreat from East of Suez. Military needs are important factors in formulating a national ocean policy, but full disclosure of current military uses of the seabed is difficult to find. These chapters are no exception. In chapter six Gordon MacDonald does describe how the oceans conceal our greatest strategic deterrent, the nearly invulnerable submerged submarine. Military spokesmen are concerned lest changes in ocean law extending national jurisdiction over seabed minerals adversely affect the concealment, dispersion and mobility of this deterrent.

Since publication of *Uses of the Seas* the U. N. Ad Hoc Committee has reported to the General Assembly.<sup>6</sup> The Committee's report and companion studies have brought an air of reality into discussions of international policy for the ocean, but *Uses of the Seas* remains the single most useful summary of issues, alternatives and opportunities in this field. Those participating in the national debate, which began with the submission of the report of the Commission on Marine Science, Engineering and Resources in January 1969, will find this volume an excellent primer.

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6. United Nations, *Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea Bed and the Ocean Floor Beyond the Limits of National Jurisdiction*, U.N. Doc. A/7230 (1968). On December 21, 1968, the General Assembly established a Committee of 42 nations to continue the inquiry begun by the Ad Hoc Committee. G.A. Res. 2467A (XXIII) (1968), reproduced in NATIONAL COUNCIL ON MARINE RESOURCES AND ENGINEERING DEVELOPMENT, *MARINE SCIENCE AFFAIRS—A YEAR OF BROADENED PARTICIPATION* at app. C-1, 234 (1969).

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