BOOK REVIEWS

ENVIRONMENTAL CONTROL: PRIORITIES, POLICIES AND THE LAW. By Frank B. Grad, George W. Rathjens & Albert J. Rosenthal. New York: Columbia University Press. 1971. Pp. viii, 311. $9.00.

The surge of interest in the environment has led to the publication of numerous books for conservationists, lawyers and the general public. Most legal works have been general in scope, designed to provide a background in a developing area of law for lawyers (and, occasionally, laymen) who are unacquainted with the field. This volume, comprised of three related papers dealing with federal environmental policy, is consistent with the prevailing survey approach.

In the first paper, 'National Environmental Policy: Goals and Priorities,' Professor George Rathjens introduces a classification scheme which he terms a 'taxonomy of environmental insults.' He divides environmental hazards into four classes: degradable water pollutants and solid wastes, non- persistent air pollutants, persistent toxic pollutants in air, water or soils, and factors which may alter the earth's geophysical environment. Rathjens contends that we should not be overly concerned with the first two categories. From the technical standpoint, the first problem is essentially solved, and although the second problem is technologically more complicated, its effects are localized and generally reversible. Such sweeping statements necessarily lead to overgeneralization in some areas. Nonetheless, such a classification is convenient for a general study.

Rathjens uses these categories in a discussion of the benefits and limits of an economic cost-benefit analysis in determining environmental standards, contending that such analysis is of less utility in the last two categories where it is more difficult to predict the eventual results of environmental degradation. The paper concludes that, to the maximum extent possible, the cost of removing pollutants should be borne directly by those responsible. In addition, those who would pollute should have a maximum range of choice with respect to methods of avoiding pollution, with control centering on output from the process rather than input. Finally, any revenues obtained from effluent charges should generally be used to deal exclusively with the pollution in question. While this paper is brief and sketchy, it raises a number of good points about the economics of pollution control. A particular pollution problem does not exist in a vacuum. As Professor Rathjens emphasizes, in order to have effective regulation, legal analysis cannot be divorced from the economic aspects of an environmental problem.

In the most detailed section of the book, Professor Frank B. Grad investigates the 'Intergovernmental Aspects of Environmental Controls.' Documenting the increasing federal role in environmental regulation, Grad gives a good summary of the important developments in air and water pollution, solid waste disposal, noise pollution and radiation control. With the exception of the last category, all of these areas were originally the subject of state and local control. Grad points out that the recent overlay of federal legislation on top of previously existing law presents a confusing picture. Other problems are a lack of integration between federal and state development programs and between state and federal environmental control efforts, and the fact that present legislation lodges rule making and enforcement authority at different levels of government. Grad concludes that federal preemption with regard to both regulation and enforcement is necessary in many areas, but that the alternatives need to be carefully examined in each instance. The next most viable regulation device is the interstate compact which Grad feels has considerable flexibility and potential. He points out that environmental problems should be dealt with on as broad a regional basis as possible. Grad is further encouraged by the mandate given to federal agencies

by the National Environmental Policy Act to consider the environmental effects of their work. This paper is the best section of the book; clear and concise, conveying a good deal of information in a relatively short space.

The final section of the volume, 'Federal Power to Preserve the Environment: Enforcement and Control Techniques,' investigates the constitutional authority and limitations relating to environmental protection by the federal government. Professor Rosenthal finds that federal environmental regulation can be upheld through the commerce clause, taxing and spending power, the treaty power, and perhaps the ninth amendment. The author concludes that environmental regulation would not require just compensation under the fifth amendment, or cause substantive due process difficulties. The real limitations are practical political factors, that is, a dislike for federal government intrusion, that have thus far restricted the federal role and will probably continue to do so, at least in the near future.

Rosenthal then discusses the pros and cons of specific sanctions, such as criminal prosecution, civil penalties, injunction, action for damages, licensing, and seizure and forfeiture, stating that it may be necessary to consider the ease or difficulty of enforcement in molding regulatory techniques. In the area of incentives and subsidies, Professor Rosenthal does not favor tax credits and direct grants to private industry by the federal government, but prefers research into methods of recycling waste. Although the author admits the dangers of trying to cure technological ills with more technology, he feels that the only other choice, halting further economic growth, is an unsatisfactory one.

Rosenthal concludes that the burden in this area must be assumed by the federal government itself; private persons can only act sporadically, and courts are not as well equipped as legislatures and agencies are to deal effectively with the problem. This is a narrow view. Many environmental groups are now organized on a nationwide scale, staffed by experienced, knowledgeable people. While it is true that courts should not legislate, they can spur on notoriously slow moving agencies and legislatures. Private litigation is particularly essential where the federal government is responsible for the pollution.

Environmental Control is of particular interest to lawyers who want a broad picture of the present role of the federal government in pollution regulation, and guidelines for determining the new federal role. This work is an outgrowth of a project undertaken by the Legislative Drafting Research Fund of Columbia University, hence its practical rather than theoretical approach, and emphasis on legislation rather than litigation. The three papers work well together, emphasizing the intergovernmental nature and broad implications of envirnmental problems, and indicating the institutional gaps where further work is needed. While both Grad and Rosenthal want increased federal regulation, neither wishes to totally preclude the states in this area. The detailed footnotes, placed at the end of the papers, provide further sources of information. This book is somewhat more scholarly in approach than most other general environmental works, and is therefore unsuitable for laymen.

THE WATER LORDS. By James M. Fallows. New York: Grossman Publishers, 1971, Pp. 294. $7.95.

While focusing on water, American industry and Savannah, Georgia, *The Water Lords* provides the basis for a broad commentary on the response of government, industry and the American people to environmental problems. Unfortunately, this study, sponsored by Ralph Nader's Center for the Study of Responsive Law, is too narrowly focused.

Unlike most industrialized cities, Savannah retains many of the characteristics that once made American cities pleasant places to live - abundant parks, tree-lined streets, a mild climate and ideal natural resources. However, although Savannah's industrial growth has been moderate by 20th Century standards, the cost to Savannah in terms of its environment, in general, and of the waters of the Savannah River, in particular, has been high.

Once used for commercial navigation and recreation, the Savannah River is now filled with industrial waste. Fallows asserts that industrial concerns, disregarding federal, state and community efforts to prevent the Savannah's pollution, are the primary villains in the river's decline. He emphasizes the contribution of Savannah's paper mill to the water pollution problem.

The failure to solve the problem of Savannah's water pollution must be attributed either to inadequate laws or to inadequate enforcement of the law. Notably, those seeking to curtail pollution have the common law doctrines of nuisance and trespass at their disposal, in addition to Federal statutes (the Refuse Act of 1899, section 10 of the Federal Water Pollution Act and the National Environmental Policy Act). Despite these tools, and the diligent efforts of many private groups and public administrators, the polluted condition of the Savannah and similar problems throughout the country continue unabated.

The Water Lords adequately relates the facts of Savannah's environmental problem and the impressions and conclusions that emerge from those facts. However, Fallows concedes that Savannah is unique in many ways. For example, it is heavily dominated by several industries; it has only a moderately concentrated population; it has a fairly unique geo-political structure; and its biggest polluter came to the city when the city's distressed economic position caused it to mortgage its environmental future. While lessons may be learned from Savannah's experience, the book would be more useful if greater care had been taken to show which of Savannah's problems are common to those of other American cities. In addition, the book unduly focuses on industry. Although industry must share a large part of the blame for water pollution, government and individuals also contribute significantly. The passing reference given to these two groups is insufficient.

Fallows partially fulfills his own goal of presenting some answers to the American environmental problem by occasional suggestions in the book. Probably the best suggestion is set out very early in the work. Fallows believes that to solve pollution, we must look beyond the pollution to the underlying causes. This is hardly a novel suggestion, but nevertheless, it should be well taken. Beyond this, however, often Fallows' suggestions amount to little more than belaboring the obvious or preaching. The legal analysis is disappointing. Coverage is so inadequate that the author seems to give up when he advises the reader to see a competent attorney. Many other suggestions in the book are little more than encouragement for the skeptical reader.

The Water Lords suffers primarily from the absence of any underlying direction other than a discussion of where this group's research in Savannah took them. Despite its facade of objectivity, complete with an Appendix entitled 'The Other Side,' the book is, as it probably should be, biased. It is poorly organized and suffers from both repetition in some areas and inadequate treatment in others. In short, it is not the good answer-oriented case study of a typical American environmental situation that it sets out to be.

Despite these problems, however, *The Water Lords* is an interesting study of industry's contribution to Savannah's pollution problem and of the paper industry's contribution to the national problem. Mr. Fallows' style is very readable. If you accept it as another study of some aspects of America's environmental problem, you will not be disappointed.

CRIMES OF WAR. Edited by Richard A. Falk, Gabriel Kolko & Robert J. Lifton. New York: Vingage Books. 1971. Pp. xvi, 590. $10.00.

Crimes of War is a comprehensive collection of excerpts from essays, statements, treaties and international agreements, and court opinions, dealing with crime in war, in general, and with criminality in the Vietnam War, in particular. The editors divide the book into three sections: I. "A Legal Framework," which covers the approach of American and international law to the issues of a.) war crimes; and b) the legality of war itself; II. "The Political Setting," a collection of reports on American atrocities in Vietnam; and III. "The Psychological and Ethical Context," a series of essays by notable contributors with diverse backgrounds–such as Erik Erikson, Jean-Paul Sartre and Arthur Miller–which discuss, from differing perspectives, the impact of the wartime experience upon the human psyche.

The editors focus their discussion of war crimes and law on two conceptual areas: a.) the criminality of war; and b.) criminality within war. They point out that there have been some attempts to outlaw war, itself. For example, the Kellogg-Briand Pact, signed by most of the major world powers in 1928, bound the contracting parties to agree not to resort to war as a means of setting international disputes. The editors also include the Nuremburg Judgment in which the German defendants were convicted not only of committing crimes in their conduct of the war but also of the crime of "waging a war of aggression." Since the Nuremburg Judgment was endorsed by the United States and by the United Nations, the editors of *Crimes of War* find in international law a basis for indicting the United States for the very fact of waging war in Vietnam.

The State Department's "Legal Memorandum on the Vietnam War" of 1966 is included to present the arguments in defense of the war. The central argument is the right of a country (South Vietnam) to individual or collective self-defense against armed attack (by North Vietnam). The opposing view is presented in the "Legal Memorandum on the Vietnam War" prepared, in 1967, by the Lawyers' Committee on American Policy Toward Vietnam. This is a well- written, careful analysis, which shows the narrow and selective way in which international legal authority is used to back up this policy and argues that a right to self-defense exists only when the necessity for action is instant and apparent, and when no other means exist.

The editors also include excerpts from opinions of American courts, to give the reader an idea of the way in which American courts have handled these issues. For example, the opinion in *United States v. Mitchell*, 246 F. Supp. 874, (D. Conn. 1965), is discussed, in which the defendant challenged the government's right to draft him, pursuant to the draft requirements of the Vietnam War. The defendant argued in that case that his political and philosophical views compelled him to dissociate himself from the war crimes and international law violations of his government in Vietnam; however, this argument the court labelled as "tommyrot."

The term "war crimes," usually refers to acts committed by soldiers that go beyond a level of atrocity that is felt to be required by and, hence, sanctioned in war. Warfare in the twentieth century has given rise to several international documents condemning certain acts as "crimes," such as the "Geneva Convention on Poison Gas and Bacteriological Warfare" (1925), United Nations General Assembly resolutions on chemical warfare and on nuclear warfare, and the Geneva Conventions of 1949 on the laws of war. The Nuremburg Principles, adopted by the United Nations from the Nuremburg Judgment, include as war crimes, "murder, ill-treatment or deportation . . . of civilian population . . . murder or ill-treatment of prisoners-of-war . . . or devastation not justified by military necessity." These and other documents are included by the editors to give the reader an idea of the international legal authority that exists for condemning an act committed by soldiers as a crime. Excerpts from the opinions in the Tokyo War Crimes Trials of 1948 are included, which questions the meaning of the term "war crime." These excerpts indicate that in order for the expression, "war crimes," to have meaning, we must be able to live with its practical consequences–such as the trial of the vanquished enemy as defendants, and the

rationale of punishment. We must satisfy ourselves that trials of "war criminals" conform to our notions of criminal justice and that is not so easy.

And Vietnam? If application of the concept of war crimes to wartime situations has been so controversial, what legal arguments can one make for or against calling certain acts of American soldiers crimes? Wisely, the editors do not attempt to present such legal arguments. They simply include excerpts from testimony at the trial of Lt. James Duffy, a participant in the My Lai massacre, which are intended to convey a feeling of what it is like to be a soldier in Vietnam. Having shifted the focus of their discussion to Vietnam, in the last part of the section on law, the editors leave the reader, nonetheless, with the impression that persuasive arguments for the *legal* criminality of wartime acts cannot be presented.

The editors then discuss the subject from a political and psychological perspective. They present the reader with a picture of the horrors of what the American government is sponsoring in Vietnam in the two sections of the book on the psychological and political aspects of war crimes. Although the book as a whole must be seen as a brief against American military involvement in Vietnam, the section on the law is not a legal brief against the war. It raises many legal questions, regarding war crimes, which law and legal institutions can answer only with controversy and confusion. Nonetheless, the section does give a comprehensive outline of the legal bases for any argument that deals with war crimes. One might be led from this to inquire further into legal bases for argument about the criminality of American involvement in Vietnam. On the other hand, one might conclude, as do the editors, that a discussion solely in legal terms is inadequate, and that one must inquire from a social, moral, political and psychological perspective in order to understand the issues. Either way, *Crimes of War* is an excellent book for lawyers and law students who care about the law and also about the social and political conflicts that give rise to law. Those of us who are still interested in and still disturbed by the American presence in Vietnam will find that the perspective of criminality in war, which this book provides, is a useful one from which to question, clarify and state our position.

THE END OF THE DRAFT. By Thomas Reeves & Karl Hess. Massachusetts: Colonial Press Inc. 1970. Pp. xvi, 200. $1.95.

The End of the Draft, is not a law book, nor does it provide any legal arguments in support of its positions. Rather, the book is an exposition of the credo of its authors, neither of whom are lawyers, and both of whom are active promoters of the National Council to Repeal the Draft. The volume is clearly aimed at the collegiate audience, which is unfortunate, as that group as a whole is probably more aware of the inequities in the Selective Service System than is any other.

The authors claim that the main thrust of their argument is that the draft can and should be abolished, because when the government must *compel* its citizens to bear arms in the national defense, the result is incompatible with the democratic precepts which supposedly govern us. To advance the argument, we are offered political science, libertarian philosophy, and economic analyses demonstrating the 'wrongness' of conscription.

To a distressing extent, much of the book strives to connect the inequities of the draft with the militarism which so thoroughly pervades our society. The authors note that the draft cannot realistically be analyzed without recognizing that it is an integral part of our foreign policy which, it is claimed, is largely controlled by the industrial sector. With this wide field of focus to consider, the arguments have a frequent tendency to drift off into para-Marxist rhetoric. Such philosophizing is hardly relevant

to the immediate issue and is not likely to be persuasive to anyone who is not thoroughly steeped in such beliefs in advance. The potentially weighty legal arguments are abandoned, and a leftist diatribe is substituted. The substitution is ineffective.

The book concludes with a chapter describing "What the People Can Do." A lengthy outline of programs for foreign and domestic policy revisions, rewriting of the Uniform Code of Military Justice, curtailment of constitutional powers supposedly usurped by the President and imposition of numerous checks against excessive use of authority by the government are suggested. The authors propose a plethora of regulatory agencies which should sit as watchdogs over the military-industrial complex. All of these would, of course, be under 'control by the people,' the ultimate safeguard against governmental excess. Peace groups should send their own people into key positions in the "violence complex," and governmental and military security classifications should be abolished. Ultimately, were all of the plans realized, we would have a totally demilitarized (and defenseless) state, supervised by a bureaucracy of people's watchdog agencies.

The End of the Draft is not scholarly in tone, nor does it pretend to be a learned treatise. Still, it is disturbing that virtually every statement of purported fact and quotation is undocumented. Often, where footnotes are supplied, (and that is rarely), they refer to unpublished doctoral dissertations as authority. Glaring oversimplifications and distortions of history abound. Careful reading reveals glaring inconsistencies: an efficient army has specialized personnel with a low turnover rate so as to maximize use of skills acquired in costly training, but at least one third of the men in uniform should be one-termers; the simple straight-shooting soldier is obsolete as the modern army is a technological complexity, yet military secrets are condemned.

The end result is unfortunate. Instead of convincing the reader of their point, the authors often establish themselves as inadvertant straw men, knocked down by flimsy rebuttals. It is impossible to take seriously the proposals for improvements when they are couched in the unrealistic and general language of New Left rhetoric. Further the inaccuracy and unacademic approach to political science and history make it difficult to accept the relatively few well-reasoned arguments (such as the economic one) at their face value. Ultimately, publications such as this one may do more harm than good to the causes they advocate, because as the superficial arguments are summarily dismissed, the tendency is to discard the substantial arguments as well.

SOCIAL RESPONSIBILITY AND INVESTMENTS. By Charles Powers. Nashville: Abingdon Press. 1971 Pp. 224. $3.50.

Social Responsibility and Investments, is "addressed first of all and unabashedly to churchmen." Yet the issues discussed, the ideas propounded and, most importantly, the questions raised by the author should be of interest to a much wider audience than just the clergy of America.

After sketching social investment initiatives already made by the churches, the author offers a theoretical framework for the whole social investment notion. Then he describes the various options open to a church seeking to use its prerogatives as an investor for social ends. The book goes on from there to explore the institutional and legal impediments which may deter the churches as they pursue these options. He concludes by outlining some ways of overcoming these impediments. Powers favors a change in the investment policies of the churches of America from traditional policies, whose sole goal seems to be the best return on the dollar, to restructured policies, one of whose goals would be the development of social justice. Despite his obvious wish for change, Powers does not attempt in this book to construct for, and to sell to, the reader a completely worked out rationale and procedure for social investment by the

church. Nor does he indulge in any eloquent theological or rhetorical appeals for such a change. Instead, he sorts out many of the issues involved in social investment about which he feels there is great confusion. He operates on the clearly stated presupposition that clarity about the present situation will lead to change in the investment policies of the church, but his principal role in this book remains not that of advocate for change but rather that of definer of issues.

Powers does not view social investment as the ultimate solution to the economic and social problems of our day. Rather, social investment represents a middle range proposal for beginning to deal with some of the problems that a theory-less political economy is creating. At the same time it is a way of putting a wide variety of inputs into that system so that the options for a free society which, in Brandeis' words, allow people to live, not merely exist, are not foreclosed before that new theory emerges. In the welter of many, much more radical solutions to the political problems of the day the modest scope of Powers' proposal alone might recommend it to quite a few investors of America who would like to improve the world situation by working within the present system.

Having decided to use the corporate system as it now exists for the furtherance of social justice, Powers outlines the options available to the investor who seeks concrete ways of manifesting his social concern. First of all, he lists the four ways in which an investor can attempt to alter or encourage a corporate practice: (1) through his decisions to buy or sell stock and other securities; (2) through his employment of the investor's proxy prerogatives available to owners of voting stock; (3) through litigation against the corporation where common stock is held; and (4) through various forms of informal persuasion. Secondly, he discusses the possibilities for "creative investment," i.e., investment which involves the investor in seeking out and supporting the efforts of those who have been essentially bypassed in the existing economic cycle, often in the form of high risk and/or low return investments. The author views the corporate proxy as an extremely powerful weapon. It is his contention that "the recent Court of Appeals decision (*Medical Committee for Human Rights v. Securities Exchange Commission*, 432 F 2d 659 (D.C. Cir. 1970)) and the General Motors campaign and similar campaigns have opened a new avenue for the investor who wants to bring informed and well articulated social issues to the attention of management and fellow stockholders in a forceful way."

Powers states that "the primary hope of this book is that stockholders both lay and clerical represent a broad enough cross section of the society and will care enough about exercising their legal prerogatives as owners of corporate America to insist on corporate practices which will work toward a more just and equitable society. However, this theory, rests on an assumption that is not a fact but only a hope, and a hope that seems to fly in the face of most of the evidence. Adolph Berle's characterization of stockholders as "passive-receptive" seems much closer to the truth. The average stockholder seems to suffer from a huge case of inertia. He just doesn't return proxies at all or else by force of habit he signs it over to management without investigating the issues. As long as the dividend checks keep coming he remains content. The General Motors proxy fight of the Spring of 1969 seems to bear this out. Despite good publicity and a relatively sophisticated campaign, The Project G.M. Proposals each received less than three percent of the proxies. These facts are not very encouraging.

The churches of America could accomplish much for social justice through a policy of social investment using all the options that Powers mentions. Somewhat ironically I feel that in these days of polarization and reaction the autonomy of modern corporate management can be used by the churches for more substantial gains in this area than corporate democracy might allow. If the churches own a sizeable block of stock – even though not even approaching a majority interest – the pressures that they could bring to bear on the management of a corporation through persuasion, publicity, sollicitation, etc. might produce results which in these days would not command the votes of a majority of people, especially a majority of investors who generally are in the corporation to make money, not to change the world.

Chapter five should be of special interest to lawyers and to law students. Here Powers deals with some of the legal restrictions which a church may encounter as it embarks on a social investment policy. Most of the problems revolve around the use of restricted funds and the application of the prudent man rule. Powers offers the beginnings of a few solutions by mentioning some of the approaches which have been proposed by legal scholars but have not yet been tested in the courts. He does not go into these proposals at any great length, but the chapter is valuable as a brief summary of the possible approaches to the problems.

Powers concludes that he will have accomplished his intent if this book raises the level of dialogue and spurs serious Christian reflection about what it means to be the investing church in contemporary America. It is this reviewer's belief that this book should spur a lot of serious reflection, Christian and secular, about the possibilities of social investment in the fight for social justice.

THE COURTS AND THE PUBLIC SCHOOLS: The Legal Basis of School Organization and Administration. Third Edition. By Newton Edwards (additional chapter by Lee O. Garber). Chicago: University of Chicago Press. 1971. Pp. xviii, 710. $12.00.

In 1933, the first edition of *The Courts and the Public Schools* was written with a dual purpose. The author intended both to clarify the relationship between the state and its schools and to systematically and lucidly present the attitudes and approaches taken by the common law in reference to school organization and administration. By 1955, school law had altered sufficiently to necessitate a revision of the original volume. The author, Professor Edwards, rewrote the sections in which the law had undergone change and added more sections where new issues had developed in order to achieve his two major objectives.

However, with the passage of time, the evolution of school law once again mandated that the text be revised. Unfortunately, Professor Edwards was dead and Mr. Lee Garber, who apparently agreed with neither of Professor Edwards' objectives, was chosen to do the revision. Substantively, the original unrevised text of the outdated second edition constitutes the first six hundred fifteen pages. Then, Mr. Garber, in his last chapter entitled "Recent Changes in School Law" (post-1955) spends eighty-three pages explaining why the first six hundred fifteen are no longer correct. What Mr. Garber's motives were for leaving so much erroneous material intact and in print is unclear at best. Its major effect is the destruction of the careful systematization envisioned by Professor Edwards, resulting in confusion and misunderstanding. First, it opens the book's authoritativeness to question and makes its use highly inconvenient since every point made in the body of the text must be checked for accuracy and precedental value in the last chapter. Secondly, the often incorrect statements made in the first six hundred pages may serve as a trap for the unwary, leading to these notions: 1) that "the common law principle almost universally applied by American courts is that school districts and municipalities are not liable to injured pupils for injuries resulting from the negligence of the officers, agents or employees of the district or municipality;" 2) that *Brown v. Board of Education*, 163 U.S. 537 (1954), was the last case of any importance on racial integration; 3) that "school officers may enforce any rule which is reasonable and necessary to promote the best interests of the school" (1954); 4) that an eighteen- year-old high school girl may be suspended for wearing "face paint," i.e., talcum powder; 5) that, with two exceptions, the only other case dealing with school dress held that pupils may be forbidden from wearing metal heel plates; 6) that a board of education may discipline a pupil for any act, no matter *when* or *where* committed, provided that the act tends immediately and directly to

destroy discipline and impair the efficiency of the school; 7) that the state may pass statutes allowing Bible reading, prayers, and hymns in school; and 8) that a teacher may use corporal punishment if he deems it necessary. To further add to the confusion, dates are omitted from all citations although one is hard put to conceive of many of the example cases having actually occurred in the post-World War I world. It is not suggested that the entire body of the first six hundred fifteen pages is totally incorrect but even if the majority is accurate, the lay reader will clearly be unable to judge which part is correct. Obviously, such an arrangement of "separate but equal" school law can only detract from any possibility of the analytic lucidity and accurate updating for which the revision was contemplated.

In addition to its internal defects, the book was revised at an inopportune time, as school law has undergone striking alteration in two notable aspects since last August. First, the area of school bussing has been remarkably modified by recent Supreme Court rulings and, secondly, *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), has generated serious doubts as to the constitutionality under the Equal Protection Clause of many presently operating systems of state school financing. Therefore, taken as a whole, the third edition of *The Courts and the Public Schools* has failed to achieve the goals envisioned by Professor Edwards in 1933.

KENNEDY JUSTICE. By Victor S. Navasky. New York: Atheneum. 1971. Pp. xx, 482. $100.00.

For thirty-five months during the early 1960's America witnessed a unique governmental phenomenon. During that period the Attorney General was the brother of the President. That should be a sufficient distinction in itself. But, according to Victor Navasky, author of Kennedy Justice, that distinction was amplified because the brothers were Kennedys.

Navasky has combined his training as a lawyer with his background as a journalist in compiling what he refers to as an "interim report" of those important months. The author's hypothesis is that the unique relationship between the President and the Attorney General provided an opportunity for the Justice Department to explore the limits of its power. Kennedy Justice is an analysis of the "exploration" its successes and failures, its conflicts and resolutions, and its implications both ominous and encouraging.

The roles of the Kennedy Justice Department in the civil rights movement and in the combating of organized crime are generally accepted as two of its most successful ventures. Surely in neither realm had the Department ever been so aggressively active. Although fields similarly shared the first priority, the methods employed in each formed a significant contrast. In the early sixties, the civil rights movement presented an ongoing crisis. Navasky portrays in great detail the Justice Department's role in a few of the crucial events, most particularly the registering of James Merideth at the University of Mississippi, that preceded the Civil Rights Bill of 1963. The reader witnesses the tedious telephone conversations between Kennedy and Mississippi Governor Ross Barnett as he tried to negotiate at least a peaceful integration of that Southern campus. In the end Meredith matriculates, and in a conventional way Kennedy succeeded. But his method, characterized as part of the "Ivy League Code" and fostered primarily by his top level advisors (eg: Marshall), cost Kennedy the respect of a major part of the more militant factions within the civil rights movement.

Contrasted with the negotiated, procedurally rigid, operations in the civil rights area was the famous no-holds-barred approach taken by the Attorney General in his fight against organized crime. Under Robert Kennedy's driving leadership, twenty-seven independent investigative agencies began to work together in gathering information

useful in the prosecution of organized crime. In a sense this approach was a success as "macro-operators" were indicted for "micro-crimes" such as perjuring on a radio broadcasting license application, or violation of the Migratory Bird Act. These tactics are contemporarily referred to as governmental harassment.

Navasky in a general way characterizes the personnel involved in the civil rights enforcements and organized crime crackdown as a, "two platoon system." Burke Marshall, Civil Rights Division Chief, was characterized as, "an Ivy League intellectual and cautious proceduralist;" and Marshall's top level staff included other "high minded libertarians." But to head the Criminal Division Kennedy chose Jack Miller, an attorney who had worked in the past to topple Hoffa in ways that "trespassed heavily on the rights of Hoffa and the Union." Miller's staff was primarily a collection of Rackets Committee colleagues who likewise, "would not raise procedural obstacles to action." These distinctions among personnel accurately reflected the diverse modus operandi of their divisions.

Another area of Justice Department involvement was in the screening and selection of administration appointments to federal judgeships. According to Navasky, this is the facet of Kennedy Justice most susceptible to criticism, because at least five of that administration's appointees have since been characterized as, "anti-civil rights, racist, segregationist, and/or obstructionist." Such appointments were not only objectionable in that they placed in lifetime positions men who were reticent in adapting to the needs of the day, but also because they were counter-productive in that these judges naturally frustrated the Kennedy policy of litigating rather than legislating. To those who followed such things, these appointments appeared as a mockery of the Kennedys' pledge of equal justice for all.

These were just three of the areas of intense activity during the years of Kennedy Justice. Navasky's book is useful just for recalling and re- evaluating them. But the book's greater value lies in its exposition of the conflicts resolved in the reaching of decisions and the implementing of policies within each of these areas.

One bureaucratic conflict cut across all project and priority boundaries. Wherever Kennedy turned he was inevitably confronted with the self- sufficient society of the FBI and its entrenched potentate J. Edgar Hoover. The FBI is a major theme of Kennedy Justice because to the extent that Kennedy could master that largely autonomous body and/or gain Hoover's cooperation, his chances for success were enhanced.

The FBI is treated by Navasky as a secret society with its own language, hierarchy, self-protective mechanisms, and rituals. He shows where Kennedy "won" the substantial increase in agents and offices in the South, and where he "lost" the increased control which the Bureau gained over the use of wiretaps and electronic surveillance.

The reader is left with the unsettling impression that whereas Kennedy won some battles, he lost the war. Thus while the Bureau often cooperated to some extent with the Attorney General's wishes, it did so only as a means towards the accrual to itself of even greater powers, for example those involved with the use of electronic surveillance. Unfortunately the FBI remained a largely unrestrained tool for the implementation of Director Hoover's whims.

But there were other conflicts as well. For example Kennedy's crisis centered action oriented responses collided often with his Assistants' adherence to the Federal system and its procedural necessities. Another conflict, illustrated by the prosecution of Joseph Kennedy's close friend Joseph Landis, arose between Kennedy's family and political allegiances and his official integrity. Throughout, however, the reader begins to sense the clashing values, and those which prevailed, in the ultimate resolution of major policy decisions. After recalling the triumphs and setbacks of Kennedy Justice, and after being exposed to the debates and decisions that shaped the legal policies of that era; one is left to ponder the somewhat precedential legacy of Attorney General Kennedy's tenure. The distinction that Robert Kennedy was the brother of President Kennedy is one of only arguable merit. For it is apparent that there are, and will continue to be, occupants of that office who also have privileged access to the ear and

mind of the President. Attorney General Kennedy may have been a de facto member of the National Security Council, but certainly Attorney General Mitchell is at least that.

Kennedy Justice is best evaluated for its concepts of the role of the government in enforcing the law. Robert Kennedy defined his evils and vigorously sought to eradicate them. As his consciousness of racial discrimination rose, so did the intensity of his response. His "Ivy League cadre" litigated and negotiated, and in so doing brought with them to the South the perfunctory services of the FBI. Kennedy's attitude towards corruption and organized crime is a legend, and his "Get Hoffa Squad" history.

But even if Kennedy's end was legitimate, his means must remain in doubt. Robert Kennedy's attack on organized crime is the most pertinent example. Here procedural safeguards were short-cut as all efforts were focused on crumbling the criminal hierarchy. The FBI engaged in extensive tapping and bugging; and all affiliated agencies were directed to focus their investigative attention on suspected participants in the notorious syndicates. In doing what he thought had to be done, the Attorney General fomented an activist government often reacting spontaneously with an emphasis on results at the expense of procedures. These are precedential policies easily subjected to abuse; and one would not be anxious to see them in the hands of an administration less "enlightened" than the Kennedys.'

It is worth considering, therefore, whether the Kennedy tactics, most vividly seen in the fight against organized crime, ought to be available to government at all. If they are accepted for one Attorney General, they become available for each of his successors in order to do what that administration thinks ought to be done.

THE PROSECUTOR: An Inquiry into the Exercise of Discretion. By Brian A. Grosman. Toronto: University of Toronto Press. 1969. Pp. 111. $7.50.

The Prosecutor, by Brian A. Grosman, an associate professor of law at McGill University, is a study of the affect of the attitudes and goals of Canadian prosecutors on the Canadian criminal justice system.

Grosman contrasts the power of Canadian and American prosecutors. The Canadian prosecutor's discretion in determining the original investigation of suspects is limited because he cannot rely on an independent investigative force. Unlike the American prosecutor, who sometimes develops his own case, the Canadian prosecutor must rely completely on the police. However, in other areas the Canadian prosecutor can exercise much more discretion than his American counterpart. There are no requirements of disclosure by the prosecutor to the defense in Canada, as there are in some American jurisdictions. The prosecutor uses his right to withhold information as a leverage in dealing with defense counsel. This information can be vital to the defense counsel in representing his client. Although this process certainly gives a great deal of discretion to the prosecutor, it is detrimental to the interests of justice.

The Canadian prosecutor's response to the problems of extreme calendar delay and limited staff is the development of the goal of disposing of cases as rapidly as possible with little or no regard to the "justice" of the situation. To achieve this end his goal is compromise, not victory.

The attitudes of Canadian prosecutors seem to vary in accordance to age. Data produced by Grosman indicates that the younger prosecutors are more likely than the more experienced prosecutors to believe everything the police tell them, and to follow police suggestions as to bail or reduced charges, rather than exercising independent judgment. The younger prosecutor is also considerably less likely to be concerned with the due process rights of the accused than the more experienced government attorney.

Both young and old prosecutors, however, consider the concept of an accused as innocent until proven guilty to be purely a matter of evidence, not having anything to do with the accused's actual guilt. They believe the accused is guilty and their concern is with proving this guilt. The law is used as an instrument for maintaining order, not for protecting individual freedom.

Prof. Grosman's suggestions for reform add nothing to the literature in this area: better training for the prosecutor, more control over the discretion to prosecute, earlier evaluation of the evidence to see whether there is sufficient evidence to present the case, more disclosure to the defense, elimination of victimless crimes, and reform of the penal system. However, the strength of this book is its analysis of the attitudes of the prosecutor. This picture of the prosecutor, not of the actual system of justice, represents the strongest indictment of our present system and makes this book interesting reading for anyone concerned with the thoughts of the individuals who exercise so much control over our system of criminal justice.