Book Reviews


Pricked, goaded, and indeed angry, but without a doubt immensely stimulated, will be the reader who has completed this valuable but difficult volume of collected articles on what is claimed to be the "wave of the future." This book is a reprint of the winter 1963 issue of *Law and Contemporary Problems* and lives up to the high reputation commanded by symposia published in that journal.

What is jurimetrics? The introduction to this volume states that the term "signifies the scientific investigation of legal problems," and suggests that it is currently concentrated in three areas: electronic data storage and retrieval, behavioral analysis of decisions, and the use of symbolic logic. These three areas are probed by the ten articles in this symposium. When the term "jurimetrics" was coined, however, it apparently included the application of science to a fourth area: the study of man and society to achieve a better understanding of the realities which underlie the legal system and on which law must act. For instance, science and the law might join in studying the effect of tort law in deterring negligence, in studying behavior of the "reasonable man," or in collecting information about "custom" or standard practices. The present volume contains only hints of the work published in this other realm of "science and the law," but as a presentation of the three topics selected, it is a valuable addition to the discussions on science and the law, juxtaposing for the reader several widely divergent viewpoints on the value of the "New Wave."

I

**THE COMPUTER AND THE LAW**

The concept of applying scientific methods to the law is by no means new. Holmes himself is quoted as saying, "An ideal system of law should draw its postulates and its legislative justification from science." But the computer revolution has brought with it the means to perform complex processes on large bodies of data, reviving old and whetting new appetites for the symmetry and logical consistency of symbolic representation and machine manipulation of legal concepts.

Two articles discuss the use of the computer for searching legal materials. Although they overlap extensively in their description of half a dozen or more systems, these articles indicate both existing activity and interesting proposals for legal research by computer. Lee Loevinger describes the system in partial use by the Anti-Trust Division of the Justice Department. Under this system manually created abstracts of decisions, memoranda, briefs, legislative history, and periodi-

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1. Berns, *Law and Behavioral Science, JURIMETRICS* 187 (1963) [the volume under review will hereinafter be cited as JURIMETRICS].
2. Baade, Foreword, JURIMETRICS 1.
4. Id. at 488.
5. For a bibliography of some of the articles and materials available in this other area, see 7 *The American Behavioral Scientist* 53 (1963). See also Hazard, Research in Civil Procedure (1963).
7. Loevinger, supra note 6, at 22.
cal material, are assigned index terms. On a given subject, the computer will produce and print material organized in nine different ways.

Loevinger also describes the work of Professor John Horty’s Health Law Center at the University of Pittsburgh. The full text of statutes is punched onto cards and transferred to tape. Programmed to search the statutes for specified “word-matches,” the computer will find all the statutory provisions containing a certain word or combination of words.8

Eldridge and Dennis describe a proposed joint project by the American Bar Foundation and I.B.M. to apply to the text of over 5,000 cases a statistical analysis of word occurrences.9 The result may be a retrieval system that is “language” oriented rather than “subject matter” oriented. Such a framework would free legal research from errors of the human indexer and the obsolescence of elaborate outlines of legal concepts upon which legal digests depend. It is clear from these articles that research by computer has gone beyond merely mechanizing existing legal digest systems. Wholly new approaches to “finding the law” are described, and are apparently feasible, or nearly so.

The implications of computer uses in the law are discussed by three articles. Dickerson’s article entitled Some Jurisprudential Implications of Electronic Data Processing must be singled out for attention. It was Loevinger’s disgust with jurisprudence as “concerned with trying to answer meaningless questions by futile speculation,”10 that led him to coin the term “jurimetrics.” Dickerson meets that challenge by applying jurisprudential thinking to “jurimetrics” itself.11 Noting that the use of computers has “piqued the interest or enthusiasm of a few lawyers, stirred profound apathy in many, and angered or frightened the rest,” Dickerson addresses himself to the latter group and discusses its basic fears. Looking on the computer more as a “mechanized consultant,”12 Dickerson suggests that there need not be a “fundamental, irreconcilable hostility between law and technology,”13 but that there is a “current need to effect a closer understanding between”14 the two. Dickerson disagrees with fears that computers will foster greater standardization in the law.

Because the use of computers extends the range of what is administratively feasible, the net result may be that, although greater standardization can be achieved in areas where greater systematization brings to light significant similarities that have previously been obscured, less standardization may in fact result where there are significant differences that computers now make it administratively feasible to reflect.15

Nevertheless, he notes that psychological pressures generated by mechanization may lure the lawyer or judge to fail to exercise his professional judgment.

A preoccupation with the beauties and efficiencies of technology, while not demanding as its price the abdication of professional judgment, often results in such an abdication. The beguilements of technology are considerable; and it is easy to forget that for the law, at least, it is a means and not an end in itself.16

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8 Id. at 10.
9 Eldridge & Dennis, The Computer as a Tool for Legal Research, Jurimetrics 78.
10 Loevinger, Jurimetrics: The Next Step Forward, 33 Minn. L. Rev. 455, 470 (1949).
11 Dickerson, Some Jurisprudential Implications of Electronic Data Processing, Jurimetrics 53.
12 Id. at 62, quoting Shubik, The Challenge of a New Era, Law and Electronics (Jones ed. 1962).
13 Dickerson, supra note 11, at 55.
14 Ibid.
15 Id. at 66.
16 Id. at 61.
MATHEMATICS AND COURT DECISIONS

Lawyers generally seem able to accept sympathetically (if not eagerly) the possible use of computers in legal research, but when these computers begin predicting the outcome of cases, the atmosphere becomes strained. Three of the articles, by Schubert, Kort, and Ulmer, are devoted to mathematical prediction techniques for court decisions and judges’ opinions.

The reader must be prepared to cope with such terms as “orthogonal,” “Boolean algebra,” “Guttman’s coefficient of reproducibility,” and “Menzel’s coefficient of scalability.” Unfortunately, little assistance in understanding these terms is provided. The gap between law and technology seems great indeed! The busy lawyer who has attained a wealth of experience in the practical affairs of our society and the courts cannot help but suspect that the terminology and symbolism may be intentionally or unintentionally screening important fallacies from full view.

The attitudes of the authors do not assist the lawyer in his quest for understanding. Without deference to the profound sense of responsibility which judges and lawyers can experience toward particular litigants, the writers deal with aggregates and statistics, presenting their methodology as just short of revealed truth. To them the methods used by the law for centuries are merely examples of a “stovepipe view” that seems “a luxury of prohibitive dimensions,” while the bench and the bar are “blissfully unaware of—or if aware, not sufficiently impressed—to utilize” the new techniques. Law reviews are condemned for their “paucity of behavioral and quantitative analyses” and this paucity indicates the “extent to which legal study remains the handmaiden to metaphors that now belong to the ages.”

If a rapprochement is needed between law and technology, such polemics seem ill-suited to achieving that end. Yet lawyers should not smugly assume that none of what is being said about them is true. If, however, lawyers do have a valuable fund of experience and method, they need not fear the “wave of the future,” but can afford an almost paternal patience while the adolescents of legal science grow wiser. Certainly it does no good to flail out in undirected and imprecise reply.

On the other hand, it does not seem that the new techniques have yet

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18 In reading these articles, I am reminded of a statement made by a professor of political science in his review of six books on organizational theory: “Altogether there is a considerable amount of mathematical and quasi-mathematical formulation in the six books, and in some selections diagrams and equations bulk larger than prose. I confess that much of this was beyond my competence, and that I was limited to following the trail up to its disappearance into the clouds and picking it up again where it came down, always at about the same place. I accept it on authority that the view is much better at the higher altitudes, and draw what comfort I can from the fact that there is no significant change in latitude.” Waldo, Organization Theory: An Elephantine Problem, 21 Pub. Admin. Rev. 210, 211 n.1 (1961).


20 Ibid.

21 Schubert, Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court, Jurimetrics 100-01.

earned the right to be relied upon. Certainly no responsible lawyer is presently prepared to counsel his client on the basis of a prediction derived from one or the other of the mathematical models. Perhaps the silence of law journals (if indeed it be such—which this reviewer doubts\(^2\)) might better be interpreted as evidence of patient forebearance than a "conspiracy of silence."\(^2\)

Schubert\(^2\) and Ulmer\(^2\) both discuss a scaling technique whereby a number of cases involving a central subject, e.g., civil liberties, are selected for analysis. Justices' votes are deemed either "pro" or "con" the central subject, and the cases and justices are "scaled" from high to low on this "civil liberties scale." Ulmer concludes that such "attitudinal structures are highly stable over time," and that such "stable patterns of behavior are precisely those factors which make prediction possible."\(^2\)

Kort and Ulmer both discuss a method of weighting factors in cases to ascertain the probable outcome. Kort isolates what he deems to be the relevant facts of a group of cases. Through mathematical solution of simultaneous equations, he arrives at a weight for each fact. Then he arrives at a total weight for the facts present in a given case. Kort finds, for example, that in workman's compensation cases, whenever the weights of facts present in a given case exceed a certain number, the case is decided for the employee. When a total weight less than the number occurs (to simplify his explanation), the case is decided against the employee. Thus, he claims, the method offers a "precise and exhaustive distinction between combinations of facts that call for a decision in favor of the aggrieved party and combinations of facts that require a decision against the party seeking redress."\(^2\)

Kort also presents a similar type of analysis using "Boolean algebra," a kind of symbolic logic, to distinguish combinations of facts.\(^2\)

These techniques, and most of the others discussed in the book, have in common the attempt to substitute symbols for verbal descriptions of various aspects of cases and to combine these symbols in some sort of equation or chart. When manipulated, these formulae allegedly predict the outcome of new cases with the same factors. These models appear, therefore, to rest on two fundamental bases: (1) they depend upon information from past decisions;\(^8\) and (2) they depend...
on human analysis of the cases or subject matter into various factors or a human
evaluation of the opinion as “pro” or “con” by some criterion. Obviously a great
deal of subjectivity can creep into the system because of this second premise and yet be camouflaged by numbers or symbols. Likewise (as Kort himself points out) the system fails to allow for new considerations in a new case, a switch in a judge’s voting position, or for a moral or ethical evaluation of the decisions themselves. One also wonders how the systems could predict the type of case where several policies tending toward the same pole of “liberality” or “civil right-ness” conflict, e.g., the question of jury trial in contempt proceedings for violation of a school integration injunction.

One outspoken critic of these mathematical schemes or models is Walter Berns. In discussing one of Schubert’s game theory analyses, Berns bluntly accuses him not only of “giving bad advice,” but of changing “the purpose of the game during the playing of it!” Berns is brutal about the “misuse of science” and concludes that “legal scholars, and even practicing lawyers . . . have more to teach to the new scientists than the new scientists have to teach them.

In the mind of the reviewer, much of the difficulty in the model building and game playing published in this volume stems from the attempt to claim a predictive value for the systems. Schubert says the “ultimate test of our theory and methods lies in our ability correctly to predict judicial decisions.” Ulmer speaks of attaining a “safer predictive route.” Of the three, only Kort seems to realize that other purposes may be more important. He states that although prediction may be one objective, the main purpose is to “provide a precise and exhaustive distinction between decisions which depend on combinations of facts that have been specified by the courts.” Kort carefully qualifies his work as “conditional” in its predictions, but valuable mainly in providing “information about the content and the application of rules of law which verbal statements of these rules do not provide.”

31 See id. at 153; Schubert, supra note 21, at 120; Ulmer, supra note 19, at 166.
32 Berns states that he had three graduate students at Cornell, each unfamiliar with the materials, attempt to identify the factors of significance in order to try Kort’s analysis in predicting a decision. The three students could not agree on the pivotal factors present. Nor could they form a “composite value” higher than the minimum necessary under Kort’s analysis to insure a decision for the party who ultimately won the decision from the Supreme Court. Berns, supra note 1, at 197.

The jurimetricians are somewhat embarrassed by a tour de force made by Professor Fred Rodell in the Georgetown Law Journal, just before the Supreme Court decided Baker v. Carr. Without computers or mathematics, Professor Rodell made a series of remarkably accurate predictions about the outcome, the various opinions, and the reasoning of the case. Rodell, For Every Justice, Judicial Deferece is a Sometime Thing, 50 Geo. L.J. 700 (1962). Schubert, however, claims that Rodell’s performance does not “have social significance unless the requisite skills could be communicated to other persons.” His (Schubert’s) method, he argues, can be used by the nonexpert with just as good results. Schubert, supra note 21, at 107.
33 Berns, supra note 1, at 199.
35 Berns, supra note 1, at 190.
36 Id. at 191.
37 Id. at 212.
38 Schubert, supra note 21, at 102. Schubert elsewhere states, “prediction is not an end in itself . . .” Id. at 107. But it is, he admits, a criterion for the success of his methodology.
39 Ulmer, supra note 19, at 166.
40 Kort, supra note 28, at 159.
41 Id. at 160.
42 Id. at 159.
What then is the use of these mathematical analyses of court decisions, if not for prediction? Before answering this question, perhaps it should be asked whether the question's implicit criterion of "usefulness" is itself appropriate. Certainly one would be hard put to discover any utility for the findings of a great deal of pure science. One wonders whether in Galileo's time star gazing was considered a particularly useful activity. Cannot man's mere curiosity be a justification for certain activities? "What would happen if" is a refrain which when repeated leads man to climb mountains, explore continents, and split atoms and sub-atoms. Will one argue that resources (professors' time, computers, paper, rockets) should not be allocated to activities of unproven usefulness? Then how will he justify, if looked at in its clearest objective light, much of the moon race and space program? Perhaps the trumpeted claims of predictive ability for the systems of legal analysis described in this volume really emanate from an unnecessary guilt complex on the part of the authors for following where their curiosity led them. We need not be impatient with what they are doing, nor even that they take some of our resources to do it, but we might ask that greater moderation be used in describing the "usefulness" of their product, especially if usefulness may not be an important criterion.

Yet even if we must, in our pragmatic culture, look for usefulness, is there not utility in challenging established notions, thus forcing reappraisals of the justifications for the "old ways"? More importantly, is there not value in suggesting new relationships between factors in cases or between decisions and judges' backgrounds. Might not knowledge of these relationships lead to new insight into the implicit but silent ethical assumptions behind the decisions? Such insights might lead to explicit challenge of the assumptions by a skillful advocate and thereby to a change in the judge's decisions; or such a challenge might disclose the importance of the judge's implicit assumption and thus influence other judges to join him in voting. If a correlation is indicated between two recurring facts in a certain kind of case, or between a judge's background and his decisions, this might be a valuable clue to a wholly proper but heretofore undisclosed ethical assumption. Once unearthed, such moral preconceptions could be examined in the light of day by the traditional methods of legal scholarship.

III

SYMBOLIC LOGIC

The final article represents the editor's third category of jurimetrics, the use of symbolic logic in the law. In this article Layman E. Allen and Mary Ellen Caldwell present two schemes of analysis for application to the law. The first is an analysis of the judicial decision process, using flow diagrams. To oversimplify, their analysis sees the decision-making process subdivided into fact determination, rule selection, and rule interpretation: the latter subdivided into semantic interpretation and syntactic interpretation.

The second scheme relates to the use of symbolic logic techniques to analyze

or pulverize\textsuperscript{45} drafted text. Through this process, the authors contend that syntactical ambiguity can be detected and corrected more efficiently than lawyers could otherwise do without the symbolical tools. As Allen himself recognizes, this analysis does not help with semantic ambiguity, \textit{i.e.}, in the meaning of a particular word. It is designed to disclose the ambiguity that results from the relation of words within a sentence.\textsuperscript{46} To illustrate: The word “or” could mean (a) “either \ldots or” in the “not both” sense, or (!) (b) “and/or”, \textit{i.e.}, including the possibility of both objects. The authors are ingenious in generating various interpretations of what appears to be relatively simple language. Whether attorneys could or would master their process is, perhaps, doubtful. But if the computer can be harnessed to the scheme, so that machines could assist the attorney in detecting possible ambiguity of drafted language, a useful service could indeed be performed. The linguists currently working on machine translations may be of significant assistance to the lawyer in this connection.\textsuperscript{47} Parsing and other logical analyses of sentences are being programmed for machine translation purposes. These programs could furnish, as a by-product, an “ambiguity detection assistance” machine for legislative or contract drafting.

It is too soon to tell whether the manipulations presented in this volume will be merely a passing fad occasioned by the computer, or whether in passing the fad will leave some residue which will be a significant contribution to legal scholarship. The first danger signs have appeared, however, that the new science will fall into the very trouble of which it accuses the old—hair splitting and irrelevance\textsuperscript{48}—distinguished only in that now the hairs are numbered, and irrelevance has also became irreverence. The arguments about the value of science in the law will undoubtedly rage for decades to come. Lawyers can wait and see what ultimate value the new concepts and techniques will have. In the meantime, the controversy appears to be good sport, and that is what makes this volume worth reading.

\textit{John H. Jackson\textsuperscript{*}}

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The importance of this trail-blazing work is twofold. It is the first comprehensive effort to clarify all aspects of the public “international law of the sea” by explicitly relating them to the various underlying interests involved. All claims, practices, doctrines, formulations, and proposals are systematically analyzed and evaluated in terms of these interests, within the distinctive conceptual

\textsuperscript{45}See \textit{id.} at 265. See also Allen, \textit{Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents}, 66 \textit{Yale L.J.} 833 (1957).


\textsuperscript{*}A.B., 1954, Princeton University; J.D., 1959, University of Michigan; Acting Associate Professor of Law, University of California, Berkeley.
framework adopted by Professor McDougal and his associates. Further, it is a significant test of the usefulness of this framework and of the methods of inquiry employed by the increasingly influential school of international law created by Professor McDougal, since they are here applied, in meticulous detail, to an area of the law characterized by a centuries-old accumulation of practice, tradition and doctrine, but now going through a period of rapid change regarded by some observers as a "crisis."

International law, as viewed by the authors, is not a set of rules or doctrines, but a process of decision-making. Rules or "prescriptions" do not, or should not, "govern" the decisions, but merely serve as guides to past experience and community expectations, and as formal justifications of the decisions. They usually travel in pairs of "complementary opposites," and it is the decision-makers' task to choose and interpret the appropriate norm. The most important decision-makers are the officials of nation-states. But their decisions, to be lawful, must be "reasonable," that is, made by a rational "weighing and balancing of all factors in context" in light of policies of the global community. Furthermore, the ultimate test of the reasonableness of a decision is its reception by other states. In this sense, it is the international community itself that is the decision-maker:

It is not the unilateral claim, but the acceptance by other states, even when manifested in reciprocal tolerances, which creates the expectations of uniformity and "rightness" in decision which we commonly call international law. The determination of what is reasonable in a particular controversy requires, accordingly, both (1) an authoritative decision-maker (in customary international law, the general community of states) and (2) decision by community criteria. It is only by a weighing and balancing of relevant factors by authorized decision-makers in terms of community criteria that reasonableness, if the word is to be given its historic and common meaning, can be determined.

Foremost among the factors which the decision-makers must weigh and balance are the various interests affected. "The historic function of the law of the sea has long been recognized as that of protecting and balancing the common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of general community interest." The authors maintain that state officials act both as "claimants" for their respective nations and as authoritative decision-makers "for world public order," and that in the latter capacity they must be in some degree objective and moved "by perspectives widely shared in the community of states." Among the objectives sought is "to promote stability in the expectations of participants that power will not be exercised arbitrarily but in certain patterns of uniformity, permitting participants to pursue their objectives rationally, economically, and effectively." In the law of the sea, according to

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3 Id. at 48 n.125.
4 Id. at 1. "Inclusive" interests are exemplified by the general interest in the use of the oceans for navigation; an example of "exclusive" interests is the interest of coastal states in security. Both interests are worthy of protection, but they must be accommodated through compromise. In contrast, a "special interest" such as the interest of a state in aggressive expansion is not entitled to protection, but must be restrained.
5 Id. at 37.
6 Id. at 38.
the authors, there is "a strong presumption . . . in favor of inclusive interest, and exclusive interest is protected only when its protection will clearly contribute most to the common good." Nevertheless, they rightly criticize doctrinaire exaggeration of either the inclusive or the exclusive interests as "internationalist myopia" and "provincial myopia" respectively.

The authors exhibit a marked preference for the continued development of the law of the sea by the resources of customary international law—the flexible process of reciprocal claims and tolerances—rather than through black-letter texts such as the four Geneva Conventions of 1958 on the Law of the Sea. Nevertheless, a large part of the work is devoted to exhaustive analysis and criticism of the texts of these Conventions (which are conveniently reproduced in appendices) and of the preliminary drafts, reports, and debates which led to their formulation. It would be a mistake to ascribe to the authors the view that all "prescriptions" are so flexible as to be meaningless or indeterminate. They attach considerable importance to particular provisions. For example, they suggest that the definition of "innocent passage" in the Geneva Convention on the Territorial Sea and the Contiguous Zone may be insufficiently specific to provide adequate guidance to decision-makers. Similarly, they recognize the difference between existing law and desirable law. This is especially clear in the discussion of the problem of access to ports. "State practice in recent centuries affords no indication that states may demand access to the ports of other states as a matter of right," even though this "contemporary pattern of authoritative expectation about access of commercial vessels to ports clearly falls short of desirable general community policy."

The authors have been largely successful in their ambitious undertaking to excel other writers in the clarification of the law of the sea. Their analytical tools have enabled them to penetrate below the surface of traditional legal doctrine and to relate the law of the sea to the needs and concerns of mankind in a way not matched in any other published work. The analysis rests on a mass of legal and non-legal data. Particularly valuable, in this respect, is the authors' insistence that many of the prescriptions, policies and proposals cannot be rationally appraised without thoroughgoing technical inquiry into the relevant facts, such as "the relationship between the intensity of fishing effort and the future availability of fish." They devote many pages to the presentation and analysis of the available scientific knowledge, concluding, inter alia, that the desirability of conservation measures has often been exaggerated and affords little or no justification for claims of territorial sea zones of greater width than the traditional three miles.

It must be pointed out, however, that the authors' evaluations and recommendations rest largely on a concept of "common" or "communit" interest which is by no means generally shared or even understood. The classification of the "common" interests into "inclusive" and "exclusive," which often come

7 Id. at ix.
8 Id. at 11–12.
9 Id. at 262–63.
10 Id. at 105, 116. See also id. at 112–13.
11 Id. at 454.
12 They concede, however, that certain stocks of anadromous fish, such as sockeye (red) salmon, present special problems of conservation. Id. at 735, 929.
13 See the authors' polemic with a distinguished European critic. Id. at 561.
into conflict; the sharp contrast between "common interests," which are worthy of protection, and "special interests," which must be restrained; and the apparent assumption that long-run interests are necessarily more important than short-run interests, are nowhere fully explained or justified. The authors' assessment of the degree to which nation-state officials are guided by concern for world community interests is rather optimistic. Their realism seems to falter, furthermore, when they ignore or minimize the role of national power in the balancing of interests by which international law has historically developed. Similarly, in the extensive analysis of the views expressed in the course of preparation of the Geneva Conventions, there is surprisingly little reference to the relation of many of these views to the particular national interests of the states concerned. There is, for example, little explicit recognition of the importance of the national interest of the United States in shaping the attitudes of the American spokesmen.

The negative attitude of the authors toward many of the views and proposals of the Soviet Union and other Communist-bloc states is often expressed by innuendo or heavy irony rather than rational argument.

The recommendations of the authors, generally based on a careful analysis of all the relevant interests and facts, are usually convincing. Occasionally, however, their preferences are not adequately supported. This is true, for example, of their view that warships should have the right of innocent passage through foreign territorial seas (even outside of international straits), which is based on the assumption, not buttressed by any factual data, that the "inclusive" interest of the world community in the freedom of such passage outweighs the "exclusive" security interest of the coastal states. In the absence of adequate data indicating the importance of such freedom to the international community, it would have been better to admit that there is a large element of uncertainty as to the respective weights of the two interests.

Perhaps to still the suspicions which exist in some quarters that Professor McDougal's elaborate conceptual structure and often obscure terminology are designed to promote the national interest of the United States in the guise of scholarly inquiry, the book is said to be "written from perspectives of identification with the larger community of mankind and addressed to all who share such identification," and "designed as a clarification of the common interest in the continued maintenance of an international law of the sea which rejects all claims of special interest and weights every decision most heavily in favor of inclusive, rather than exclusive, interests." The authors by no means defend every position taken by the United States Government. For example, they strongly favor the inclusion of "security" in the list of interests for which contiguous zones may be established, although the United States successfully opposed such inclusion at the Geneva Conference.

On issues of crucial importance, the authors' preferences generally do coincide with those of the United States Government. This is particularly evident in their powerful defense of a narrow territorial sea and in their views on nationality of vessels. But this coincidence need not be inter-

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14 For further discussion of some of the concepts, see McDougal, Lasswell & Vlasic, Law and Public Order in Space (1963), especially at 101-03.
16 McDougal & Burke, op. cit. supra note 2, at 223-26.
17 Id. at x.
18 Id. at 605-07.
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preted as a deliberate effort to promote a narrow national interest. It may rather be regarded as an indication that the policies of the United States are in broad harmony with the rationally defined common interest of the world community.

Despite some imperfections and the need for further clarification and validation of Professor McDougal's concept of "common interest," this book is bound to have a lasting if not always acknowledged influence on the evolution of the law of the sea. The method and the recommendations of its authors may be questioned and even rejected, but they cannot be ignored. Any further discussion of the law of the sea in traditional terms of analytical jurisprudence will seem hopelessly naive.

Oliver J. Lissitzyn*

BOOK REVIEWS


This book is an effort to classify and analyze the conflict of laws issues that arise from applying a national antitrust law to activities engaged in elsewhere but which affect the national economy—the so-called "extraterritorial application" problem. While the work is now two years old, the problems it treats are only too vividly before us today¹ and will probably grow more serious, not less, in the future. In the Federal Republic of Germany, these issues are summarily treated in Section 98(2) of the Cartel Law:² "This law shall apply to all restraints of competition effective in the area of applicability of this law, even if they result from acts done outside such area." The book considers this provision, but in a way instructive of more than the German law, since it includes a comparative study of American doctrine. Because the work is relatively inaccessible to the American antitrust bar, governmental and private, a report on its purpose and conclusions seems justified.

Schwartz uses a two-part structure. After a short introduction that includes an excellent review of the relationship between the German and EEC antitrust legislation, some 120 pages are devoted to an analysis of transactions effective within Germany though conducted elsewhere, an analysis that proceeds in the functional context of specific types of restrictive arrangements and practices. Part one begins with the legislative history and meaning of section 98(2), followed by a chapter defining the section's specific concepts: "territory," "restrictions," and "effect." The principal sections of part one present a detailed review of the domestic effects and thus subjection to the Cartel Law of export cartels, with and without inclusion of the domestic market; of international vertical restraints such as resale price maintenance clauses, exclusive dealing and tying contracts, reimport prohibitions and the like; of international license agreements with their varying restrictive clauses; and of international cartels of the "classic" variety. This discussion, which to some degree is an avowed adaptation of Brew-

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¹ See text accompanying note 24 infra.

ster's approach, is valuable on several grounds: for its clear organization which facilitates analysis of the problems posed; for its substantive learning as to the German law on these common arrangements; for its use of economic teaching as to markets, substantiality of effects, and the like; and for its comparative insights bearing on the treatment of such conduct under Sherman and Clayton Act standards. It is a source of German case law as well as secondary literature, and in my limited knowledge of the German doctrine, it seems quite sound in its conclusions on most of the problems posed. These conclusions are many, for the form of the study involves testing the "internal effect" of each restrictive practice and deciding whether the statute, as so interpreted, would support an administrative or judicial finding of violation. At times one may quarrel with a particular reading of "internal effect," and the resulting conclusion as to the violation of the statute; but each reading is explicitly reasoned out, its bases clear and persuasively stated. This part of the book, supplemented by Schapiro's study of domestic application of the German Cartel Law, should give any practitioner faced with these problems a sound background for his own evaluation.

The second part of the book is an ambitious and detailed effort to classify the international conflicts problems arising from the application of the German Cartel Law to such extraterritorial conduct. It is assumed that the effects of the conduct would justify a finding of violation under the standards explained in the first part. This portion is difficult to review short of translating Schwartz's table of contents; even then, it would require a full explanation of the general civilian categorization of these conflicts problems, taxing both the reader's patience and this reviewer's competence. Suffice it to say that the use of section 98(2) as a conflicts-regulating norm is explained both as to jurisdiction and as to substantive applicability of the Cartel Law in its administrative, penal and civil aspects. This latter choice of law problem, mistranslated by Schwartz as "jurisdiction over the subject matter," is of course familiar in the American context. What distinguishes Schwartz's treatment is the careful delineation of the application of the German Cartel Law depending upon whether a private lawsuit, a civil administrative proceeding, or a criminal proceeding is involved. This delineation is necessary because section 98(2) invites several conflicting approaches, and in any event this conforms to the usual civilian classification of conflicts problems. If the section is merely an expression of the conflicts rule to be applied in civil administrative processes, then private litigation would be subject to German private law conflicts rules, with all that would imply as to greater autonomy in the choice of law and forum. At most, the section would express a limited public order exception to these rules. If, as is persuasively

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3 BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); see SCHWARTZ, DEUTSCHES INTERNATIONALES KARTELLRECHT 55, 104, 119-24 (1962) [hereinafter cited as SCHWARTZ].

4 See, e.g., the definition of "relevant market" for the purpose of bringing certain patent license restrictions within the German Cartel Law; SCHWARTZ 78-81, 240. I have discussed this elsewhere. Buxbaum, The Applicability of the German Cartel Law to Licenses of Foreign Patents, 8 ANTITRUST BULL. 925 (1963).


6 SCHWARTZ 154-55, 250-51, 267. At the same time he consistently speaks of jurisdiction in personam when he means jurisdiction in personam, in rem, or quasi in rem. Ibid.

7 See, e.g., United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).
argued by Schwartz, section 98(2) is an imperfect conflicts rule applica-
tible to all three types of proceedings, severe limitations are im-
posed as to choice of law or forum and other incidents of party auton-
omy. In the most interesting portions of this chapter, he evaluates the
American conflicts rules, which do not make or need to make these
distinctions, and which thus prevent party autonomy even in private
litigation from compromising the exclusive reach of the Sherman Act.

Similar interesting comparisons can be gleaned from the first topic in
this part of the book—the rules of international jurisdiction that
under section 98(2) govern German civil and administrative actions.
In the main these are familiar problems, for they bear on whether a
case, private or public, can be heard. Schwartz follows the private,
administrative, and criminal case categorization in this discussion.
From it we learn that the contacts justifying the exercise of
jurisdiction in Germany may be even thinner than in the United States.
Indeed, in the case of administrative proceedings, Schwarz follows the
older and somewhat unsatisfactory doctrine that jurisdiction
exists whenever that state's substantive law would be applicable,
a method of analysis strange to Americans. Of course, even given jurisdic-
tion, any agency would proceed only on the basis of its own substantive law.
The reverse situation, however—grounding jurisdiction on the applicabil-
ity of the substantive law—is hardly logical, even if in the antitrust field
applicability would seldom obtain in the absence of a jurisdictional contact.
Even in private litigation the competence of German courts arises out of
contacts, such as local assets, that at most would give an American
court the opportunity to order attachment in aid of jurisdiction, but
could not independently ground jurisdiction over the person. These
details are lucidly explained and perceptively compared to the American practice.
In both situations Schwartz is forced to deprecate the somewhat circular
German learning and to stress that jurisdictional contacts, because they
aid the execution of judgments, should affect any decision to exercise
jurisdiction. Since the newer American cases use similar result-oriented arguments to justify the assumption
of jurisdiction, the difference in approach may be more semantic than real.

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8 In the German system, an “einseliger Kollisionsnorm,” one which regulates only the
applicability of a particular system’s law; see WIEHTÖLTER, EINSITZIGE KOLLISIONS
NOREN AUS GRUNDE DES IPR (1956). The common English translation is “unilateral conflicts rule”;
see EHRENZWEIG, CONFLICT OF LAWS 312 (1963).
9 SCHWARTZ 154.
10 That is, what in the German classification would be “Zuständigkeit” or, perhaps,
“competence.”
11 SCHWARTZ 151, citing IV NEUMAYER, INTERNATIONALES VERWALTUNGSRECHT 471 (1936).
12 A special justification may exist for the German doctrine in cartel cases because of
Section 36 of the Cartel Law, concerning the automatic appointment of an agent to rep-
resent the “cartel” in German proceedings and thus to subject it to German jurisdiction. See
SCHWARTZ 159.
13 Or—at least in the United States—the agency would seldom have occasion to act.
14 See, e.g., Zivilprozessordnung (Code of Civil Procedure) §§ 23 (local assets), 29
(contract to be effectuated locally); SCHWARTZ 139.
15 See generally, EHRENZWEIG, CONFLICT OF LAWS 76–85 (1963).
16 See, e.g., SCHWARTZ 158–63.
17 See, e.g., United States v. Watchmakers of Switzerland Information Center, Inc., 133
F. Supp. 40, 45 (S.D.N.Y. 1955). See also United States v. Scophony Corp. of Am., 333 U.S.
795, 817 (1948). Thus, both American and German cases may be more concerned with what
Schwartz calls the “fairness” of allowing the local suit than with either jurisdictional con-
tacts or exact interpretations of “domestic effect.” SCHWARTZ 61.
A third part of the book, really a necessary adjunct to the second, explores
the limits set by rules of public international law upon the exercise of jurisdiction
by national tribunals. Because both American and German law apply to and
base jurisdiction on foreign conduct alone, it is necessary to evaluate the recog-
nized principles of international law which justify or limit this result. Here
Schwartz performs a much-needed service in ridding the accepted principle of
objective territoriality of the fallacious prerequisite of an act performed in the
assuming and affected state. The doctrine, for both jurisdictional and choice
of law purposes, is one of effect, and needs no additional internal contact, even
if "effect" in this complex field is such a vague concept that it can become a
stumbling block to the legitimate exercise of jurisdiction or the application of
domestic law. And with that begins and ends the search for international law
limits on the actions of states in this field.

Of course this does not answer the hard problems, the problems of relief or
of securing evidence. To these issues Schwartz devotes relatively brief but very
searching passages, including one of the best evaluations of the ICI-British Nylon
Spinners imbroglio I have read. These are not in the last analysis legal but
political problems. Inability to effectuate the relief ordered in ICI does not pre-
vent the imposition of perhaps more drastic but locally achievable remedies.
These comity issues, which the Federal Maritime Commission, for example, is
currently provoking in its efforts to supervise the dual rate and other practices of
ocean shipping conferences, are not essential to a methodological study such as
this one. Even so, Schwartz's work is the more valuable for clearly understanding
when comity issues arise, and for its sound, careful judgment on those mentioned.

In addition, the book is a valuable source of detail and example. The care it
expends on proper categorization may seem excessive to American readers, and

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18 Whether American courts formally speaking base jurisdiction on domestic effect is
questionable; in fact, however, it weighs heavily. See note 17 supra.
19 SCHWARTZ 257–69.
20 This is recognized in the RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED
STATES § 18(b) (Proposed Official Draft, 1962): "A state has jurisdiction to prescribe rules
of law attaching legal consequences to conduct that occurs outside its territory and causes an
effect within its territory, if the effect within the territory is substantial, occurs as a direct
and foreseeable result of the conduct outside the territory, and the prescribing of a rule of law
with a view to preventing or regulating such effect is not inconsistent with the principles of
justice generally recognized by states that have reasonably developed legal systems." Inter-
national law and conflicts learning about "effect," derived from simpler tort cases, see KAGEL,
INTERNATIONALES PRIVATRECHT 216–21 (1960), seems inadequate to provide doctrinal support
for the application of domestic antitrust law. This has been the center of recent criticisms of
Schwartz's book. See Seldl-Hohenveldern, Völkerrechtliche Erwägungen zum Deutschen Inter-
nationalen Kartellrecht, 9 AUSSENWIRTSCHAFTSDIENST DES BETRIIBS-BERATERS 73 (1963). On
the other hand, one of the chief merits of Schwartz's approach is its thoughtful tracing of
"effect" in a great variety of market situations.
21 See, e.g., the excellent discussion in Note, Limitations on the Federal Judicial Power
(judgment); British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. [1953] Ch. 19 (C.A.
1952), [1955] Ch. 37 (1954). For a chronology of these events, see Note, 63 COLUM. L. REV.
23 SCHWARTZ 275–81.
24 N.Y. Times, April 2, 1964, p. 57, col. 6, April 3, 1964, p. 54, col. 6. For a discussion of
the claims to regulation of maritime conferences asserted by the F.M.C. and the method of
assertion, see Comment, Regulating Ocean Shipping, 51 CALIF. L. REV. 986 (1963).
is not always needed for an understanding of American law. But in doing so the book clarifies the analysis of statutory intention to reach foreign conduct affecting domestic interests, and so is a major contribution to an understanding not only of the German Cartel Law but also of the Sherman and Clayton Acts in this "extraterritorial" field.

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