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On Iniquity. By Pamela Hansford Johnson

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BOOK REVIEWS

ON INIQUITY. By Pamela Hansford Johnson. New York: Charles Scribner's Sons. 1967. Pp. 142. \$3.95.

What should be done about books and films that exploit sex and violence? Pamela Hansford Johnson attended the Moors Murder Trial, and it shocked her into asking this question. The crime was brutal enough to shock most of those who heard of it; a ten-year old girl was tortured, sexually abused, and murdered by a young man and woman who recorded their crime with tape-recorder and camera. The shock of the trial provoked the question because the defendants owned a modest library of some fifty books that were devoted to sadism, sexual perversions, torture, and nazism. There is some reason to believe that they were influenced by these books.

In truth, Miss Johnson's theme is broader than I have stated; her own words are:

I have tried to examine whether there are things which may encourage us in wickedness, or else break down those proper inhibitions which have hitherto kept the tendency to it under restraint. (pp. 11-12.)

However, when Miss Johnson talks of the details of that which may encourage wickedness, she talks directly to the problem of the portrayal of sexual perversions and cruel violence in mass circulation paperbacks and the theatre. Of course, it was sensible of her to limit most of her discussion to questions of books, the theatre, and the mass media, for this is the area of her own professional competence.

The question—can what we read and see make us wicked—is certainly worth asking; and if you wish to read a challenge to our current standards of permissiveness, then this book would be a good first choice. Does she go so far as to argue for strict censorship? No; it is reasonably clear that she does not want to suppress books, but rather wants to avoid the mass circulation of certain books. Moreover, she does not object to the mere portrayal of sex; she does object to the portrayal of sex-without-feeling, of sex-plus-cruelty. One cannot state precisely what it is that Miss Johnson advocates, since she does not work out the consequences of all of her ideas. She has deliberately chosen not to carry her questions to their ultimate consequences and work out a specific program; she has taken the approach that she is merely asking questions and not answering them.

Since Miss Johnson has limited herself to asking questions, it

is appropriate to wonder whether she has asked the right question. Note that the form of her question is: can books (or movies, or theatre) cause us to be wicked. The question may not be appropriate; by choosing to focus on books as a cause of wickedness, she may have chosen to focus on something that is not a very significant cause (even if we grant that it is a cause) of the wickedness that we think we see around us.

Doubt as to the appropriateness of the question is intensified by a consideration of the type of wickedness it is that Miss Johnson is talking about. The wickedness that threatens us is the creation of an "affectless society" (Miss Johnson's phrase). We are in danger of regarding other people as objects that exist to be used, instead of as humans who are like ourselves; the affectless society is a society that has suffered from a loss of feeling of each of its members for the worth and dignity of others. I agree with Miss Johnson that this danger is a danger worthy of our gravest fears; I doubt that books (or even the mass media) are a significant cause. What role have large cities and large corporations played in making our society what it is? Miss Johnson's diagnosis of our society may be correct, but the evils that she sees may have been caused by the urbanization and industrialization that have been so marked in the Nineteenth and Twentieth Centuries. The incessant warfare of this century has probably also played a part in brutalizing our society.

So far, I have suggested that Miss Johnson has asked the wrong question; I fear that even if the books that she abhors were prevented from entering the mass market that we would still be in danger of the affectless society. However, even if the question is the right question, there is reason to believe that it is in the wrong form. The form of the question focuses (perhaps unintentionally) on the content of the books; however, the context in which a book is presented is probably more important than the content of the book. At this point, it is relevant to point to our own American experience with obscenity laws. I would like to suggest (without attempting to demonstrate) that the scholarly and judicial dispute over the meaning of obscenity has established that there can be no satisfactory definition of obscenity so long as the inquiry is directed toward investigating what is printed on the pages of a book. Furthermore, the Supreme Court of the United States has apparently come to the same conclusion, if the pandering principle of the *Ginzburg* case is in fact the guidepost to future decisions.

My fundamental objection to Miss Johnson's question can perhaps

be made clearer by the use of a metaphor drawn from the example of medicine. We can see that the body politic has developed a disease that threatens to become more and more serious—the disease is the affectless society. We can also see that this disease is accompanied by a repugnant and repulsive sort of literature that exploits scenes of sex-plus-voilence and sex-without-feeling. Miss Johnson assumes that it is a cause of the disease, that it is some sort of virus. I assume that it is a symptom of the disease, that it is like a fever. Of course, it is rational to treat symptoms; if one can reduce the level of a fever then the body can respond more efficiently to the disease. However, one cannot treat a fever by surgery or amputation; there is no reason to believe that we can deal with the fever of a debased literature by attempting to amputate it.

Regardless of what is the right question, Miss Johnson has done us all a service by writing about the trial. If we keep the facts of the case in mind, we cannot avoid facing up to the reality that there is a problem. The defendants in the case rejected the values that are necessary for the continued existence of our society. We need to ask why this happened. It is at least tolerably clear that as of the present we do not know why.

LEWIS H. LARUE*

VIETNAM AND INTERNATIONAL LAW, *An Analysis of the Legality of the United States Military Involvement*. By The Consultative Council of the Lawyers Committee on American Policy Towards Vietnam. Flanders, N. J.: O'Hare Books. 1967. Pp. 111 and Appendices. \$2.00.

This book relates back to a pioneering legal memorandum issued by the Lawyers Committee in the fall of 1965.¹ Apparently the first substantial examination of the legality of full American combat actions in Vietnam,² the memorandum has been followed by an

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¹*American Policy Vis-A-Vis Vietnam, Memorandum of Law*, reprinted at 112 CONG. REC. 2552 (daily ed. Feb. 9, 1966).

²It was preceded by a short State Department Memorandum, *Legal Basis for United States Actions Against North Viet-Nam* (March 8, 1965), reprinted at STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 2D SESS., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM 199 (Comm. Print 2d rev. ed. 1966) [hereinafter cited as BACKGROUND INFORMATION]. A much more comprehensive legal analysis of earlier American actions, made approximately two and one-half

extensive and still burgeoning debate. In March, 1966 the office of the Legal Adviser to the State Department issued a memorandum³ seemingly in response to the Lawyers Committee's conclusions that American actions were illegal. The Foreword to the present volume states that after the Government's legal analysis had been released the Committee asked a number of eminent authorities on international law and relations to act as a Consultative Council and to prepare a detailed reply. *Vietnam and International Law* is the result. It appears to have been read widely as a decisive answer to the Government's case.⁴

The book concludes that American military measures on behalf of South Vietnam have violated international law on many counts. One of the principal claims is that the United States has acted contrary to the United Nations Charter because the circumstances do not justify the use of force in collective self-defense under Article 51: there has been no "armed attack" and South Vietnam is neither a member of the United Nations nor even a state with a government capable of making an independent request for such assistance. Instead, the United States is seen as having intervened illegally in a civil war in South Vietnam. Violations of the 1954 Geneva Accords are also charged on the grounds that the United States wrongfully supported South Vietnam in frustrating the elections for unification scheduled in 1956, gave prohibited military assistance (first in equipment and supplies, and later increasingly in personnel) prior to and of a more

years before the bombing of North Vietnam started in February 1965, appears in Comment, *The United States in Viet Nam: A Case Study in the Law of Intervention*, 50 CALIF. L. REV. 515 (1962).

³Dep't State (Legal Adviser), *The Legality of United States Participation in the Defense of Viet-Nam* (March 4, 1966), reprinted at 112 CONG. REC. 5274 (daily ed. March 10, 1966), and at 60 AM. J. INT'L L. 565 (1966).

⁴Witness a letter to the Editor of *The Times* from Mr. Philip Noel-Baker, Labor M.P., in which he says, speaking of a reported change in American opinion on the Vietnam war:

Further evidence is furnished by the book *Vietnam and International Law*, which was recently published, and to which Lord Chorley and others drew attention in your columns the other day. The collective legal authority of the 11 American co-authors is very high; their argument is unanswerable. They show, with the fullest detail, that United States Government policy in Vietnam has set aside the obligations of the U.N. Charter, of the Seato Pact, of the Geneva Agreements of 1954, and of general international law.

They also destroy the legend that the war was caused by an "armed attack" on the sovereign state of South Vietnam by its "foreign" neighbour, North Vietnam.

The Times (London), August 24, 1967, at 7.

serious nature than North Vietnam's activities in violation of the Accords, and engaged in war actions even before the occurrence of the claimed attack by North Vietnam.

Additional major breaches of international law are asserted. The United States is said to have started the bombing of North Vietnam in February, 1965 as an illegal reprisal and to be using some methods of warfare which would be illegal even if this were a case of justifiable collective self-defense. Rather than being committed to its present course by the SEATO Treaty, the United States is said to have violated that compact. Failure to meet the obligation in Article 33(1) of the Charter to seek a peaceful settlement of disputes also is charged, as well as disregarding in the context of Vietnam the example set in Laos by the 1962 Geneva Accords.

These charges are formidable. Some of the questions and many of the supporting details are not examined in the Government's memorandum. The gravity of the issues underscores the necessity of discussion. This the book compels, and it contributes strongly to an awareness of legal restraints on makers of foreign policy. Whether or not one agrees with the book's conclusions they must give one pause.

For example, what of the United States' obligation to seek a peaceful settlement of this dispute? It is clear that prior to the start of bombing in 1965 the United States engaged in numerous diplomatic consultations about problems in Southeast Asia⁵ and took part in the 1962 Accords relating to Laos.⁶ Yet many official statements also suggested a policy of military victory in Vietnam.⁷ The possibilities of introducing ground forces and using air power directly against North Vietnam were raised at high levels in the Government at least as early as General Taylor's report to President Kennedy made in November, 1961.⁸ Nor was the dispute in fact submitted formally to the Security Council until January, 1966,⁹ nearly a year after the bombing started.

⁵See Secretary Rusk's summary of these efforts at 53 DEP'T STATE BULL. 5-9 (1965).

⁶These accords are set out in BACKGROUND INFORMATION 99-107.

⁷See, e.g., BACKGROUND INFORMATION 110, 114-15; House Republican Conference Comm. on Planning and Research, *The United States and the War in Vietnam*, 112 CONG. REC. 22,383-84 (daily ed. Sept. 20, 1966); Staff of Senate Republican Policy Committee, *The War in Vietnam*, 113 CONG. REC. H5248 (daily ed. May 9, 1967).

⁸See the passage from his report quoted by General Taylor during his testimony before the Senate Foreign Relations Committee in 1966. THE VIETNAM HEARINGS 171-72 (Vintage ed. 1966).

⁹The letter of transmittal is reprinted at BACKGROUND INFORMATION 271-73.

On the issue of reprisals, this characterization of the initial American air strikes on North Vietnam in February, 1965 seems not to add to the book's prior rejection of the claim of armed attack.¹⁰ Nevertheless an earlier American strike presents a different case. In bombing torpedo boats and facilities in North Vietnam following illegal attacks on American destroyers in August, 1964 in the Gulf of Tonkin, the United States appears to have gone beyond the reasonable objective of protecting its ships and their free passage through international waters.¹¹

As to methods of warfare, the book's figures (p. 60) for the tonnage of American bombs dropped in Vietnam raise questions under the principle of proportionality. The test is one of reasonable necessity in relation to the values attacked, rather than an arbitrary limit on the personnel and weapons to be employed in defense.¹² Yet it must be asked whether all of the ordnance used meets the test, and what the relation is (particularly as this is considered a limited war) between resulting military effects and non-military damage or injuries.¹³ Still

¹⁰South Vietnam's military position at the time was extremely bad. REPORT TO SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 2D SESS., THE VIETNAM CONFLICT: THE SUBSTANCE AND THE SHADOW 1 (Comm. Print Jan. 1966) [hereinafter cited as Mansfield Report]; Warner, *Vietnam*, The Reporter, March 25, 1965, at 28. If this was the result of an armed attack by North Vietnam, greater defensive measures would be justifiable. Although the White House statement announcing the bombing spoke of retaliation, as the book points out (p. 54), the fact that Ambassador Stevenson also reported these measures to the Security Council as taken in collective self-defense, BACKGROUND INFORMATION 157-59, is not mentioned. The same is true of the claim of collective self-defense made in the Government's 1965 legal memorandum. Note 2 *supra*.

¹¹This air strike is condemned as a reprisal in Stone, *International Law and the Tonkin Bay Incidents*, in RASKIN & FALL, THE VIETNAM READER 307 (Vintage ed. 1965). The United States has argued that the raid was justified because the incidents were part of a larger pattern of illegal use of force by North Vietnam. BACKGROUND INFORMATION 131, 134, 158, 227.

¹²MCDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 218, 241-44 (1961).

¹³See SCHLESINGER, THE BITTER HERITAGE 46-49 (1967) for some asserted instances of excessive destruction and the opinion that if the present United States policy continues, "[T]he effect will be to pulverise the political and institutional fabric which alone can give a South Vietnamese state that hope of independent survival which is our presumed war aim." *Id.* at 47-48. Some American tactics which would seem to involve very substantial chances of civilian casualties are described in HARVEY, AIR WAR-VIETNAM (Bantam 1967). See, for example: "recon by fire" and "recon by smoke" in areas of suspected Vietcong activity, techniques in which the presumption appears to be that any persons "flushed" are enemy, *id.* at 57, 59-60; but for discussion of possible mistakes see *id.* at 62-63; saturation raids by B-52 bombers on Vietcong sanctuaries which may "set fire to 50 square miles of jungle," *id.* at 106-07, 126-27; and "counter terror" operations, *id.* at 48. It is also the case, of course, that Vietcong and perhaps North Vietnamese forces as well have injured civilians both deliberately and through the indiscriminate use of various weapons.

another of the book's conclusions is that the United States was not legally committed to its involvement by acts of prior Administrations or by the SEATO Treaty (pp. 67-70, 84). With this finding there can be no dispute.¹⁴

In its total character, however, I believe *Vietnam and International Law* is not as even-handed an assessment of the Government's arguments as the first chapter suggests. The book was conceived as an answer to the State Department's brief, which favored the position of the United States. In challenging that brief the book makes an adversary presentation of the opposing case.

At the outset, the statement of "basic facts" deserves examination. It is said, for example, that "[a] separate state or nation of 'South Vietnam' has never existed" (p. 21). Reference is also made to a 1946 convention signed by the French and Ho Chi Minh which recognized the Vietnam Republic as a free state within the French Union. Yet there is no mention of two treaties signed in June, 1954 by France and the State of Vietnam which allegedly made the latter independent of France. These treaties are part of some observers' argument that South Vietnam's predecessor state was fully independent before the execution of the Geneva Accords in July, 1954. Although this claim is disputed¹⁵ it would seem to merit mention. Moreover, the issue of

For example see the list of various asserted terrorist incidents during the period 1960-1966 reprinted in 113 CONG. REC. H1864-67 (daily ed. Feb. 28, 1967), and reports of execution of prisoners including civilians, N.Y. Times, Mar. 6, 1967, at 12, and of an attack on a village in which many civilians were killed, N.Y. Times, Dec. 7, 1967, at 1, 14.

¹⁴The Treaty is set out at BACKGROUND INFORMATION 70-74. I disagree, however, with the further conclusions in the book that unanimous consent is required under SEATO for military measures and that even had such consent been given United States actions would be illegal absent prior authorization from the Security Council. The first argument is merely a variation on the book's conclusion that there was no armed attack on South Vietnam. Unanimous consent is needed under Article IV(2) of the Treaty in cases not involving such an attack, but if one has occurred then Article IV(1) obliges *each* party to act (although not necessarily to use force.) The second argument suggests that any military measures taken by the SEATO parties would necessarily constitute regional enforcement action subject to Council control under the Charter. But self-defense is not enforcement action, as the State Department's brief correctly argues, 60 AM. J. INT'L L. 570-71. States may act together in collective self-defense (before the Council takes action) even though they belong to a regional arrangement. BRIERLY, *THE LAW OF NATIONS* 395-96 (6th ed. Waldock 1963); Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AM. J. INT'L L. 16-17, and 17 nn.37 & 39 (1967).

¹⁵For the view that these treaties granted independence to the State of Vietnam see Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam* 10 (May 1966), reprinted in 112 CONG. REC. 14,943 (daily ed. July 14, 1966), and in 5 DUQUESNE L. REV. 235 (1967) [hereinafter cited as Moore & Under-

the South's historical "separateness" appears to be more complex than the book indicates.¹⁶ In addition, the book's view of the Viet Minh's asserted popularity derived from resistance to the Japanese during, and particularly at the end of, World War II differs from other accounts which emphasize the Viet Minh leaders' careful planning and concentration on seizing power at the expense of other nationalist groups.¹⁷

Secondly, important legal and factual issues are discussed in an adversary manner. On the general scope of collective self-defense and in its rejection of the claim of armed attack, the book's analysis does not deal with certain contrary legal conclusions asserted by a number of authorities. Nor does it examine some of the conflicting evidence on the role of North Vietnam which has been developed in the general debate over American actions. Thus, collective self-defense is termed justifiable only under the Charter's "very narrow exception" (p. 26) to the general ban in Article 2(4) on the use of force by member states individually. This exception is also said to be available only if a member has been attacked (pp. 36-37, 39-41). Yet the restrictive characterization in the former statement is disputed, and the latter view, I believe, is incorrect.

Whether, even absent Article 51, defensive measures could con-

wood]; Young, *The Southeast Asia Crisis*, 1965 HAMMARSKJOLD FORUM 118; CROZIER, SOUTH-EAST ASIA IN TURMOIL 93 (Penguin Books 1965). The treaties are said not to have become effective, however. Partan, *Legal Aspects of the Vietnam Conflict*, 46 B.U.L. REV. 289 (1966), citing 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW 289 (Dep't State Pub. 7403 (1963)).

¹⁶See the comments on historians' findings of cultural and political differences between North and South Vietnam in Rovere, *Reflections: Half Out of Our Tree*, New Yorker, October 28, 1967, reprinted at 113 CONG. REC. S15,719 (daily ed. Nov. 2, 1967). Substantial numbers of Vietnamese seem to have drawn political or religious distinctions between the two post-Geneva regimes in 1954 and thereafter. It has been said that 860,000 refugees, including more than 500,000 Catholics, moved to the South after the Accords were executed, and that perhaps 80,000 Vietnamese moved to the North. Fall, *How the French Got Out of Viet-Nam*, in RASKIN & FALL, *supra* note 11, at 88. According to a former member of the Canadian delegation to the International Control Commission, many North Vietnamese sought exit visas through the delegation during 1956 and 1957 but were unsuccessful. Blockley, *The Origins of Crisis: Hanoi, 1957*, 113 CONG. REC. A892, A895 (daily ed. Feb. 27, 1967).

¹⁷See, e.g., a report made on June 10, 1965 to a parliamentary committee by the Canadian Foreign Minister, who stated that in 1945 "refraining from any attacks on the Japanese, the Communist-led movement concentrated on driving other nationalist movements from the streets of [Hanoi]." 113 CONG. REC. S14,409 (daily ed. Oct. 9, 1967). See also FALL, THE TWO VIET-NAMS 60-66 (rev. ed. 1964); LA-COUTURE, VIETNAM BETWEEN TWO TRUCES 7 (1966).

stitute an act prohibited under Article 2(4)¹⁸ has been questioned.¹⁹ Article 51 by its terms does not grant rights. Rather it recognizes, pending action by the Security Council, what would seem necessarily to be regarded as an established principle permitting the use of force in defense. The claim that the Article is restrictive in nature is certainly questionable. For example, the language "if an armed attack *occurs*" is considered by many authorities not to bar military responses (under the pre-Charter right of preventive self-defense) to threats of attack.²⁰

Moreover, there seems to be less question about the correctness of interpreting non-restrictively the reference in Article 51 to attacks on member states. There is no suggestion in the Article that members may call only on other members for military assistance. A non-member's right of individual self-defense could well have no practical value if it could not ask the far more numerous member states for help. In neither their practice nor their expectations do states appear to distinguish between members and nonmembers regarding rights of

¹⁸These provisions of the Charter are as follows:

Article 2

* * *

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

* * *

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

59 Stat. 1037, 1044-45 (1945).

¹⁹BRIERLY, *supra* note 14, at 420.

²⁰Quotations from writings both for and against this broad interpretation are collected in 5 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 981-91 (Dep't State Pub. 7873 (1965)). See also in support of a possible broad interpretation BRIERLY, *supra* note 14, at 419-20. Indeed action to *forestall* an imminent attack in the form of aid to Canadian rebels was taken against an American ship in *The Caroline*, 2 MOORE'S *DIGEST OF INTERNATIONAL LAW* 409 (1906); 7 MOORE'S *DIGEST OF INTERNATIONAL LAW* 919 (1906), a case cited in the book (p. 27) for a very restrictive view of the right of self-defense. *But see* Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 1963 PROC. AM. SOC'Y INT'L L. 147, for the view that preventive action is no longer permitted.

collective self-defense.²¹ Many authorities also agree that under Article 51 members may lawfully join in the defense of nonmembers.²²

These subsidiary matters lead to the critical question whether there was an armed attack on South Vietnam. Several related issues are encompassed. These in turn raise disputed questions of fact and law, some of which the book does not consider. In the first place, what is the standard for an armed attack? The test given in the book, "if military forces cross an international boundary in visible, massive and sustained form" (p. 27), seems too narrow. It looks only to invasions in the traditional overt style. Yet any major use of force across a border "against the territorial integrity or political independence of any state" (the prohibition in Article 2(4) of the Charter) should justify defensive measures. Inciting and assisting armed revolutionaries in another country has been considered an attack by some legal authorities and has been condemned in at least two General Assembly resolutions as a threat to peace and to the values protected in Article 2(4).²³ This position also has been asserted by states in a number of instances not mentioned in the book.²⁴ The authors contend that subversion and infiltration were well known before World

²¹For example, both the United States and Russia, as parties to the NATO and Warsaw Treaties, participate in mutual security arrangements calling for the defense of states not members of the United Nations. It is suggested in *Vietnam and International Law* (p. 40) that these pacts and the Korean Armistice Agreement deal with zones of divided states and are therefore outside the Charter's purview. Yet if the Charter does permit members to join only in the defense of other members, the above interpretation seems no answer to Article 103 (providing that Charter obligations will prevail over members' other international obligations). Moreover, West and East Germany and North and South Korea, having existed and acted as independent international actors for some time, should be considered states despite absence of general recognition as such. BRIERLY, *supra* note 14, at 139. Again in the Korean War both the United States, which took military action prior to the Security Council resolution calling for the use of force, and Britain, as stated by Prime Minister Attlee, considered that participation in the collective defense of South Korea, a nonmember, would have been legitimate had the Council failed to act. SPANIER, *THE TRUMAN-MACARTHUR CONTROVERSY AND THE KOREAN WAR* 35-38 (1959).

²²Moore, *supra* note 14, at 13-16; Wright, *Legal Aspects of the Vietnam Situation*, 60 AM. J. INT'L L. 751 (1966); Moore & Underwood, *supra* note 15, at 57-59; 5 WHITEMAN, *supra* note 20, at 1060-81; BRIERLY, *supra* note 14, at 394 n.1, 419.

²³Moore, *supra* note 14, at 12 and the authorities there cited; Partan, *supra* note 15, at 305. Portions of General Assembly Resolutions 193 (1948) and 380 (1950) are quoted in Moore & Underwood, *supra* note 15, at 43-44.

²⁴See Thomas & Thomas, *The Dominican Republic Crisis 1965—Legal Aspects*, 1966 HAMMARSKJOLD FORUM 27-28. During the recent fighting in Yemen the U.A.R. commander was reported to have justified the bombing of towns in Saudi Arabia on the ground that they were "bases of aggression" against the Republic of Yemen. N.Y. Times, May 17, 1967, at 9.

War II and were meant to be excluded from the category of armed attack under the Charter (pp. 28-29), but it seems impossible to conclude that such means can never be as effective as an overt attack. Indeed current reports indicate that depending on whether their own security is at stake, states consider externally directed guerrilla activity to be a danger or a weapon of consequence.²⁵

The second problem concerns the evidence regarding North Vietnam's activities. As *Vietnam and International Law* shows (pp. 28, 51), the State Department memorandum, in asserting that by 1965 at least 40,000 guerrillas had been infiltrated by the North into the South, refers only to the portions of the 1962 International Control Commission report which find that activities of this sort occurred. The memorandum may be assumed to rest also on the more detailed factual presentation in the Department's report issued in February, 1965 and entitled *Aggression from the North*.²⁶ In any event it seems clear, as the book acknowledges (pp. 28, 30-31, 51, 57),²⁷ that the fact of infiltration has been established. There remains great dispute, however, over its amount and over the proper characterization of North Vietnam's part in the conflict. Some observers have found significant North Vietnamese presence and control, and the Canadian Government has charged the North with what amounts to an attack.²⁸

²⁵See, e.g., Cuba's alleged insurrectionary aims toward several Latin American countries, N.Y. Times, Oct. 6, 1967, at 38; N.Y. Times, Aug. 2, 1967, at 13; Burma's reported fear of Chinese aid to guerrillas. The Sunday Times (London), Nov. 19, 1967, at 6; reports and charges by Rhodesian officials that guerrillas from Zambia operate in Rhodesia, N.Y. Times, Oct. 5, 1967, at 2; The Observer, Aug. 27, 1967, at 1; charges by Kenya against Somalia, N.Y. Times, May 3, 1967, at 1; N.Y. Times, May 2, 1967, at 15; and claims by the head of the Palestine Liberation Organization that China is providing arms and training for guerrilla warfare against Israel, N.Y. Times, Nov. 25, 1967, at 12.

²⁶Reprinted in BACKGROUND INFORMATION 171. For the view that this in fact shows relatively little Northern support for the guerrillas in the South see Stone, *A Reply to the White Paper*, in VIETNAM, HISTORY, DOCUMENTS, AND OPINIONS ON A MAJOR WORLD CRISIS 317 (M. Gettleman ed. 1965).

²⁷The Commission's 1962 report is reprinted in full at 113 CONG. REC. S4086 (daily ed. March 20, 1967). The majority found that "in specific instances... armed and unarmed personnel" and supplies had been sent to the South to carry out "hostile activities, including armed attacks," and that the North's zone had been used to incite and support activities aimed at overthrowing the administration in the South. *Id.* at S4087. South Vietnam was also found to have violated the 1954 Accords, as is discussed below.

²⁸As to numbers, the report that only 400 North Vietnamese soldiers went into the South in 1964 (pp.31, 90-91) differs from the figures in the State Department's 1965 paper, BACKGROUND INFORMATION 173, 181-82, and may or may not be the correct breakdown of the Defense Department's claimed total of 12,400 infiltrators in 1964, 113 CONG. REC. S2665 (daily ed. Feb. 27, 1967). For the reports of significant North Vietnamese presence see CROZIER, *supra* note 15, at 134-135, 137-43 (citing at 137 an alleged statement of Ho Chi Minh in 1959 to the effect that the North had to

Others deny that such control existed and find the conflict basically a civil war between the Saigon Government and Southern rebels.²⁹ Yet despite the extent of this controversy, the book does not discuss statements tending to show a substantial military role on the part of North Vietnam. Thus, as to the evidence by itself the book's judgment denying the occurrence of an armed attack is certainly incomplete.

In support of this judgment the book also makes the separate argument that whatever North Vietnam did was done in response to prior violations of the 1954 Accords (pp. 28, 30-31, 48-52, 95-97).³⁰ But once

direct the anti-imperialist revolution in the South), and see the 1966 articles by N. Sheehan & T. Oka cited in Moore, *supra* note 14, at 9-10 n.22. In 1965 the Canadian member of the I.C.C., dissenting from a report that the bombing of the North indicated a violation of the 1954 Accords, said that this had resulted from the North's increased efforts directed at the overthrow of the Southern regime. Moore & Underwood, *supra* note 15, at 35. The Canadian Foreign Minister made similar statements in presenting a report to a parliamentary committee on June 10, 1965, 113 CONG. REC. S14, 408-11 (daily ed. Oct. 9, 1967). In a statement made on November 26, 1967 the Prime Minister of New Zealand said "many hundreds of documents captured from the enemy have established conclusively that North Vietnamese control over the National Liberation Front and the Vietcong is direct and all pervasive." 113 CONG. REC. A6045 (daily ed. Dec. 8, 1967).

²⁹In addition to citations in the book (pp. 64-65, 90, 104) see Wright, *supra* note 22, at 758, 762 n.32; KAHN & LEWIS, *THE UNITED STATES IN VIETNAM* 99-126 (1967); Devillers, *The Struggle for Unification of Vietnam*, in *VIETNAM*, *supra* note 26, at 230; Fall, *Viet-Cong—The Unseen Enemy in Viet-Nam*, in RASKIN & FALL, *supra* note 11, at 252-61. The United States Government's total estimate of 40,000 for infiltrators during 1959-1964 is also relatively small in comparison with its estimates of combined Vietcong and Northern forces at the end of each year from 1960-1964. The respective figures are 36,000, 63,000, 79,000, 92,000, and 126,000. 113 CONG. REC. S2665, (daily ed. Feb. 27, 1967). Yet comparative numbers would not necessarily show the extent of military direction or assistance and would not answer the question whether the guerrilla war began on orders from the North.

³⁰The authors note (p. 94) the absence of any argument in the State Department memorandum that the 1954 Accords do not bind the United States. And in the book many actions are termed United States violations of the Accords. Yet the American representative's statement at the session when the Final Declaration was adopted is not discussed (it appears in an appendix), and since he expressly stated "my Government is not prepared to join in [the] declaration by the Conference," BACKGROUND INFORMATION 69, it would seem clear that the United States is bound only by its own "unilateral declaration." In it the United States *declared* that it would "refrain from the threat or the use of force to disturb [the Accords], in accordance with Article 2(4) of the Charter," and that it would "view any renewal of the aggression in violation of the... agreements with grave concern and as seriously threatening international peace and security." *Id.* Thus to violate this undertaking American actions would have also to violate the Charter. Moore & Underwood, *supra* note 15, at 72-73, 76-81. South Vietnam accepted the demarcation line and the restraints on hostilities but has otherwise protested the Accords. *Id.* at 81-82. If the South is regarded as bound, however, American actions which were legitimate under its declaration could have involved South Vietnam in breaches of the Accords.

again there is conflicting evidence, and the argument remains unproven. Quoting from several reports of the International Control Commission during the period 1955 to 1957, *Vietnam and International Law* shows that American war materials were frequently sent to South Vietnam in ways that avoided the inspection provided in the Accords. The book thus contradicts the assertion in the State Department memorandum that the "considerable military equipment and supplies" received by Saigon prior to late 1961 "were reported to the ICC and were justified as replacements for equipment in Vietnam in 1954."³¹ Moreover, the book quotes the findings in the Commission's 1962 report—not mentioned in the Government's memorandum—that South Vietnam had violated the Accords in receiving "increased military aid from the United States" and in establishing a "factual military alliance" with this country (p. 51).³² The authors also contend that American personnel participated in direct war actions long before February, 1965, when the United States formally announced that it was joining in the active military defense of South Vietnam (pp. 51-52).

What of North Vietnam's activities? It has been charged with receiving by mid-1956 substantial assistance in arms and personnel from the People's Republic of China in order to enlarge its military potential.³³ The Canadian Foreign Minister stated in 1965 that after the prospect of reunification elections had passed North Vietnam resumed hostilities, using personnel and arms left in the South during the period of free exchange specified by the Accords.³⁴ Complaints against attacks by regular North Vietnamese troops were made by Saigon to the Commission at least as early as November, 1960.³⁵ And in the matter of personnel, the United States' claim that its forces

³¹The earlier I.C.C. reports are quoted at pages 49-50. The State Department's assertion appears at 60 AM. J. INT'L L. 577.

³²See also 113 CONG. REC. S4087-88 (daily ed. March 20, 1967).

³³Speech of June 1, 1956 by Assistant Secretary of State Robertson, quoting a British Note given to the U.S.S.R. in April, 1956 (which protested the increase of the Viet Minh army to 20 divisions from 7 in July, 1954), in BACKGROUND INFORMATION 80; Young, *supra* note 15, at 107, 113-14; Fall *supra* note 16, at 90.

³⁴See the Foreign Minister's report, *supra* note 28, at S14,410. He mentions evidence dealt with by a committee of the I.C.C. and quotes a statement of the Vietnamese Workers Party in July, 1954 which he views as showing "that the Northern regime intended to interfere in the South." *Id.* For similar conclusions as to resumption of hostilities by North Vietnam see HAMMER, VIETNAM-YESTERDAY AND TODAY 168-69 (1966), and Blockley, *supra* note 16, at A893. But in rebuttal see SCHLESINGER, *supra* note 13, at 17-19, where it is said that most scholars disagree with the above interpretation.

³⁵BACKGROUND INFORMATION 7.

increased substantially only in late 1961 after there had been a marked increase in infiltration is supported by the statistics and is also the view of the British Government.³⁶ Yet the Mansfield Report, as is noted in *Vietnam and International Law* (pp. 30-31),³⁷ concludes that before 1965 mainly political cadres and military leaders were infiltrated, and that the arrival of North Vietnamese regulars in significant numbers was a "counter-response" to the introduction of American combat forces. However, the start of this infiltration is put at the end of 1964, prior to the arrival of these American forces.³⁸

An important legal issue arises from the phase of the "armed attack" controversy just considered, and it is surprising that this too receives little consideration in the book. Substantial violations of the 1954 Accords have been charged to both regimes, but what kinds of treaty breaches justify resort to force? The most serious charges against South Vietnam are repudiation of the provisions for an election in 1956 and its military build-up with American aid. North Vietnam's chief violation is said to be the use of substantial armed force across the demarcation line. As a matter of law, can the former violations justify the latter? Under any interpretation of the Charter and Article 51, and particularly the restrictive one urged in the book, the answer would seem necessarily to be no. Failure to participate in elections cannot be an armed attack. Nor would a mere increase in military potential qualify. Insofar as the Charter is relevant, this rule would apply whether or not a treaty breach were involved and despite any

³⁶For the United States position see 60 AM. J. INT'L L. 577. In April, 1965 the British Secretary of State for Foreign Affairs said in the House of Commons:

[I]t is important to notice that in 1959, when this pressure from the North began, and even as late as 1961—nearly two years later—there were still only 700 members of the United States Armed Forces in South Viet-Nam....

The action from the North preceded the arrival of United States forces in any considerable degree in the South."

Moore & Underwood, *supra* note 15, at 31. Bernard Fall has stated that "the Geneva Agreement... allowed the presence of over six hundred American advisers, the number there at the time of the cease-fire." Fall, *Our Options in Vietnam*, The Reporter, March 12, 1964, at 21. According to official United States figures, military personnel in South Vietnam increased from 327 to around 700 or 800 at the end of 1960, to 3,000 at the end of 1961, and to 11,000 at the end of 1962. See BACKGROUND INFORMATION 6; 113 CONG. REC. S2665 (daily ed. Feb. 27, 1967). But these statistics presumably would not include any personnel operating covertly.

³⁷It should be noted that a typographical error on page 30 makes one reference to the Mansfield Report, *supra* note 10, inaccurate. The book states that the Report "also notes that by 1962 'United States military... forces in South Vietnam totaled approximately 10,000 men'" (emphasis added). Actually the word *by* should be *in* (Mansfield Report, *supra* at 2), with the result that the figure of 10,000 would not give force levels at the end of 1961.

³⁸Mansfield Report, *supra* note 10, at 3.

contrary provision in a particular agreement. While neither Vietnam is a member of the United Nations, each is said to have an application on file.³⁹ And the rule would appear to be the same without consideration of the Charter.⁴⁰

It is argued without elaboration in *Vietnam and International Law* that the principle of material breach of a treaty (by the South) justifies such resort to force as may be chargeable to North Vietnam. The same contention is made in the State Department memorandum to justify South Vietnam's disregarding the military restrictions of the Accords in view of the alleged infiltration from the North.⁴¹ Yet these two contentions differ significantly. The North is said to have used force across the demarcation line despite the ban on hostilities, whereas the South's military measures were defensive and were taken (before the bombing started in 1965) on its own territory.

Initially the book's contention (p. 48) seems to be that Saigon's breach of the election provision,⁴² without more, entitled the North to use force. This conflicts directly, however, with the general rule that "the breach of a treaty is not in itself an 'armed attack' within the meaning of Article 51 of the Charter."⁴³ Apart from the Korean War, this rule seems to have been followed in the divided entities of Germany and Korea after the breakdown of post-World War II arrangements for elections and unification. And a different course could well have been catastrophic. The book cites only the State Department's memorandum as legal support for the claim that a political grievance can permit military action otherwise prohibited by a treaty. Perhaps the prospects of settling a war such as the one ended in 1954 could be said to be improved if the sanction for a violation of the settlement were the resumption of fighting. On the other hand, this could increase the chances of political changes being made by violent means. Any such asserted policy consideration would

³⁹Moore & Underwood, *supra* note 15, at 27, 169 n.104.

⁴⁰BRIERLY, *supra* note 14, at 410-11.

⁴¹60 AM J. INT'L LAW 577.

⁴²The book states (p.46 and n.64) that the I.C.C., and Britain and the Soviet Union as co-chairmen of the Geneva Conference, insisted on the elections being held. This is only partially correct in the case of the British Government, which stated in a Note to the Soviet Union in April, 1956 that it had always considered the elections advisable and had advised the South Vietnamese Government to enter into consultations but that "Her Majesty's Government do not agree that the Government of the Republic of Viet-Nam were legally obliged to follow this course..." Moore & Underwood, *supra* note 15, at 218 n.278.

⁴³McNAIR, LAW OF TREATIES 577 n.1 (1961), quoted in Moore, *supra* note 14, at 5, and in Moore & Underwood, *supra* note 15, at 88-89, 219 n.281.

require careful examination, whereas the book makes its argument without discussion of these factors (pp. 48-52).⁴⁴

Perhaps this argument should be considered differently. The claim may be that in its military build-up, together with the alleged American war actions prior to 1965, the Saigon regime violated the Accords with what amounted to force.⁴⁵ The means of doing so would have been supplied by the United States. But if the North's military action within South Vietnam prior to 1965 is to be justified under the Accords, it must be on the theory that the North acted in collective self-defense

⁴⁴The same question of the proper limits of the material breach rationale arises in connection with the book's argument (pp. 36-37, 40-41, 73-74) that as a mere zone South Vietnam has no right to ask for aid in collective self-defense (although apparently some such zones can be included in defense treaties the other parties to which are clearly states) (p. 40), *see also* note 21 *supra*. Of course if South Vietnam were a state its right to make such a request would be established, but the book does not consider in any detail the possibility that whatever their prior status North and South Vietnam may have become *de facto* states since 1956. On this point it is contended (pp. 37-39) that membership in United Nations agencies and recognition by other countries have not conferred statehood on South Vietnam. The latter assertion appears questionable in that states establishing relations with either regime after 1956 would seem to recognize that entity as a member of the international community. *See* Letter from Professors Bishop, Baxter, McDougal, Sohn & Alford to President Johnson, Feb. 14, 1966, in 112 CONG. REC. 3694 (daily ed. Feb. 23, 1966). And India and Laos, at least, appear to have relations with both regimes. Moore & Underwood, *supra* note 15, at 29, 172 n.116. There is other evidence as well, including carrying on diplomatic relations generally, acknowledgements of separate statehood during United Nations debates in 1957 and 1958 (over a resolution for the admission of "Vietnam" and a counterproposal for the admission of both Vietnams and both Koreas) and participation by both Vietnams as parties in the 1962 Geneva Conference and Accords. *Id.* at 24-27; BACKGROUND INFORMATION 99, 101. Several authorities have concluded that they are separate states. Moore, *supra* note 14, at 4 and n.8; Moore & Underwood, *supra* at 29, 172 n. 119; Letter from Profs. Bishop, et al., *supra*; CROZIER, *supra* note 15, at 134-35. *See also* BRIERLY, *supra* note 14, at 155. *Contra*, Partan, *supra* note 15, at 298; Wright, *supra* note 22, at 757-59, 757-58 n.19, 759 n.21.

As to whether a zone may request aid in collective self-defense, a number of authorities agree with the State Department's contention, 60 AM. J. INT'L L. 569-70, that even as a zone South Vietnam may properly consider the prior use of force crossing the demarcation line as an attack under international law. Justification is found in the basic purposes of the Charter and of the 1954 Accords to prevent such hostilities, and in the community's experience with continuing demarcation lines. Moore & Underwood, *supra* note 15, at 5, 253 n.53, 325-26 n.249. Moore, *supra* note 14, at 1-2, 4-6; Partan, *supra* note 15, at 306 and n.81. This contention is opposed as well. Vietnam is said to be a different case from other divided countries, there having been a "colonial" civil war followed in 1954 by a settlement looking toward unification. In these circumstances the material breach principle is said to permit disregard of the cease-fire line after a major violation of the settlement. Wright, *supra* note 22, at 756-60; Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1125, 1129, 1137, 1153-54 (1966).

⁴⁵*See* Partan, *supra* note 15, at 304, 306-08.

with the National Liberation Front as the legitimate government of the South (which is Hanoi's claim).⁴⁶ If the Front is not such a government but is considered an indigenous rebel group fighting a civil war in South Vietnam, Hanoi's assistance would be as much a violation of the 1954 Accords as Saigon's receipt of aid from the United States,⁴⁷ assuming that the Accords bind the South. Nevertheless, in these circumstances, the conduct of the state committing the prior unlawful intervention could be regarded as an attack on the aggrieved side in the civil war. That side could then request assistance from another state.⁴⁸ Thus the discussion in *Vietnam and International Law* (pp. 65-66) regarding the alleged civil war in South Vietnam and the duty of an outsider not to intervene in a civil war must be read as contending either that no intervention is justifiable even though another state has intervened illegally, or that only one of North Vietnam and the United States is entitled to respond to the other's intervention.⁴⁹ Which one is so entitled depends on the conflicting evidence already reviewed.

On another important point the presentation in *Vietnam and International Law* is quite one-sided. The Accords executed at Geneva in 1962, which sought to end foreign interference in Laos, are held out as "an Example of Peaceful Solution which Could be Followed for Vietnam" (p. 76). But this suggestion is made without examining the current status of the 1962 settlement. Both Vietnams and the United States were among the parties, each of whom agreed not to use Laotian territory to interfere in other countries' affairs and not to bring foreign troops into Laos or to "facilitate or connive at" such conduct.⁵⁰ Yet, in the United States' view it has complied substantially with these Accords whereas North Vietnam has not.⁵¹ Operations of North Vietnamese forces are said to be documented in a report of

⁴⁶*Id.* at 304. If this is the claim advanced in the book, questions of the Front's origin and relation to North Vietnam, the extent of its control, and its international standing should be examined.

⁴⁷*Id.* at 299, 301, 307.

⁴⁸*Id.* at 307-08.

⁴⁹It seems difficult to argue that the North may disregard the Accords entirely and consider the United States the only intervener. North Vietnam has not acknowledged that its troops are present in the South and has maintained consistently that the Accords (as interpreted by it) remain in force and indeed are the reason why United Nations participation in the dispute would be inappropriate. See Moore & Underwood, *supra* note 15, at 259 n.72, 257 n.70, 314-20 n.233; Partan, *supra* note 15, at 302, 314 and n.118. But see Wright, *supra* note 22, at 756-60.

⁵⁰BACKGROUND INFORMATION 101.

⁵¹See, e.g., statements by Secretary Rusk in 1966 in THE VIETNAM HEARINGS, *supra* note 8, at 51-52, 278-80.

the Laotian International Control Commission published in 1966,⁵² and the Laotian Premier has reportedly estimated the numbers of such troops at 40,000.⁵³ Alleged infiltration from North Vietnam via Laos has been a major complaint of South Vietnam and the United States since at least 1960 and was an issue at the Geneva Conference in 1962.⁵⁴ None of these charges or reports is mentioned in the book.

There are conflicting reports too on the presence or absence of American soldiers in Laos. In addition, United States planes are said to have bombed infiltration routes since December, 1964.⁵⁵ Thus both sides seem to be violating the 1962 Accords at present,⁵⁶ but questions of purpose and of responsibility for prior violations⁵⁷ bear significantly on the war in Vietnam. The international obligations assumed in 1962 by North and South Vietnam and the United States, among others, would (if honored) seal Laos from the Vietnamese war. That this has not occurred could be said to be a factor expanding the latter struggle because it would be much easier to defend against infiltration without striking directly at North Vietnam if the Laotian border were closed.⁵⁸ Nor would the activity of either adversary in aiding local factions in Laos appear to justify the other side's using Laotian territory in connection with operations in Vietnam.

In summary, *Vietnam and International Law* is provocative but

⁵²N.Y. Times, Aug. 23, 1966, at 9; N.Y. Times, July 25, 1966, at 2. The Polish member abstained.

⁵³N.Y. Times, Oct. 7, 1967, at 4.

⁵⁴See BACKGROUND INFORMATION 7 (1960 complaint by South Vietnam), 88 (statement by Secretary Rusk in November, 1961).

⁵⁵As to the presence of soldiers compare N.Y. Times, June 17, 1966, at 4, with N.Y. Times, Feb. 13, 1967, at 6. The bombing is reported in Legislative Reference Service, *U.S. Policy Toward the Far East: Chronology of Significant Events 1844-July 30, 1966*, 112 CONG. REC. 26,758 (daily ed. Oct. 19, 1966).

⁵⁶For a short summary of current interference by North Vietnam and the United States in Laos see study prepared for SENATE COMM. ON FOREIGN RELATIONS, 89TH CONG., 2D SESS., NEUTRALIZATION IN SOUTHEAST ASIA: PROBLEMS AND PROSPECTS 29 (Comm. Print. Oct. 1966). It would seem that whatever effect the settlement has today derives less from the parties' feelings of obligation than from calculations of national interest. See *id.* at 9, 29-30.

⁵⁷It has been argued that regarding the 1962 Accords "the Communist states were pleased to achieve their objective of the withdrawal of American military power from Laos without accepting international control of a kind which might obstruct seizure of power." SENATE COMM. ON FOREIGN RELATIONS, *supra* note 56, at 29, quoting MODELSKI, INTERNATIONAL CONFERENCE ON THE SETTLEMENT OF THE LAOTIAN QUESTION, 1961-62, at 33 (Canberra: The Australian National University 1962).

⁵⁸See articles discussing a barrier for the demilitarized zone, 113 CONG. REC. A3576, A823 (daily ed. July 17, and Feb. 22, 1967) and naval patrolling of the coast, Newsweek, July 31, 1967, at 26.

adversary. That its questions should be asked cannot be challenged; that in connection with many of them additional evidence and issues should be considered seems apparent. The need for debate, including examination of the future effect of American actions in other situations if they are considered as precedents rather than violations of international law, remains compelling. In issue are not only the conduct of and possible solutions for the war in Vietnam, but also the rules for and the shape of American involvement elsewhere in Southeast Asia. For example, to what should the United States look ahead in Thailand?⁵⁹ If the struggle in Vietnam came about through "the politics of inadvertence . . . [and] a series of small decisions,"⁶⁰ the importance of constructing a reasoned and legitimate policy for other problems is self-evident.

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THE LAWYERS. By Martin Mayer. New York: Harper & Row. 1967. Pp. xvii, 586. \$8.95.

*"Oh wad some power the giftie gie us
to see oursels as others see us!"*

On beginning Martin Mayer's self-acclaimed "wide-ranging, often anecdotal report on the law and its practitioners in the United States," I hoped that the author might vouchsafe us the "giftie" of which Robert Burns sang. To say that this versatile journalist has disappointed us in this hope is to say more about the ambition of the hope than the talent of the author or the quality of the book.

For Mayer has indeed attempted what his publisher has claimed for him—a compendious survey not only of American lawyers in all their shapes and forms, but of the law itself, its practice and customs, the courts, agencies and miscellaneous bodies which apply it at the urgings of lawyers, the tools, methods, and instincts which the bar brings to bear, and indeed, the larger social questions upon which all of these try to operate. That so huge an effort fails is not surprising; that it fails so well, is.

⁵⁹See the disturbing report and analysis in LOMAX, THAILAND: THE WAR THAT IS, THE WAR THAT WILL BE (Vintage ed. 1967).

⁶⁰SCHLESINGER, *supra* note 13, at 31.

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Mayer's first explorations take him to a sometimes anecdotal, sometimes sociological description of the American Bar. In these passages he describes who the American lawyers are without any pretensions to examining why they are who they are. He brings to this effort both the journalist's gift for particularization and epitome and the characteristic fault of easy generalization and simplification.

Nevertheless, there emerges from Mayer's opening treatment of the bar an inkling that he regards the subjects of his book with something approaching affection. To the lawyer-reader this, of course, is gratifying and furnishes such a reader with a warm feeling as he addresses the rest of the book.

The glow is only slightly dissipated as one advances to a discussion of the law schools. Here Mayer's thesis is that the intellectual education of the American lawyer reflects the highest standards of educational excellence, but may, nonetheless, fail to prepare its pupils adequately for the practice of law in the real world. He finds that it may well be desirable to expose candidates for a law degree to the disappointment and disillusion, the conflicts and frustrations of the society in which they must operate, before rather than after they graduate.

The point is not a new one; the gap between a law graduate and a lawyer—between a student and a practitioner and between a novice and a professional—has been a matter of concern both to the law schools and to the bar since the law schools first became a significant force in the education of lawyers. The fact that the observation is not novel does not detract, however, from the value of having it repeated. Once again Mayer's eye for incident helps him dramatize this gap and to remind us of the fact that the law and lawyers are supposed to serve real social needs, not merely conform to high intellectual standards. On the whole, however, Mayer's treatment of the function and performance of the law school is both complimentary and optimistic. The lawyer-reader may think himself safe to proceed with his self-esteem intact.

But not for long. Any treatment of American lawyers must confront the problems posed by the criminal law; it is too easy a mark to expect that it would escape the attention of the author. The chapters on the criminal practice and law begin with a description of the criminal law "the way it is now" and in these passages Mayer succeeds in conveying a sense of the human helplessness, institutional irrelevancy, and pervasive dinginess which plagues what we pretentiously call the "administration of justice." There is almost a

Dickensian ring to his indictment of the courtroom procedures. Read, for example, a portion of his description of Felony Part in New York County:

Judge Simon Silver, looking quite small, as judges always do in black robes, sits on a raised chair behind a very long desk on a platform raised perhaps eighteen inches off the courtroom floor. Behind him are flags and (*pace* the atheist set) a raised gilt motto: "N GOD WE TRUST." (The "I" has fallen off.) Below him at a long table sit assorted clerks and probation officers. Over by the lawyers' door is a small desk and some chairs for the young Legal Aid lawyers, three or four of them, who will represent about three-fifths of the defendants. Backed against the wooden barrier is a sometimes empty, sometimes crowded row of wooden armchairs, for paid lawyers. People are forever walking back and forth. On the wall at stage left, where the jury box would be, there are more chairs for policemen, chatting, lounging, waiting to lead their catch to the bar. Besides the clerk's table stands a small raised platform with a small table and wooden armchair, for witnesses. The Assistant District Attorney, a very young lawyer with protruding eyes and a glum expression, stands at a lectern before this platform, slightly stage left. In dead center, facing into the public area, a uniformed policeman, known in the lingo of the court as "the bridgeman," pulls folders from the clerk's table (p. 151.)

Mayer is not content to chastize the criminal side of the law for its imperfect furniture; he rebels against its apparent irrelevancy and the indignity it imposes on its clientele. Not unnaturally, he looks for "something better." Here he finds some glimmers of hope which he displays just long enough to tantalize the reader into the tentative belief that there may in fact be "something better" which is obtainable. He reviews the efforts of the Vera Foundation with respect to bail, the hesitant gropings of our jurisprudence towards an understanding of "insanity," the effort of the courts to afford some measure of relief to juveniles charged with offenses, and the embryonic efforts in the direction of correcting the appalling disparities in sentencing procedures. The lawyer-reader almost lapses back into the euphoria of the earlier chapters. But Mayer will not let us alone. He concludes his "search for something better" with what must surely be one of the most corrosive attacks on the criminal law ever set down in a book of general readership: the obscene, vulgar tortured ode of a Negro prisoner in a Mississippi jail.

Similar skepticism affects Mayer's treatment of the relationship between the law and the poor. The target of his pessimism in this

connection, however, is the utility of the judicial process as a means for vindicating the rights of the poor. It is his thesis, essentially, that the poor simply do not have adequate access to the judicial process for the purpose of asserting their rights, and, moreover, when such rights are asserted, the judicial process is too inflexible to appreciate and establish those new groups of rights which most concern the poor. Consequently, Mayer is forced to look to the legislatures as a repository of relief for the poor and this, in turn, leads him to be perhaps unduly harsh in his criticism of efforts, increasingly in evidence, to make the judicial process more understandable and accessible to the poor.

His review of the experience of legal aid and neighborhood law offices, both public and private, gives him no encouragement that they furnish the poor with any real prospect that their condition can be improved. "The battle to improve the condition of the poor as a group (as distinguished from the fate of individual poor people individually oppressed)," he says, "must be won in the legislature, not in the courts, and it is confusing and cruel to the poor to pretend otherwise." (p. 302.)

Mayer's pessimism in this respect stems in part from his belief that neighborhood law offices tend to be the purveyors of "a collection of newly manufactured and unseaworthy rights." Yet he also spends an entire earlier chapter in a somewhat turgid and imprecise canvass of common law jurisprudence out of which there emerges reluctant praise for the genius of a system that has historically manufactured "rights" as societal pressures required them. One must wonder just how "seaworthy" *assumpsit* or *trespass* were when first broached; surely, as Mayer recites elsewhere at some length, the concept of "fault" as the nexus of tort liability had a long gestation period and painful birth. What Mayer may really be saying about the relevancy of the judicial process to the condition of the poor is that in the accelerating pace of modern social change the common law has become obsolete, and no longer has the capability to make those timely adjustments in the body of accepted legal doctrine that are needed to make it an effective instrument of that change.

Shifting gears (as the author himself does with somewhat disturbing frequency throughout the book), some attention should be paid to a phenomenon which most practicing lawyers reading this book will regard as extraordinary. The book contains an entire chapter on "Books, Binders and Bits." It is a zestful and imaginative description of the literature which practicing lawyers must use to ply

their trade. What is remarkable about it is the color with which the author invests so humdrum a corner of the profession; it is very hard to make bibliography sing. This chapter illustrates the service Mayer performs best for his professional reader: so much that is familiar to the lawyer is new and fresh to the layman, with the result that the former can enjoy new insights through the perceptions of the latter.

If this book, then, explores jurisprudence and contingent fees, the condition of the poor and the condition of the rich, the quantity and quality of law and lawyers, the courts from Felony Part to Supreme and does so usually with trenchant style, general sympathy, and responsible criticism, why does it ultimately disappoint? For two reasons, I suspect.

First, because the author has been ambivalent about his task and ambiguous in his choice of audience, he has written a book that says both too much and too little.

To lawyers, some things about which he writes are of value, some of his insights are interesting, his compliments are pleasing, his criticisms largely undisturbing, but in the end his treatment of serious subjects will tend to be trivial to this readership and much of his "anecdotal" treatment will be familiar enough to the experienced lawyer to be trite. To the lay reader, I must imagine that the book simply has too much to say about lawyers to command wide popularity. I simply cannot bring myself to believe, much as I love the profession, that there is a very large body of people outside it who wish to sit in their living rooms at the end of a hard day and read 586 pages of detail about all its nooks and crannies, no matter how well crafted those pages may be.

In the second place, one must confess, the book disappoints because of "oursels." No power can really give "the lawyers" a sense of satisfying self revelation. We are too many and different, too good and bad, too rich and poor to be vulnerable to successful literary capture.

Perhaps the book should be addressed as an anthology, rather than as the systematic "report" it claims to be. There is external as well as internal evidence to support the suitability of such an approach. Many of the chapters were pre-published in more digestible bites and directed to more selective readerships in various popular magazines, including *Esquire*, *Harpers*, *The Saturday Evening Post*, *Redbook* and even (!) *T.V. Guide*.

Having read some of those articles as they were printed and having been impressed with them, I must conclude that the book eventually disappoints because, when finally assembled, it too often becomes either precious or pretentious. The whole of the book, in short, is not as good as the sum of its parts.

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