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David P. Currie

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victim of brutality. The militant extremist's venomous epithets of hate continuously hurled at him also may be considered "abrasive." But the Kerner Report is correct in calling for a tempering of police attitudes, rather than emphasizing that the ghetto change its attitudes, for the police service represents a kind of "captive audience" with which society is in a better position to deal. The police should be the ones to take the initiative to eliminate the barriers to adequate relationships with the ghetto dwellers.

However, the *Report* did not sufficiently stress the fact that the change in the thought patterns of the youth who might hurl the Molotov cocktail during the next disorder must come from a positive contact created by the policeman on patrol. That experience will have far more effect than the dialectical persuasion exercised by the articulate community relations officer. It did not emphasize sufficiently that positive attitudes of the patrolman assigned to the ghetto beat are more likely to prevail when those of his chief, captain, and supervisors are similarly positive. It did not clearly point out that good police-community relations only can be the product of good police organization and good police administration.

Perhaps the Kerner Report is too replete with necessary sociology and psychology and history for its reviewer to insist on the inclusion of considerations taking the form of police administration principles. Regardless of how far the ambitious coverage could have been extended, the Kerner Report well might serve as an indispensable standard and recognized textbook for the police academy recruit. More important, a well thumbed copy should find its place on the desk of each police chief in the cities of America.

*William J. Osterloh**

WATER LAW, PLANNING & POLICY (CASES AND MATERIALS). By Joseph L. Sax.¹ Indianapolis: The Bobbs-Merrill Company. 1968. Pp. xxxii, 520. \$13.50.

Joseph L. Sax is in the forefront of the current drive to carry the law schools into the second half of the twentieth century. His new book of classroom materials takes a hitherto moribund subject and accomplishes with it the three principal goals of present-day curriculum reform: He escapes from the rut of courses in how to read cases by inviting students to apply their knowledge to the solution of problems; he makes his subject relevant to the real world by focusing upon current problems of profound social interest and importance; and he succeeds in working in much of the nonlegal material indispensable to understanding any substantive legal problem. His

* A.B., 1964, M.Crim., 1966, University of California, Berkeley. Director of Police-Community Relations for the San Francisco Police Department.

1. Professor of Law, University of Michigan; formerly of the University of Colorado.

book is a must for courses in water law, a model for casebook editors in all fields, an example for all who believe or need to be convinced that law is an instrument for making our society a better one, and a needed plea for closer attention to the management of our natural resources.

Water law is not one of the staple law school subjects, except in the arid West; the aridity of the subject, as well as the humidity of the climate, has been against it in other parts. Prior to Professor Clark's current collation project² the only significant treatise on the subject was an insufferably wordy and antique discussion upon riparian and appropriative rights.³ The standard casebook before Sax, though much more recent and concise, is of similar focus and scope.⁴ This pattern is understandable; the invention of the appropriation doctrine was a milestone in legal history,⁵ and the overriding legal and practical question in water-poor states has been how to secure an adequate water supply. In moderation, this history makes interesting reading, and the appropriation law presents some issues of analytical difficulty sufficient to challenge any student. But all this is nuts and bolts; it addresses not the nation's serious current water problems but the daily details of administering a well-established system. There are better places than a classroom to learn the mechanics needed to practice law in Denver, and there are better things to do in the classroom than teach them.

When analytical legal complexities intrude, Professor Sax highlights them, as in the administration of the disarmingly simple (to the initial glance) appropriation doctrine.⁶ But such intellectual games are not the real meat of this book, nor of this subject, as the author emphasizes. In studying the recent New York water shortage, for example, the reader is cautioned to ask not simply what legal issue is at stake, but rather: "How do problems like this really get solved, and what role do legal and other governmental institutions play in developing solutions?"⁷

This, I submit, is what law is all about. Analytical exercises are great for first-year students, but the upperclassman who already knows how to think about law profits more from putting his knowledge to use on real problems than by playing still more games. We have been mesmerized too long by the thought that what is good for first-year students is good for everybody. Moreover, the final year of law school is likely to be the last time the average lawyer has for calm, detached reflection about the function of law as

2. WATERS AND WATER RIGHTS (R. Clark ed. 1967). See the telling review by Professor Meyers in 77 YALE L.J. 1036 (1968).

3. S. WIEL, WATER RIGHTS IN THE WESTERN STATES (3d ed. 1911).

4. F. TRELEASE, H. BLOOMENTHAL & J. GERAUD, CASES AND MATERIALS ON NATURAL RESOURCES (1965).

5. See, e.g., Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886).

6. J. SAX, WATER LAW, PLANNING & POLICY 218 (1968).

7. *Id.* at 153. Yet Sax is not deluded into thinking that law can solve all our problems. He states that "one of the least studied and most important things that a lawyer needs to know . . . is how unimportant strictly legal considerations can become in the resolution of conflict." *Id.* at 152.

a social tool and its relation to other disciplines. If we purport to train tomorrow's civic leaders we must not let this opportunity pass.

In Professor Sax's formidable first chapter, "Public Planning for Water Use," built around the proposed diversion from the Columbia River to the Colorado Basin, Sax unsparingly hurls the student into a seething vat of equitable apportionment, benefit-cost analysis, subsidy policy, the bureaucratic and political problems of water planning, the role of private groups, and such alternatives to diversion as saline conversion and weather modification. The problem is so vast and the relevant matters so multifarious that one is left rather overwhelmed, as perhaps the author intended. The chapter is a highly effective introduction because it opens up vistas of virtually insoluble but very real problems with which the law, if not the ordinary practitioner, must deal. One could spend years working on this problem alone, and I find myself fighting the wish for still more material. Obviously there cannot be enough in a single chapter to permit of an acceptable solution, but there is enough to suggest the scope of the problem and the basic lines of approach that must be taken toward its resolution.

The second chapter is uninformatively titled "Managing Water Use." It contains the bulk of Sax's treatment of the traditional water law course, an examination of the law relating to rights to use surface waters. Even here Sax is adamant in resisting the urge to present doctrine in hothouse case form. The chapter is in three parts, unified by the common thread of stress upon administrative as well as substantive issues. The first section in unorthodox fashion explores in some detail the statutory and contractual framework of water allocation and administration within a federal reclamation project. It exposes the student to nonjudicial materials such as he seldom encounters and emphasizes that for many water users the familiar riparian and appropriative systems are of little practical importance.

Riparianism and appropriation respectively emerge in greater detail in the next two sections, but still in far from traditional form. The former appears as one element in the intensive study of a second colossal issue of resource management: the northeastern drought of the early 1960's. One principal thrust of this part is the search for an appropriate institutional framework for the making of water policy. The Delaware River Basin Commission, set up by interstate compact, managed to avert catastrophe by taking emergency measures; what institutional changes, Sax asks, would have made it more likely that the crisis would never have arisen?⁸ Least revolutionary is the appropriation section, which is built around a good hypothetical problem of less pretentious proportion, aptly designed to get the maximum mileage out of the analytical problems of appropriation and to allow western teachers, "with modest supplementation of local materials,"⁹ to convey a good measure of detailed professional preparation.

Chapter three, on recreation and conservation, turns very largely on

8. *Id.* at 180.

9. *Id.* at ix.

intimate consideration of the proposed storage project to produce peak electric power for New York City at Storm King Mountain. Here the author has made a bold choice in order to avoid the danger of superficial platitudes, reproducing lengthy, technically difficult excerpts from the briefs in a single case. They are, he affirms, "tedious reading for most students,"¹⁰ but "a careful analysis of them teaches more about conservation problems in water law than all the judicial opinions and articles written."¹¹ His choice is a brilliant one, for the briefs illustrate most tellingly the painstaking factual and technical analysis that must go into any informed decision on resource use.

Chapter four is about the current, critical, and underdeveloped issue of pollution. As Sax says, this law is not found to any significant degree in appellate opinions; it is found in statutes and in administrative practice. This fact renders the law of pollution at the same time more interesting and less accessible. Sax has made a worthy start toward collecting and discussing it, and he introduces us to the thorny problem of sanctions by discussing effluent charges and government incentives.¹²

Chapter five largely deals in interesting and useful fashion with the neglected issue of ground water, with incidental attention to flood control and other matters. The central point made here, in addition to imparting a general knowledge of the subject, is the peculiar divergence of doctrines covering ground and surface waters despite their close hydrologic interdependence. The resultant problems are knotty, and law reform seems indicated. To my eye this should have been chapter four; the physical separation of rights to use ground and surface water seems to me to weaken the force of Sax's valuable insight into the defects of their separate legal treatment.

In the area of pollution, I should like to see more attention paid to the scarcely credible dispersion of authority. Sax tells us something about the federal pollution administration, and he adverts to a few of the problems of state agencies operating under stream-quality standards approved by the federal agency.¹³ But this is only part of the story.

The deposit or discharge of pollutants into the Chicago River, for example, is regulated by a number of authorities. There are state statutes and federally approved quality standards administered by the state's Sanitary Water Board.¹⁴ In addition, both the City of Chicago and the Metropolitan Sanitary District, the legally independent municipal corporation responsible for disposing of the sewage of Chicago and of much of surrounding Cook County, have ordinances forbidding discharge of offensive matter.¹⁵ The

10. *Id.* at viii.

11. *Id.*

12. *Id.* at 407-21.

13. *Id.* at 387-407.

14. See ILL. REV. STAT. ch. 19 §§ 145.1-.22 (1967).

15. CHICAGO MUN. CODE, §§ 31-2, 36-46, 38-8 to 38-12 (1967); Industrial Waste Ordinance of Metropolitan Sanitary District, July 13, 1962.

Rivers and Harbors Act of 1899,¹⁶ as recently construed by the Supreme Court, forbids the discharge into navigable waters of industrial waste whose sediment may obstruct navigation,¹⁷ and of "refuse," including substances, such as aviation gasoline, that are of value before entering a stream but merely pollutants thereafter.¹⁸ This statute is enforced by the Attorney General on notification from the Army Corps of Engineers,¹⁹ which is responsible in general for maintaining the navigability of our streams and lakes²⁰ but has itself been responsible for a good deal of pollution.²¹

If the Sanitary District wants to build a new sewer, treatment plant, or farm for sludge disposition, it can exercise a limited power of eminent domain,²² but it is subject to the zoning ordinances of the innumerable cities and villages within its limits.²³ It must ask the permission of the City of Chicago, the State Toll Highway Commission, the Cook County Highway Department, or the State Department of Public Works in order to interfere with or tunnel under a road or a waterway.²⁴ It must clear a landfill, a dam, or a diversion of water with the Corps of Engineers²⁵ and refer any project affecting real estate in the City of Chicago to the Chicago Plan Commission.²⁶ So small a matter as the proposed construction of a sewer and pumping station to make it feasible for boatowners to stop throwing human wastes into Chicago's Monroe Street Harbor requires the cooperation of the Navy, the Coast Guard, the Federal Water Pollution Control Administration, the state, the city, and the Sanitary District.²⁷ Chicago's water supply is controlled by its Bureau of Water;²⁸ sewage collected by the Bureau of Sewers²⁹ is treated and disposed of by the Sanitary District;³⁰

16. 33 U.S.C. §§ 401-18 (1964).

17. *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

18. *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

19. *See* 33 U.S.C. § 413 (1964).

20. 33 U.S.C. § 1 (1964); 33 C.F.R., ch. II (1968).

21. Representative Henry Reuss, sponsor of a current bill to require the Engineers to obtain the consent of the Interior Secretary for dumping, has been reported as saying the Engineers annually deposit the bulk of 10 million cubic yards of harbor dredgings into the Great Lakes. *Chicago Daily News*, July 10, 1968, at 50, col. 6.

22. ILL. REV. STAT. ch. 42, § 327 (1967). In 1967, due to pressure from Kankakee County interests opposed to the reclamation of abandoned strip mines there with Chicago sludge, the state legislature deprived the District of power to condemn land outside its boundaries. Act 223, [1967] Ill. Laws. A general revision of the District's structure later in the same session appeared to reinstate the power, Act 261, [1967] Ill. Laws; however, the District proceeds on the assumption that its power has been limited.

23. Vinton W. Bacon, General Superintendent of the Greater Chicago Metropolitan Sanitary District, in answer to a question from the floor at the July 11, 1968 Board Meeting.

24. *See* 1968 Proceedings of the Board of Trustees of the Metropolitan Sanitary District of Greater Chicago, at 266-76.

25. *See* 33 U.S.C. § 403 (1964).

26. *Compare* ILL. REV. STAT. ch. 24, § 11-12-4.1 (1967), with 1968 Proceedings, *supra* note 24, at 280-81.

27. *See* 1968 Proceedings, *supra* note 24, at 281, 478.

28. CHICAGO MUN. CODE §§ 8.1-4, 8.1-8 (1967).

29. *Id.* §§ 8.1-4, 8.1-14.

30. ILL. REV. STAT. ch. 42, § 326 (1967).

garbage is collected by the Bureau of Sanitation;³¹ the city Board of Health, its Department of Buildings, and its Port Department have authority over certain nuisances;³² air pollution is the responsibility of separate city, county, state, and federal agencies.³³ Resource use is indeed an admirable vehicle for the study of the evils and complexities of a splintered system of government.

The Chicago River, as you may have guessed, remains filthy. We have a profusion of laws and a plentitude of enforcement agencies, but ineffective enforcement. One reason for this, as Sax shows in discussing the federal water-quality law,³⁴ is the puny nature of the sanctions invoked. Administration of this law proceeds through a cumbersome multistep scenario—a conference of government officials, then a hearing including the polluters themselves, then court action—with delays for voluntary compliance in between, and with the strong possibility that a court, if the case ever got that far, might find practical considerations to avoid the grant of relief. In fact only one case has gone to court, under this statute,³⁵ not because the Federal Water Pollution Control Administration has been dormant but because it has been content to settle disputes by agreements postponing the date of compliance for periods comfortable for the polluters. The experience of Chicago's Metropolitan Sanitary District has been similar. This agency has been active in enforcing its industrial waste ordinance; its Board of Trustees commonly passes upon half a dozen or so violations during one of its bimonthly meetings.³⁶ Yet, though the ordinance can be read to authorize fines for past violations,³⁷ the District generally contents itself with applying pressure for future compliance by ordering the cessation of the offensive discharge after a liberal grace period. The absence of retrospective sanctions encourages industry to see how long it can save money by continuing to pollute the waterways; furthermore, the difficulty of tracing the source of pollutants, especially when large slugs are intermittently discharged into the sewers in the dead of night, enhances the odds against the risk of even a cease-and-desist order.

In this connection I hope Professor Sax's statement that "the common law is of little significance in pollution control"³⁸ is only a description of the

31. CHICAGO MUN. CODE § 14-11 (1967).

32. CHICAGO MUN. CODE §§ 8.3-3 (Port); 9-11, 9-13, 9-19 (Health); 99-1, 99-3, 99-4, 99-7 (Buildings) (1967).

33. See 42 U.S.C. §§ 1857-1857 i (1964), *as amended*. (Supp. 11, 1967), *as amended*, Pub. L. No. 90-148, 81 Stat. 485 (1967); ILL. REV. STAT. ch. 111 ½, §§ 240.1-.17 (1967); ILL. MUN. CODE, ch. 17 (1968). Illinois and Indiana have also approved an interstate compact respecting air pollution. See ILL. REV. STAT. ch. 111 ½, § 240.31 (1967); ch. 393, [1965] IND. LAWS.

34. J. SAX, *supra* note 6, at 396-404.

35. 33 U.S.C. §§ 466-466n.

36. See, e.g., 1968 Proceedings of the Board of Trustees of the Metropolitan Sanitary District 102-19.

37. Industrial Waste Ordinance of the Metropolitan Sanitary District, art. 111, § 3 (1962) forbids certain discharges; art. V, § 4 allows fines against "whoever violates any provisions of this Act and fails to comply with an order of the Board of Trustees."

38. J. SAX, *supra* note 6, at 387.

present situation and not a suggestion that we should look in the future entirely toward administrative remedies. Sax's materials demonstrate some of the unfortunate technical limitations on private litigation,³⁹ and the failure of the recent suit to enjoin indiscriminate use of DDT on Long Island⁴⁰ is not very encouraging as to the prospects. But administrative enforcement itself has yet to prove a howling success. Judges, often less susceptible than legislators or administrators to political pressures, might with a little prodding investigate the relevant costs, benefits, and equities and assure that resources are not destroyed without justification. Indeed, in Sax's pet Storm King controversy it was not the administrators charged with protecting the public interest but the court, prodded by private conservation interests, that forced recognition of competing aesthetic values.⁴¹ In a day when steel plants continue to make Chicago's air a sickening red poison in the teeth of federal, state, and municipal air-pollution legislation it would seem unfortunate to dismiss the possibility of significant resort to private remedies.

At this point the economic considerations that Sax stresses in his earlier chapters on the northwest-southwest diversion and on conservation⁴² become critical. Because pollution is normally a classic externality case—the costs of pollution commonly fall upon those who do not reap the benefits of which it is a byproduct—the pollution chapter would be an ideal place to undertake the study of Ronald Coase's valuable thesis on social cost.⁴³ This thesis is valuable because it admonishes lawmakers to be aware of the full equation of costs and benefits in passing upon such problems as nuisance abatement—to recognize, for example, that making Chicago's air breathable may raise the price of automobiles or put steelworkers out of jobs.⁴⁴ It is also valuable in that it challenges the lawmaker to spell out what values motivate him to a decision that causes economic inefficiency—to explain why, for instance, redwood trees ought to be preserved, as I firmly believe, even if they will bring more money as suburban paneling than as a national park.

Sax's water law materials do grapple with the notion that today's gross national product is the sole gauge of human happiness. He includes arguments, for example, that benefit-cost analysis tends to give a misleading impression of our ability to reduce the value of such imponderables as education or national defense to common monetary terms⁴⁵ and that applying ordinary discount rates to resource problems is likely to overemphasize income at the expense of capital.⁴⁶ As Wisconsin's sorry lumbering record

39. J. SAX, *supra* note 6, at 387, 422-31.

40. *Yannacone v. Dennison*, 55 Misc. 2d 468, 285 N.Y.S. 2d 476 (Sup. Ct. 1967).

41. *See Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

42. J. SAX, *supra* note 6, at 24-43, 364-85.

43. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

44. Full consideration of economic costs and benefits can prevent as well as defend the destruction of resources: As Willard Hurst's intensive study of the Wisconsin lumber industry demonstrates, insufficient knowledge may be a more common cause of resource misuse than is villainy or venality. *See* J.W. HURST, *LAW AND ECONOMIC GROWTH* (1964).

45. J. SAX, *supra* note 6, at 35-38.

46. *Id.* at 365-68.

shows, today's high income may mean tomorrow's poverty;⁴⁷ to say we are a million dollars richer because the redwoods have been cut down and sold for that amount ignores the fact we haven't got the trees any more. There may also be something less than democratic in allowing people to participate in determining their destiny in proportion to their wealth rather than to their numbers. Finally there remains the notion that there are things money does not measure at all. We outlaw murder without taking account of the money costs and benefits of taking a particular life because we place human life beyond the money calculus, and our expensive criminal procedures represent a decision taken despite, not because of, the money factor.

The study of pollution, like Sax's chapter on ground water, suggests that ultimately we may find that the best teaching tools in the resource field are even less doctrinally structured than Sax's book itself. The distinction between water quality and water supply, for example, is an artificial one. The costs of purification, in the first place, may be such that a polluted supply is little better than no supply at all: Witness the irrelevance of the inexhaustible Pacific Ocean to the supply problems of its bordering city of Los Angeles. The availability of alternate sources may also weaken the case against polluting a given waterway. And, to revert to the Chicago River, it was an attempt by the Lake States to preserve their share of the water supply that finally induced the Supreme Court, after failure of a direct attack by the downriver states upon the use of the waterway as a sewer,⁴⁸ to apply pressure for the construction of sewage-treatment works⁴⁹ and to condition a future diversion increase upon the adoption of all practicable additional means of reducing the nuisance.⁵⁰

Moreover, the separation of water law from other aspects of the use and abuse of natural resources is somewhat strained. The problem of sewage disposal in Chicago, for example, has raised issues both of water pollution and of water supply all the way to the Supreme Court for the better part of the century;⁵¹ yet it cannot be fully understood without reference to the law and science of air pollution and of land use as well, for burning or heat-drying sludge fouls the air, and using it for fertilizer frightens the neighbors. Conservation of the Hudson River's beauty near Storm King Mountain involves issues of water use, but it is also intimately related to the questions of the Redwood National Park and of billboard legislation. Comparison of the administrative and legal machinery respecting air pollution would enrich a study of water pollution, and the subject is of equal importance and interest in its own right.

The goal, I think, is a program of instruction occupying perhaps half the student's time throughout the third year. A set of background materials dealing generally with resource problems would be required, built on the

47. See J.W. HURST, *supra* note 44.

48. *Missouri v. Illinois*, 200 U.S. 496 (1906).

49. *Wisconsin v. Illinois*, 289 U.S. 395 (1933); *Wisconsin v. Illinois*, 281 U.S. 179 (1930).

50. *Wisconsin v. Illinois*, 388 U.S. 426 (1967).

51. See notes 48-50 *supra*.

pattern Professor Sax has given us for water alone. There would be much emphasis on other disciplines, and each student would be expected to explore a single resource problem in depth.

In today's world the problems of human resources and natural resources are linked closely together. The overriding problem in both fields is the control of population growth, which in many parts of the world threatens to overcome our best efforts toward modernization and development, and exerts uncompromising pressure on natural resources. Even apart from the fact that without birth control a point must ultimately be reached at which people begin starving in great numbers, the quality of life can be much impaired by excessive population. The earth could be made capable, Harrison Brown surmises, of supporting fifty or perhaps a hundred billion people; but the resulting world would be one, he suggests, in which we should not be eager to live.⁵² Even today inequalities in the distribution of wealth make the inability or unwillingness to control population an extreme handicap for individual families and for entire groups or nations, as witnessed by our own urban ghettos. And once again the competing values do not lend themselves very well to resolution by traditional economic analysis alone. This was graphically illustrated by the recent Illinois and New York decisions rejecting actions for bringing about the birth of the disadvantaged plaintiff:⁵³ The typical measure of tort damages attempts to put the plaintiff back into the position he occupied before his injury, but it is not easy to prove how much better off an unfortunate child would have been if he had never been born.

In this context the enormity of Pope Paul's recent reaffirmation of the Roman Catholic Church's opposition to artificial contraception is manifest.⁵⁴ In advanced western countries it seems reasonable to expect that the edict will be ignored; the Pope has demonstrated his irrelevance to the problems of this century and of the future, and the disrespect his decision will engender may permanently reduce his moral authority on other issues. In the United States, Canada, and Western Europe, therefore, the announcement is bad politics more than anything else. The real tragedy will occur in places like South America, where many of the people are too unsophisticated to take the initiative toward family limitation, and where massive governmental support is needed to mount a successful program of birth control. If the encyclical has the intended and not unlikely effect of thwarting these programs, the Pope may well become the direct and conscious author of more human suffering than any other man who ever inhabited the globe.

In the management of all our resources, human and natural, we can afford to take neither papal fiat nor the whims of the market, appealing as they may be to our sense of simplicity, as our single lodestar. Of fundamental importance for lawyers, for all those who determine public

52. H. BROWN, *THE CHALLENGE OF MAN'S FUTURE* 220-21, 236-37 (1954).

53. *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343 (1966); *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).

54. See *N.Y. Times*, July 30, 1968, at 1, col. 8.

policy, and for each of us as participants in the human community are the wise words of Harrison Brown:

Although the emergence of industrial society required no concerted, planned effort, perpetuation of that society will require effort of a magnitude which transcends all previous human effort. . . . If man is to find his way successfully through the labyrinth of difficulties that confront him in the years ahead, he must, above all, use his intelligence. He can no longer rely upon the unforeseeable fortunate circumstance; future mistakes will have consequences far more dangerous than past ones have been. . . . [I]t is within the range of his ability to choose what the changes will be, and how the resources at his disposal will be used—or abused—in the common victory—or ignominious surrender —of mankind.⁵⁵

*David P. Currie**

55. H. BROWN, *supra* note 51, at 265-66.

* Professor of Law, University of Chicago.