

1971

Book Reviews

William F. Cercone

George Edwards

Gilbert T. Venable

Raymond A. Jensen

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

William F. Cercone, George Edwards, Gilbert T. Venable & Raymond A. Jensen, *Book Reviews*, 9 Duq. L. Rev. 556 (1971).

Available at: <https://dsc.duq.edu/dlr/vol9/iss3/22>

This Book Review is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Book Reviews

CARDOZO AND FRONTIERS OF LEGAL THINKING. By *B. H. Levy*. Cleveland: Case Western Reserve University Press, 1969. Pp. xi, 365. \$9.95.

This 117-page treatise on the life and judicial writings of Benjamin Nathan Cardozo, Associate Justice of the United States Supreme Court (1932-1938) is worthwhile reading for lawyer and layman alike. It is a brief and comprehensive summary of Cardozo's philosophical approach to law as illustrated in a selection of his opinions. The book also focuses attention on the great body of law established by appellate judges in the review of issues before them, revealing most vividly that changes in the law are not made solely through the legislature. On this theme, the author makes his point through the opinions of Cardozo.

Of course, when we speak of Cardozo, we speak of an Olympian figure in the field of law. As Judge Cuthbert W. Pound, Cardozo's colleague on the New York Court of Appeals, said of him: "The judge should, no doubt, like our own great Chief Judge, be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound and comprehensive learning, but such men are rare."

The book starts with a biographical sketch of Cardozo's early life. Born in New York City on May 24, 1870, his ancestry in America goes back to colonial times. His maternal great-grandfather, Benjamin Mendes Seixas, helped drill Revolutionary troops. His great-great-uncle, Rabbi Gershom Mendes Seixas, participated in the inauguration of George Washington. On the paternal side, we find his great-great-grandfather, Aaron Nunez Cardozo, a merchant, arriving from London in the middle of the 18th Century. The author opines that from this background there was formed in Cardozo the best of the patriot—his concern for the welfare of the states; the best of the businessman—his sturdy grip on everyday realities; the best of the minister—his zeal to actualize ideals.

In 1889 at the age of 19 Cardozo graduated from Columbia College. His interest in governmental theory was well developed at this early date with a commencement oration on "The Altruist in Politics" and with a B.A. thesis on communism. A quick perusal of these early efforts

Book Reviews

reveals the deliberative and philosophical nature of Cardozo and his concern for moral fundamentals which were characteristic of him throughout his lifetime.

At the age of 20 he had earned a Master of Arts degree in political science and after two years at the Columbia Law School, he was admitted to practice in 1891. It was not long before his arguments won notice and his memory for cases became famous. He spent two decades specializing in appellate practice.

Then, in November 1913, he was elected a Justice of the Supreme Court in New York City in the course of the Fusion movement. Within a month, and even though he had not served in the Appellate Division, the intermediate court in New York, he was appointed by Governor Glynn to serve temporarily as Associate Judge of the highest court in the state, the Court of Appeals, when additional help was needed. The governor had asked that court to name its candidate and Cardozo was unanimously chosen. As the author notes, few are the lawyers whose abilities are so outstanding that they have been drafted for high judicial office in this way. Later, Cardozo was appointed a regular member of the Court, and in 1917 he was elected, running with joint endorsement of both parties. In 1927 he became Chief Judge of the Court.

In 1927 he declined an appointment to the Permanent Court of Arbitration at the Hague, but in 1932 came a more urgent call. President Hoover invited him to serve on the Supreme Court of the United States because 'the whole country demanded the one man who could best carry on the great Holmes tradition of a philosophical approach to modern American Jurisprudence.' The appointment was unanimously confirmed by the Senate, which had subjected two of Hoover's previous nominees to attack. On March 14, 1932 Cardozo took his place on the Country's highest tribunal.

The author points out that Cardozo had always been at home in the rarefied circles of the law. Cardozo displayed the meditative temper of the appellate judge as far back as 1903 when he turned his scholastic attention upon the Court of Appeals and wrote a book on its jurisdiction.

A clear understanding of Cardozo's approach to his work comes from his own appraisal: "The submergence of self in pursuit of an ideal, the readiness to spend oneself without measure, prodigally, almost ecstatically, for something intuitively apprehended as great and noble, spend oneself one knows not why—some of us like to

believe that this is what religion means. True, I am sure, it is that values such as these will be found to have survived when creeds are shattered and schism healed, and sects forgotten and the things of brass and stone are one with Nineveh and Tyre."

Like the work of many men who reach great heights in their field of endeavor, there is nothing earthshaking or new in Cardozo's philosophy or approach to the law. However, there is that clarity and beauty of language that demonstrate his consummate scholarship, coupled with the "saving common sense and practical experience, as well as sound and comprehensive learning" about which his colleague, Judge Pound, talked, and which give his opinions that persuasive and inspiring quality.

His great contribution rose out of the combination of a strong inclination toward settling the law in terms of its basic principles and the awareness of changes in the socio-economic era in which he lived. His interpretation of the Social Security Act of 1935 (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C., c. 7 (Supp.)) demonstrated this philosophic-pragmatic approach. After deciding in favor of its constitutionality, Cardozo went on to cite the legal proposition that Congress may spend money in aid of the general welfare, and then said:

There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. *United States v. Butler* (297 U.S. 65) *supra*. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. 'When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.' *United States v. Butler, supra*, p. 67 Cf. *Cincinnati Soap Co. v. United States, ante*, p. 308; *United States v. Realty Co.*, 1963 U.S. 427, 440; *Head Money Cases*, 112 U.S. 580, 595. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being

of the nation. What is critical or urgent changes with the times.

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 442. Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co.*, *supra*, has set the doubt at rest. But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

The reader can judge for himself the quality and elegant simplicity of the language as Cardozo lays down the broad philosophic basis of a great social principle.

The author pictures Cardozo as an eminent proponent of the realist movement in the law which insists on freedom from formalism and less idolatrous devotion to precedent in every case, less emphasis on legal abstractions and more attention to understandable language in coincidence to the "push and sweat of life." Cardozo's adherence to this legal realism is evident in his observation:

We are talking about ourselves and looking into ourselves, subjecting our minds and souls to a process of analysis and introspection with a freedom and in a measure that to the thought of our predecessors would have been futile and meaningless, or even downright unbecoming.

Though Cardozo was an exponent of making the law fit the social conditions, he was not one to overthrow precedent lightly: "What has once been settled by a precedent, will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct upon the faith of the pronouncement." To which statement he added, however: "On the other hand, conformity is not to be turned into a fetish."

The author points out that when opportunity afforded and an

ethical trend was clear, Cardozo did seek to bring the law into accord with morals. As the exponent of a living law as he conceived it, he marched "to the time of community justice when its trumpets sound loud and steady".

Though Cardozo was not hesitant to change the law through his opinions, there were times when he felt the change required should be made by the legislature and not by the court. The following cases serve as examples. In *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 (1916), Cardozo forcefully extended an earlier New York trend, and held the Buick Company liable to an ultimate buyer for injuries caused by a defective wheel. A few years later in *Glanzer v. Shepherd*, 233 N.Y. 236, 135 N.E. 275 (1922), a public weigher was requested by a seller to submit a copy of the finding of weight to a buyer for his use. In reliance thereon, the buyer overpaid. The actual weight was less than the weight certified and the weigher was held responsible to the buyer. Then in the case of *Ultramares Corporation v. Touche, Niven and Company*, 255 N.Y. 170, 174 N.E. 441 (1931), a public accounting firm was asked to prepare and certify a balance sheet which the firm knew was to be shown to potential creditors. Cardozo declined to hold the accountants liable to the creditors for the negligence of an honest blunder. He said that such an extension of liability

will so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud. . . . Many pages of opinion were written by judges the most eminent, yet the word was never spoken. We may not speak it now. A change so revolutionary, if expedient, must be wrought by legislation.

There is no doubt that Cardozo's passionate interest in the everyday problems of people, his great scholarship, and his understanding of the philosophy of the law place him among those men who, in whatever profession, come too far and few between. He was a man of intellect and position, yet, as the author points out, he was renowned for his warmth and amiability and friendliness to those around him. In the words of the author:

The "stuffed-shirt" formalities which so often accompany success at the bar are foreign to him. How many distinguished lawyers would answer a letter of simple inquiry on the day it is received,

Book Reviews

and in their own handwriting? How many can count their corridor acquaintances by the legion?

In short, this is a book that will keep up the interest for those who like to read about the growth of the law through the great contributions of men who espouse its cause. Certainly the book demonstrates how Cardozo's moral intelligence, brilliant scholarship, and ability to communicate legal theory clearly and precisely ensure that his vision will continue to have a profound impact on the body of American law. I enthusiastically recommend the reading of this book.

*William F. Cercone**

* Judge, Superior Court of Pennsylvania.

KEEPING THE PEACE. By *Herbert Jenkins*. New York: Harper & Row, 1970. Pp. 203. \$5.95.

This may be the best book yet written on modern police problems by a career police officer. It is brief. It makes no attempt at complete coverage of the subject. But to me it was considerably more exciting than its title might imply. It could appropriately be called *From Klan to Kerner Commission*. The author, Herbert Jenkins, long-time chief of police of Atlanta, Georgia, joined the Ku Klux Klan as a routine aspect of becoming a police officer in Atlanta, Georgia, in 1931. By 1968 the same Herbert Jenkins was one of the important contributing authors of the "Report of the Presidential Commission on Civil Disorders," the famed Kerner Report, which is the as yet unexecuted blueprint for cure to America's racial problems.

Jenkins tells the story of the intervening years with the utmost simplicity. It is the story of a brave and honest man, forced by the circumstances of his chosen career in law enforcement, to face and deal with the complex problems posed by the racial revolution of the mid-Twentieth Century in America.

Part of the value of the book is that Jenkins started with the racial biases of the typical white southerner in the 1930's and says so with the utmost candor. It helps to understand the problem with which he labored for a lifetime if we read his statement as to why he joined the Ku Klux Klan:

In the thirties in Atlanta and throughout the South it was helpful to join the Ku Klux Klan to be an accepted member of the force. This was your ID card, the badge of honor with the in group, and it was unfortunately often an allegiance stronger than the policeman's oath to society.

Not every member of the Atlanta force belonged to the Klan but those who did not had very little authority or influence. The Klan was powerful in that it worked behind the scenes with certain members of the Police Committee and the City Council. A well-liked and respected member of the department who was not a Klan member could still get promoted through the ranks if supported by the Klan. But as he owed his rank to the Klan he could never defy them for fear of his job—and his life. The Klan was a kind of Mafia in dirty sheets.

Anxious for advancement, I joined the Klan along with the others of my generation of police officers. As a matter of course the new recruits were gathered up one night and carried to Stone Mountain to take the pledge of allegiance in front of the traditional flaming cross.

This was the extent of my association with the Klan. When I was told that new members would be assessed \$15 for bed sheet "uniforms" I had nothing further to do with them. I already wore a uniform and had no intention whatsoever of covering it with a bed sheet.

And here is the reaction of the young Jenkins to the proposal by a liberal mayor of Atlanta, for whom as a rookie policemen he then acted as chauffeur, to hire Negroes in the Atlanta Police Department:

I was thunderstruck at such a suggestion and began to protest but the Mayor cut me off. He told me that such a thing was not possible for the present and would only be possible in the future when the Negro people and white people had been educated to the idea. He said that he had no doubt that such a thing would occur in the future and, turning around in his chair and looking me straight in the eye, said it would occur peaceably only if those in positions of authority at the time had the wisdom and ability to make it so.

It might bear noting at this point that three liberal mayors of Atlanta in succession, Mayors Key, Hartsfield and Allen, all made major contributions to keep Atlanta and its police department in the forefront of American cities in terms of racial progress. The genius of all three, a genius obviously shared by their police chief, was that they

Book Reviews

tried to lead, and this inevitably meant shaping events rather than merely reacting to them.

Jenkins does not espouse gradualism as a matter of principle, but he does portray how Atlanta achieved progress step by step on, for example, as difficult a problem as integration of the Atlanta police force, a force which started with eight Negro officers in 1948 and now has 20% of the force Negro.

When the first Negro officers were hired, they were prohibited by police regulation from arresting a white person. When Jenkins abolished that regulation, he recalls wryly:

[T]he issue wouldn't die. When the final restrictions on Negro policemen arresting white persons were officially lifted, some twelve years after the first employment of Negro police officers, an irate citizen called me late one night demanding to know how I would feel if my wife were arrested by a Negro.

"Not very chipper," I replied. "It would be a little discouraging after all these years to know that my wife had violated the law."

It is obvious that Jenkins did not start with any religious or philosophic background which committed him to the cause of racial justice and equality. Over and over in relation to various aspects of the race problem the chapters of the book portray a person of essential decency and common sense wrestling with the practicalities of a law enforcement problem involving discrimination on a racial basis, and coming to the conclusion that nothing less than full equality would work.

In the early '60's, called on to enforce state trespass laws against SNCC sit-ins in lunch counters, Jenkins declined to do so. He stated his reasons:

Frankly the police had grown weary of fighting over this matter of segregation and saw little point in operating on the basis of an elaborate set of state laws which would collapse like a crumbling house of toothpicks before the onslaught of a huffing and puffing federal judiciary.

* * *

Therefore, although under great pressure to do otherwise, the police refused to go along with any further charades enacted to defend segregation to the end. As a result, when most of the store managers eventually realized they could not count on the police to enforce segregation and allow them to continue operating in a segregated manner, they closed down their lunch counters.

If much of Jenkins' police policy on the race problem was rooted in pragmatism, by the time President Johnson appointed him a member of the Kerner Commission, his views appear to have hardened into conviction:

In Atlanta we have stressed to the men in our department that they must be color-blind; and it makes no difference what minority group is referred to.

* * *

Ultimately separatism based on race simply will not work. Among other things, it always leads, even without intending to do so, to the worst kind of violence. The nation will tolerate this for just so long.

* * *

The police have been accused of aggravating and in some cases causing riots by their intemperate response in tense situations. I believe the police must bear a part of the blame.

* * *

The refusal of the conventional white police force to take the problems of the ghetto resident seriously is probably the major cause of rioting. For many years the police have been indifferent, although not always with malice or premeditation.

While the primary focus of this whole volume is upon police problems arising from the Twentieth Century black revolution, Jenkins has some perceptive comments on other police related topics. Contrary to most public statements by police administrators, he declines to blame the Supreme Court for crime increases or for "tying the hands of the police". Noting that the Supreme Court cases most objected to were really designed to restrain illegal police procedures, Jenkins comments:

What did this imply about police procedures in the future? It meant that police would have to investigate more fully, talk with more witnesses to the crime or people with some knowledge of the circumstances surrounding the crime. It required that a person's guilt be established through careful police methods.

As to the impact of these cases, he goes even further:

Does this mean that our arrest record has suffered as a result? Not at all. Our arrest and "clear-up" record is better than it has ever been. The Supreme Court decisions have had the effect of *making better policemen out of all of us*. We are now doing

Book Reviews

things correctly whereas in the past we might have been haphazard in collecting information and gathering evidence for a case. (Emphasis in original.)

On the controversial topic of firearms control, Jenkins points out that of 183 homicides committed in Atlanta in 1968, 128 were committed with firearms; and adds, "If this is not sufficient argument for some kind of weapons control among the civilian population, I do not know what is."

In police circles an equally controversial topic is the subject of one-man patrol cars, and Jenkins makes an interesting defense of Atlanta's use of them:

The department adopted one-man patrol cars for the following reasons:

1. The record, both local and national, shows that more police officers are killed in two-man than in one-man patrol cars.

2. A majority of the calls answered by the police do not require any action by them—merely counseling, giving of advice.

3. When a police officer needs to call for assistance he has twice the number of units to call on and can get help faster than he could otherwise.

4. Sound police management requires an officer to do his own thinking, to use his own initiative and imagination, and to develop so that each day he does a better job.

5. For the Atlanta police to adopt arbitrarily the two-man patrol car would cause the number of patrol units and the police service to be cut in half, or it would require all police personnel to work seven days per week, instead of five days.

On the deficit side of the ledger I would be inclined to complain that while Jenkins tells us that Atlanta succeeded in recruiting Negro citizens to the extent of 20% of Atlanta's police force, he does not go into the even more interesting question of how this was accomplished. And while he makes a point that the Klan influence of the '30's has been in his view eliminated from the Atlanta Police Department, he leaves the reader who is knowledgeable in such matters eager for him to write the detailed story of how this result was achieved.

One major omission is the failure to deal with the police problems produced by organized crime. Conceivably, of course, this might be because Atlanta had little experience with this phenomenon. If that were true, how such a desirable result was achieved would be at least as interesting a story as Atlanta's handling of the race conflict. Maybe there will be another Jenkins' volume after his retirement.

On publication of the Kerner Commission report, a fellow citizen of Atlanta, Dr. Martin Luther King, sent Jenkins a telegram which read:

You, as a member of the President's Commission on Civil Disorders, deserve the gratitude of the nation because you had both the wisdom to perceive the truth and the courage to state it. . . .

I think that *Keeping the Peace* is another illustration of Jenkins' "wisdom to perceive the truth and the courage to state it."

George Edwards*

* Judge, United States Court of Appeals for the Sixth Circuit.

ATTORNEYS' GUIDE TO SELECTIVE SERVICE AND MILITARY CASE LAW. By *Curry First*.† Philadelphia: Central Committee for Conscientious Objectors, 1969. Pp. 187. \$3.50. Supplement, 1970. Pp. 53. \$1.75.*

There is no area of legal practice where the need for well-organized and up-to-date publications is more acute than in selective service law. The majority of criminal cases now being heard in the federal courts are alleged selective service violations. Millions of young men are seeking advice relative to personal selective service problems at the administrative level.¹ Combined with this unprecedented case load, the complex and highly technical nature of selective service law practice has led to a state of near confusion. Compounding the confusion is a series of rapid changes in the law. For example, the past year alone saw the Supreme Court in *Welsh v. United States*,² expand the conscientious objector classification for thousands of potential applicants, the elimination of various deferments³ which had shielded thousands of registrants and the establishment of a lottery system,⁴ which in itself, is a masterpiece of

† Member of the Bars of Pennsylvania and Wisconsin. Formerly Staff Attorney, Central Committee for Conscientious Objectors.

* Available from CCCO, 2016 Walnut Street, Philadelphia, Pa. 19103.

1. The number of appeals to State Appeals Boards rose from 9,741 in 1965 to 117,835 in 1968. 2 SSLR 29.

2. 398 U.S. 333, 90 S. Ct. 1792 (1970).

3. Exec. Order No. 11527, amending 32 C.F.R. §§ 1622.22(a)(b), 1622.23(a) & 1622.24(a)(b) (1970).

4. Exec. Order No. 11497, amending 32 C.F.R. § 1631 (1970).

Book Reviews

obfuscation. Pending legislative proposals and judicial decisions promise further disruption of the system.⁵

No lawyer taking on a selective service case should be without access to the Selective Service Law Reporter.⁶ This voluminous work contains the relevant statutes, regulatory materials and recent cases, many of which are not readily available from other sources. It also features an extensive and well documented practice manual and a news letter which highlights recent developments in the field. Although there are many other publications dealing with selective service law, few of them are of value to a lawyer who has access to the Selective Service Law Reporter. For example, a new book entitled "*IV-F: A Guide to Draft Exemption*"⁷ contains little that is not found in more definitive form in the SSLR.

From the viewpoint of the practitioner, the Selective Service Law Reporter has at least one major weakness. Because it began publication in 1968, its recent case section contains no court opinions issued prior to 1967. Since its index refers only to materials in the Reporter, its usefulness is limited by the omission of the earlier cases. This inadequacy is remedied by the *Attorneys' Guide to Selective Service and Military Case Law*, a glorious index.

For the practicing draft lawyer, the "Attorneys' Guide" is probably the only essential supplement to the SSLR; it is certainly the biggest bargain among selective service books. The heart of the guide is an outline of selective service and military law. The outline is printed twice, once in compact form without citations, and again with references to every relevant section of the Selective Service Act, regulations and local board memorandums and to every pertinent selective service case. The *Guide* also contains two tables of cases, one in alphabetical order and the other in chronological order. Although in general these tables are of a dull utilitarian nature, it is interesting to note that the first case listed is *Kneedler v. Lane*, 45 Pa. 238 (1863). Curiosity moved me to the library to read this decision, the only state court case in the list. In the course of 100 pages of opinions and several months of litigation,

5. *E.g.*, The President has recommended the elimination of student deferments, 2 SSLR 59, and the Supreme Court has granted certiorari to decide whether the prohibition by the selective service system of legal counsel at personal appearances is valid. *Weller v. United States*, 397 U.S. 985 (1970), *facts at* 309 F. Supp. 50 (N.D. Calif. 1969).

6. Available from the Public Law Education Institute, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036. Regular rates: new subscriptions \$15/year, renewal subscriptions \$55/year (special rates available to libraries, non profit legal defense organizations, law students and counselors).

7. D. SUTTLER, *IV-F: A GUIDE TO DRAFT EXEMPTION* (1970) (paperback \$1.50).

the Justices of the Pennsylvania Supreme Court declared the Civil War draft to be unconstitutional, reversed themselves, and discussed such related topics as the contumacy of the United States attorney and the suspension of the writ of habeas corpus.

The *Guide* is designed for use in litigations rather than in counseling. Information relating to areas such as medical, student and occupational deferments is extremely sparse since these subjects are seldom involved in litigation. For example, the 1-y deferment is represented by only one entry in the outline (with citations to one regulation and two local board memoranda) although this deferment is of great importance and complexity in draft counseling. The brief section on military law also reflects this emphasis on federal court litigation. It concentrates on subjects such as in-service conscientious objection and the activation of reserve units, omitting the decisions of the Court of Military Appeals and the innumerable regulations which govern military life.

For the attorney preparing a selective service case for trial, the *Guide* provides an invaluable, detailed check list of potential issues. I have found it worthwhile to re-read the compact version of the outline with each new selective service case I handle. When an issue is spotted that is relevant to the materials in a particular registrant's file, it is a simple matter to brief the issue by referring to the authorities cited in the *Guide*. At trial the *Guide* becomes even more valuable, for it permits the attorney to assemble a respectable brief on an unexpected issue with great speed. For example, it is not uncommon for the defense attorney to be unaware of what evidence the United States attorney may point to to establish a basis in fact for the denial of a conscientious objector claim. The *Guide* lists twenty types of factual circumstances which have been held not to constitute a rational basis for denial of such a claim. If, for example, the Government were contending that an expressed willingness to kill in self-defense constitutes a basis for denial of a conscientious objector claim, the *Guide* quickly provides two cases in point.

Each time the index number of a case appears in the outline, it is underlined to indicate whether the registrant was acquitted, convicted, or granted partial relief. In the heat of trial this leads to a strong temptation to assume that where a case has resulted in acquittal, the court must have ruled in favor of the registrant with regard to the particular question under which the case is cited. This is not necessarily so and the *Guide* properly warns the reader to turn to the opinion itself. The

wisdom of this advice is exemplified by the opinion in *Petersen v. Clark*⁸ where Judge Zirpoli held in favor of a registrant while, in dicta, rejecting eight defenses. The *Guide* would be a significantly more useful research tool if it used the underlining system to indicate the way the court had ruled on each issue.

The *Guide* deals not only with selective service issues, but also with questions of procedure that arise in selective service trials. This portion of the outline contains such fascinating subjects as the nolo contendere plea, what questions are for the jury, discovery motions, the selective service file as evidence and the statute of limitations. Some of the entries in this section, such as the right to subpoena local board members, are not treated adequately in any other publication on selective service law.

The entries in the area of trial procedure, however, point up a weakness of the *Guide*. Successful defenses in selective service prosecutions are dependent, as in no other area save perhaps anti-trust, on the creative use of the law of criminal procedure. Under many of the entries in the outline it would be extremely helpful to have citations to the leading authorities, yet the *Guide* cites only cases which are concerned with the selective service act. To add this broader range of authorities to the outline would be a monumental task, and it would be an act of ingratitude to fault the author of such a comprehensive work for failing to take on this additional chore. However, the attorney who uses the *Attorneys' Guide to Selective Service and Military Case Law* should be forewarned that there still is no substitute for hard work and that total reliance on the *Guide* and the SSLR may be inadequate.

*Gilbert T. Venable***

8. 285 F. Supp. 700, 289 F. Supp. 949 (N.D. Calif. 1968), *rev'd*, 411 F.2d 1217 (9th Cir. 1969).

** Assistant dean, Arizona State University School of Law.

TRUTH IN REAL ESTATE LENDING. By *Joseph L. Abraham*. Chicago, Ill., Commerce Clearing House, 1970. Pp. xii, 299. \$12.50.

"Frankly, whether or not it will be entirely fruitful lies to a large extent in your hands." These words of President Franklin D. Roosevelt from his last speech to the Congress of the United States might well be the epigraph for the federal truth in lending statute.¹ The consumers of the United States must be the ultimate judge of the value of this statute. The tentative conclusion of the reviewer is that the statute, at least in the field of real estate lending, has not yet accomplished what it is presumed its authors hoped to accomplish.

This is by way of introduction to a discussion of Joseph L. Abraham's book *Truth in Real Estate Lending*, which is a survey of the federal truth in lending statute as it pertains to real estate. The bulk of the book is devoted to paraphrasing either the statute or Regulation Z of the Federal Reserve Board² or commenting on some of the rulings issued by the staff of the Federal Reserve Board or the Federal Trade Commission. This is not to say that the author has not done the best that he can with the material which is available. He himself points out that there have been no court cases to speak of in the field.

He has not attempted to write the only other type of book that possibly could have been written, namely, an actual survey of how lenders and borrowers have reacted, the various problems they have encountered, including in that category the methods which have been used by various lending institutions to solve the mechanical and legal problems which have been raised by the existence of the act.

In some of the specific areas of doubt created either by the statute, the regulations or the interpretations the author's position seems most conservative as befits the newness of this law. As an example he points out the peculiarity of holding a real estate broker not to be an "arranger" of credit even when he prepares an "application" for a loan which is converted into a contract upon its acceptance by the lender.³ The staff of the Federal Reserve Board has held that the "contract" documents required to be prepared before a real estate broker can be held to be an "arranger" of credit are the security instruments themselves. As the author points out, this does have the virtue of practicality,

1. 82 Stat. 146, et seq; 15 U.S.C.A. §§ 1601-1665.

2. 12 CFR 226.

3. J. Abraham, *Truth in Real Estate Lending*, 18 (1970).

but it might not appeal to a court in the light of one of the avowed purposes of the act, namely, to bring to the consumer's attention all those who either directly or indirectly are involved in the credit extension.

Certain of the author's interpretations, however, seem to be unduly strained and not warranted by any opinions issued by the enforcement agencies. For example, his position on the responsibility of a lender who bids in the property at the foreclosure sale and subsequently sells it, taking back a purchase money mortgage, is that if the lender does this with any "regularity" he becomes a creditor *merely* because of his credit sale activities.⁴ He goes further and indicates that the foreclosure under a power of sale may be a credit transaction when the property is bid in by a third party who defers all or part of the purchase price. These statements seem to disregard the purpose of the statute entirely. It was intended to protect consumers and not sophisticated purchasers at foreclosure sales.

Appropriately the author refers in several different sections to the problem of "consummation" and the method to be used to establish the fact that a loan transaction has been "consummated" according to the requirements of Regulation Z.⁵ Since this is of crucial significance for both the disclosure and rescission requirements, it is good to have Mr. Abraham reaffirm one's own judgment that the issuance of commitment letters by lenders is to be encouraged since the acceptance of such written commitments by borrowers goes a long way in fixing with precision the time elements required in both disclosure and rescission. More importantly, it also accomplishes the goal of the statute, that is, the giving of the requisite information to the consumer to allow him to opt out prior to committing himself irrevocably to the transaction.

The book performs the service of pulling together the statute, the regulations and some of the more interesting opinions issued by the enforcement agencies. It must be said however, that at the present time the practitioner who encounters problems of more than an elementary nature in the applicability of the statute to real estate would be well-advised to make liberal use of one of the loose-leaf services which contain the important opinions issued by the staff of the Federal Reserve Board since the factual distinctions in this field are of exceptional importance.

4. *Id.* 23.

5. *Id.* 78, 170, 209.

The philosophical implications of the truth in lending statute both with respect to its economic cost and its effect on the consumer are not within the ambit of Mr. Abraham's book. One cannot refrain, however, from commenting that while no responsible participant in the field of real estate could possibly object to the goal of full disclosure, it seems clear, after some experience with the statute and the regulations, that the emphasis on form over substance is not really accomplishing the goal Congress intended. The consumer of real estate financing does not seem to be any better informed as to his interest cost than before. This is primarily due to the fact that the real estate lending industry had always itemized charges although it had not converted lump sum charges to an annualized rate. Whether the consumer is better informed by such conversion is questionable. The opposite effect is more probable since the customer now is told that the interest rate is substantially higher than the rate his mortgage carries. This has proved to be confusing to most borrowers.

In summary the book discusses some of the problems raised by the new statute and might prove an appropriate starting place for the practitioner who is confronted with a problem in the field.

*Raymond A. Jensen**

* Member, Bar of Illinois.