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Charles Rembar, The Law of the Land: The Evolution of Our Legal System

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The Law of the Land: The Evolution of Our Legal System by Charles Rembar, New York, N.Y.: Simon and Schuster, 1980. Pp. 413.

The task of rendering the law a subject reasonably comprehensible is indeed an awesome one. Charles Rembar has produced a creditable such effort in *The Law of the Land: The Evolution of our Legal System.* Rembar, a trial lawyer of no menial significance—among his more notable defenses have been the "Lady Chatterley's Lover,"[1] "Tropic of Cancer"[2] and "Fanny Hill"[3] obscenity cases, all in which the defense prevailed—has tempered a lucid and fluid writing style with a scholarly knowledge of the law and its origins and has achieved a result which is both informative and, at times, humorous. The former characteristic makes the book a product worthy of the investment in time and money, and the latter maintains the reader's interest so that such will not have been wasted.

The book is highly readable and entertaining, in particular with regard to the author's almost uncanny grasp of the niceties of the early English law. There are fourteen easily segmented chapters dealing with such areas as evidence, equity, the "old New Pleading" (an enlightening progression of the simplification in pleading requirements), the rights of the criminally accused, and the inception of trial by jury. The common law versus statutory law, criminal versus civil, procedure versus substantive distinctions are explained early in the book in a manner which should appeal to the lay reader as well as refresh the lawyer. The primitive modes of dealing with transgressors of the law, both civil and criminal—hue and cry, feud, and ordeal and compurgation, all methods conducted by the populace who assumed responsibility of assuring that "justice" was done—are discussed at length with examples interspersed so that each is clarified. Rembar distinguishes among the early writs of debt, detinue, contract and trespass (the "preferred" writ) and expounds upon our English development: from the thirteenth century addition of statutory law to the existing judicial system upon the establishment of Parliament and its flourishing under Edward I, to the eighteenth century's introduction of the default judgment, up to the abolishment by the 1848 New York state legislature and the later Federal Rules of Civil Procedure of

1. Grove Press, Inc. et al. v. Christenberry, 276 F.2d 433 (2d Cir. 1960).
2. Atty. Gen'l v. The Book Named "Tropic of Cancer", 184 N.E.2d 328 (Mass. 1962).
3. Memoirs v. Massachusetts, 383 U.S. 413 (1966).

the more restrictive forms of pleading. He elucidates many fundamental differences in American and British law, *e.g.*, the inability of an English court to declare an act of Parliament unconstitutional and the absence of a written constitution in Great Britain.

An elaborate discussion of the various rules of evidence and the reasons for each is perhaps the high point of the book. The chapter on the development of the jury and a critique of the present day system is excellent. Occasionally, the author's factual and historical detail is complemented by his personal views, which he offers in his analysis of a jury's effectiveness: Rembar recommends the retention of the jury system only in criminal litigation. And he concludes the American legal system to be uniquely characterized by two distinctive benefits to the criminal defendant: the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt.

Two areas of the author's personal perceptions are particularly apparent: (1) his abhorrence of the United States Supreme Court's expansion of the First Amendment guarantee of freedom of speech to areas beyond what he feels the drafters of the Bill of Rights envisioned.[4] This view comes as somewhat of a surprise when expressed by one who had successfully argued the cause of allegedly obscene works on the ground that the writers and producers were exercising this constitutional right.[5] One puzzling feature was Rembar's mention of the Supreme Court's 1957 *Roth*[6] decision with which his subsequent defense of "Lady Chatterley" differed, without mentioning the stricter test later adopted by the Court.[8] The *Roth* Court condemned any work whose dominant appeal was to the reader's or viewer's "prurient interest,"[9] but provided that its salvation could nonetheless be achieved by a showing of any "social redeeming

4. *See, e.g.*, C. REMBAR, LAW OF THE LAND, 265, 315. For example, the author disagrees with decisions such as the one which held that advertising by lawyers is speech protected by the First Amendment (*see* REMBAR, at 265). And he strongly berates a 1976 Supreme Court decision holding unconstitutional on First Amendment grounds portions of a federal statute which limited the use of money in federal elections. Rembar's analysis of this latter holding is that the Court thereby effectively guarantees a "rich man . . . a greater voice in government than a poor man," which he feels may be "fact, but it is not law." REMBAR at 394.

5. Rembar apparently advocates the extension of the First Amendment protection only to those areas expressly stated—speech, press, and religion—but, where applicable, regards this protection as complete and unfettered.

6. Roth v. United States, 354 U.S. 476 (1957).

7. Rembar deems *Roth* a "thumping defeat for libertarians." REMBAR at 327.

8. *See* Miller v. California, 413 U.S. 15 (1973).

9. *Roth*, 354 U.S. at 487.

value,"[10] no matter how trivial. Rembar obviously felt this restriction on the freedom of speech to have been excessive,[11] but he does not seize upon the opportunity to comment upon the stricter standard adopted by the Court in the 1973 *Miller* decision.[12] Although "Lady Chatterley" was in the interim between those two decisions when *Roth* was indeed the prevailing authority, the reader wonders why Rembar does not chastize the *Miller* test that a work is obscene unless the degree of "literary, artistic, political or scientific" value in a challenged work is "serious."[13] At any rate, his distaste for the expansion of areas protected by the First Amendment and his impregnable position of its strength in areas where applicable appear anomalous. And the reader is left to ponder why he did not comment upon the relatively illimitable restrictive effect of *Miller*, which should have served to compound his distress over the *Roth* restriction. Rembar's defense in "Lady Chatterley" would unquestionably have failed under the more stringent *Miller* test thereafter adopted. (2) Rembar's more-than-occasional indication of his negative subjective opinion of former President Nixon is expressed, albeit with levity. He calls the Nixon administration "anti-intellectual"[14] and disapprovingly refers to the disregard by Nixon and his predecessors of the exclusive right of Congress to declare war, designating them, respectively, "King John and King Richard and King Lyndon."[15] He further uses Nixon's predating of his gift of papers to exemplify a form of legal fiction used in a fraudulent manner, as contrasted with the use of such fiction purposefully (an example of the latter was the legal presumption of the king's omnipresence during the Middle Ages, in order to allow a litigant to proceed with criminal prosecution in the king's absence, since the presence of the royal personage was traditionally required).

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10. "All ideas having even the *slightest* redeeming social importance . . . have the full protection of the guarantees of the First Amendment. . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484-5.

11. "The *Roth* case did not, could not, mean what it seemed to mean." REMBAR at 328. Rembar argued in "Lady Chatterley," *supra* note 1, that the "First Amendment protected any work that had discernible social value, no matter how lustful or prurient, no matter how offensive, no matter how violative of community standards." REMBAR at 328.

12. Miller v. California, 413 U.S. 15 (1973). This test later adopted by the Supreme Court renders the *Roth* test pale in comparison. *See infra* note 13.

13. *Id.* at 25. The Court in *Miller* specifically rejected the "utterly without redeeming social value" test which Rembar had successfully used in the "Fanny Hill" case, Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966), and substituted instead the requirement that the social value be significant, or "serious."

14. REMBAR at 199.

15. *Id.* at 290.

And Rembar's premise that the law is generally recognized and respected is qualified by his statement that there are some exceptional officials who transgress, such transgressions being illustrated by Nixon's "simple outlawry."[16]

At times, the historical data does become almost a dissertation, and the reader may tend to feel he has reverted to a college European history or law school legal history course. Mr. Rembar's research in the piecemeal establishment of our nation's judicial system has surely been exhaustive, and certainly no lawyer can read his book without having learned much about his profession's development. As a research vehicle, the chapter on evidence is perhaps the most fruitful and the chapter on the complexity of pleading which addresses the tendency of many lawyers to make work in order to maximize fees, as well as the author's feeling that the bar is publicly obligated to provide citizens with out-of-court legal advice free of charge, and his opinion that it is necessary for lawyers to act professionally beyond reproach ("slightly better [than most professional groups] is not enough"[17]) is one every lawyer would do well to digest. He further presents a plausible, but arguable, proposition that the government should bear the expense of paying lawyers who provide actual litigation services for indigent persons. The book is replete with such controversial positions that would provide inventive topics for debate.

Perhaps the theme of the book is best set forth in the final sentence. "Its [the law's] task is to draw generally sensible lines within the infinite shades of circumstance that constitute our world."[18] Rembar, who is quite evidently fascinated with the subject matter of his profession, has produced a laudable work that will enlighten many a layman and inspire many a practitioner as to the profoundity and virtues of those "sensible lines."

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16. *Id.* at 407.
17. *Id.* at 266.
18. *Id.* at 213.

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