

1981

Book Reviews

W. Paul Gormley

John E. Semonche

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Humanitarian Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

W. Paul Gormley and John E. Semonche, Book Reviews, 14 *Vanderbilt Law Review* 229 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol14/iss1/8>

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

BOOK REVIEWS

CHEMICAL WEAPONS: DESTRUCTION AND CONVERSION. Published for the Stockholm International Peace Research Institute London: Taylor and Francis, 1980. Pp. 201. *Reviewed by W. Paul Gormley.**

As an indispensable phase of its efforts to achieve worldwide disarmament, the Stockholm International Peace Research Institute (SIPRI) has published a number of studies devoted to the elimination of chemical warfare.¹ As a phase of its campaign seeking disarmament, this volume, dealing with the unique area of chemical warfare, was produced.

In view of the success achieved by the 1925 Geneva Protocol, the reader may ask what, in reality, is the future potential of chemical warfare? Until the use of chemical agents against innocent civilians and poorly armed tribesmen by Soviet forces in Afghanistan, the answer probably would have been negative. On the other hand, the indiscriminate use of chemicals against the Vietnam environment haunts the prior success in the application of the 1925 Geneva Protocol.²

While not classified as a strategic weapon in the sense of nuclear power,³ chemical agents are weapons of mass destruction and therefore their use should be treated as a crime against hu-

* B.A. 1949, San Jose State University; M.A. 1951, University of Southern California; Ph.D. 1952, University of Denver; J.D. (hons) 1957, LL.M. 1958, George Washington University; M.Int.-Comp.L., D.Jur., 1975, Free University of Brussels (VUB); LL.D. 1972, Victoria University of Manchester. Leverhulme and Simon Fellows, 1968-1972, University of Manchester, England. Member of the District of Columbia and United States Supreme Court bars.

1. SIPRI, **CHEMICAL WEAPONS: DESTRUCTION AND CONVERSION** 1-2, n.1-3 (and the sources cited therein) (1980) [*hereinafter* cited as **CHEMICAL WEAPONS.**] See also, A. Westing, **WARFARE IN A FRAGILE WORLD: MILITARY IMPACT ON THE HUMAN ENVIRONMENT** (1980). As indicated in **CHEMICAL WEAPONS**, the SIPRI Yearbooks contain a series of major studies devoted to the elimination of chemical weapons and their production.

2. A. Westing, **ECOLOGICAL CONSEQUENCES OF THE SECOND INDOCHINA WAR** (1976); and A. Westing, Ch. 3, *Tropical Regions*, in **WARFARE IN A FRAGILE WORLD**, *supra* note 1, at 71-103.

3. SIPRI, **NUCLEAR ENERGY AND NUCLEAR WEAPON PROLIFERATION** (1979).

manity. Primarily because of the injuries needlessly sustained by those persons least able to protect themselves,⁴ the use of chemical agents shocks the conscience of mankind. Accordingly, SIPRI is correct in treating chemical warfare as an indispensable phase of total (or even partial) disarmament, and this book, by focusing its attention on the single subject, renders a significant contribution while recognizing related areas, such as environmental protection and ocean pollution.

The book is a permanent record, although edited, of an international symposium organized by SIPRI in June of 1979. The purpose of this conference and of the subsequent book was to focus attention upon current negotiations and to attempt to promulgate a draft convention on the prohibition of the production, storage, or use of chemical weapons. In addition to the destruction—or conversion to peaceful uses—of existing stockpiles of these weapons, the distinguished group of thirty experts discussed fundamental problems, such as the destruction of existing plants, on-site inspections (or on-the-spot inspections), varying means of verification (singularly, the most important stage in the disarmament process), the scientific methods that will be selected to deactivate weapons, production facilities, and the scope of proposed treaty texts. Aside from military, policy, and legal choices, economic implications become crucial, especially as public safety and environmental safeguards even at the regional and global levels become applicable. Accordingly, the book attempts to indicate the methods and procedures by which chemical weapons disarmament may be achieved. While the two superpowers should provide the example in this phase of worldwide disarmament, it needs to be recognized that all nations—including the dictatorship of the left and the right—must eliminate their chemical warfare capability.

At the outset, this book renders its major contribution by dealing with the *implementation of measures* designed to outlaw chemical warfare and the production of supporting chemical agents. In its efforts to concentrate on future attempts to control and eliminate warfare, the book confronts the basic difficulty not present in other aspects of disarmament: the lack of reliable information. In the first paper, by Dr. J.P. Perry Robinson, the basic reality facing disarmament is conceded: neither NATO nor the

4. Compare the language in the 1949 Geneva Conventions and the 1971 Protocols.

Warsaw Pact has released information as to their chemical weapons capability. Similarly, the United States and the Soviet Union have withheld information from the general public. The last Soviet pronouncement was given in 1938; consequently, scholars and policy makers must rely on intelligence sources. Obviously, there may exist a credibility gap that in turn will adversely affect any conclusions advanced in the present volume. By way of example, the methods of verification proposed may prove inadequate if chemical warfare capacity remains undetected. Several of the authors recognize this inherent shortcoming. Notwithstanding the "iron curtain" that has been drawn across any public view of existing chemical weaponry, a three-stage system of control is proposed: 1) monitoring, 2) assessment, and 3) evaluation. The first stage of monitoring, which appears to be the most difficult to achieve, is discussed in a number of papers. For instance, the use of remote sensing satellites and other airborne sensing devices can detect potential violations, but the book unmistakably indicates that satellites alone will be unable to afford a completely reliable system of verification.⁵

Against the background of incomplete information and serious limitations in the proposed verification system, the ultimate requirement is proposed, namely, international cooperation. Indeed, this reviewer has advocated a higher degree of regional and international cooperation to resolve major environmental problems confronting mankind.⁶ Not by chance, the premise offered in the *Introduction* is that the "degree of trust and mutual confidence obtaining between parties to the international negotiations may thus become more important than the merits and demerits, objectively considered, of competing combinations of treaty provisions on elimination, preclusion, scope, and verification." This theme of mutual cooperation is also fundamental to the position of Dr. Lundin,⁷ who seeks to "create" "confidence-building measures,"

5. This reviewer is a strong supporter of the use of remote sensing satellites in a number of areas, such as the detection of ocean pollution. See e.g., B. Jassani, *Outer Space — Battlefield of the Future?* (SIPRI, 1978); Gormley, *Book Review*, V ANNALS AIR & SPACE L. _____ (1980). See generally, Diederisk-Verschuur & Gormley, *The Future Legal Status of Nongovernmental Entities In Outer Space: Private Individuals and Companies as Subjects and Beneficiaries of International Space Law*, 5 J. SPACE L. 125 (1977).

6. W. Gormley, *HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION* (1976).

7. S. Lundin, *Confidence-building Measures and Chemical Weapons Con-*

particularly between the superpowers. Beginning with the provisions of the Helsinki Declaration—on the assumption that such confidence-building measures can be traced to the deliberations of the Conference on Security and Cooperation in Europe—he suggests that those states possessing chemical weapons must generate a sense of trust in their negotiations leading up to a disarmament treaty and in its subsequent observance. In support of his plan to eliminate chemical weapons, Dr. Lundin maintains that confidence-building measures applicable prior to the entry into force of a chemical disarmament convention also be incorporated within the scope of treaty texts, and remain relevant apart from the treaty provisions. A number of stages involving increased cooperation between states is proposed, especially during the verification process. Thus, a complaints procedure is proposed: a committee of experts, established pursuant to a disarmament treaty, possibly within the framework of an international disarmament organization, is also advocated as a means of implementation. If this alternative, strongly favored by the reviewer, becomes functional, the treaty instrument will control the confidence-building measures, pursuant to the norm of *pacta sunt servanda*. Yet, the authors recognize the importance of enacting an international convention—and realistically the difficulty of securing universal ratification, in view of the fact that less than ninety states have ratified the 1979 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*—but they do not rely exclusively upon this type of legal solution.

In evaluating this approach, it appears that the alternative solution, international and regional, plus bilateral cooperation between superpowers⁸ (absent a treaty), may render significant contributions, particularly during the negotiations leading up to the adoption of a multilateral convention. Owing to the nature of disarmament and the necessity for universality, the types of implementing measures required and emphasized in the book demand an organizational structure. While the superpowers, even with the cooperation of a group of industrialized states, may be able to agree to specified measures of weapons destruction and verification procedures, states jealous of their sovereignty (e.g., Commu-

vention, in *CHEMICAL WEAPONS* 139.

8. J. Goldblat, Part III, *Status of US-Soviet Negotiations for a Chemical Weapons Convention*, in *CHEMICAL WEAPONS* 157.

nist China, France, India, Pakistan, plus the dictatorships of the left and of the right) will be at least as hesitant to submit to international control of their chemical manufacture as they are toward control of their nuclear capability.

As can be seen from the fields of human rights protection and the safeguard of the environment, more modest goals can lead to a significant degree of success, which in turn may lead to steps being taken toward a far-reaching solution, an example being the entry into force of the United Nations Human Rights Covenants. Consequently, the thrust of the symposium convened by SIPRI has taken a realistic approach. These experts conceive of a ten to twenty year period to achieve a functional system of disarmament. Because of the fact that chemical warfare was not used in World War II, and that it is regulated by the 1925 Geneva Protocol, immediate action is not required; a more deliberate and piecemeal approach therefore can be employed. The use of chemical warfare in Vietnam by the United States and by the Soviet forces in Afghanistan, however, attests to outbreaks of chemical warfare regardless of the Protocol.

One major shortcoming remains: the need of international supervision within an organizational structure is conceded, but a detailed proposal is lacking. Hence, the required solution is offered but not discussed. Detailed information is provided as to the technical measures that are available to deactivate facilities, particularly the means of production.⁹ In the first instance, existing weapons and stockpiles of chemicals must either be 1) destroyed, or 2) converted to peaceful uses; however, the cost of either procedure is tremendous. Generally, it is much more costly to convert chemical weapons to peaceful uses, as for example to pesticides or agricultural substances, than to manufacture those products from raw materials at the outset. The desirable solution is still, however, to convert these substances to peaceful uses, rather than assume the risks inherent in attempted destruction. Only the cost factor, and possibly the length of time required, may limit this alternative.¹⁰ Indeed, much of the difficulty confronting any sys-

9. R. Mikulak, *Destruction of US Chemical Weapons Production and Filling Facilities*, in *CHEMICAL WEAPONS* 57.

10. K. Lohs, *Destruction or Conversion of Chemical Warfare Agents: Possibilities and Alternatives*, in *CHEMICAL WEAPONS* 69. He concludes:

Most of these compounds and most of the other intermediates of CW agents can find application in the civilian chemical industry for the manu-

tem of verification can be traced to the fact that similar production plants are used to manufacture chemicals for peaceful purposes. As a result, frequent on-sight inspections are essential; however, neither private industry nor the government affected will consent to such constant interference by international teams of inspectors owing to a legitimate necessity to safeguard industrial secrets. The authors take the position that only physical surveillance can assure the peaceful employment of these chemical-producing installations.

The first alternative, however, destruction by burning, exploding, or dumping, has an even greater destructive potential because of the possibility of environmental destruction and the danger to human beings. Major health hazards arise to persons residing in the immediate area and to the personnel attempting to dispose of these weapons systems. As shown by Dr. Kurata,¹¹ serious accidents occurred after World War II when attempts were made by the American military government to destroy the chemical weaponry of the former Imperial Forces. A total of one hundred and two separate accidents, resulting in one hundred and twenty-seven casualties, occurred in connection with these chemical elimination experiments. Not only were people killed and seriously injured throughout these events (even though no one had been killed during World War II by gas, owing to the abstention from chemical warfare), but the ocean environment was polluted. Fishing grounds and the indigenous fisheries were contaminated; Japanese fishermen were killed or injured when these containers were dragged from continental shelf regions in their fishing nets. These injuries and widespread environmental pollution occurred as the result of defective disposal techniques. Lessons can be learned from these tragedies that may guide future experiments.¹²

facture of pesticides, pharmaceuticals, dyestuffs or plastics. These substances are valuable as base products and also in terms of the essential raw materials from which they are synthesized.

Id. at 70 (sources omitted).

11. H. Kurata, *Lessons Learned From the Destruction of the Chemical Weapons of the Japanese Imperial Forces*, in CHEMICAL WEAPONS 77.

12. *Id.* at 89-90. A somewhat similar experience took place in Europe following World War II, when Nazi chemical substances were dumped into the Baltic Sea.

The best known case of stockpile destruction was carried out in a kind of disarmament effort after the defeat of Germany in 1945, during which large quantities of chemical stockpiles (including nerve agents and mus-

It is much more costly, in the long term, to attempt disposal in remote portions of the globe or in outer space, as has been suggested for the disposal of nuclear materials.¹³

The conclusion offered by Kurata is that a treaty should set forth standards to safeguard mankind and the environment, as follows:

The various stages of a disposal system, such as reception of a consignment of weapons from the possessor country, transportation, storage, actual disposal operations, recording and notification, should be clearly set out in a future treaty prohibiting chemical weapons. There should be proper inspection at every stage.

Dr. Kurata concedes the disturbing fact that terrorists may be able to seize such chemical substances. The use to which chemical weapons can be put need not be elaborated: "[T]hus, the importance of the certain, safe and secure disposal of CW agents and chemical munitions cannot be overemphasized."

Other authors, e.g., Vojvodić and Binenfeld,¹⁴ deal with the inherent dangers to be confronted when attempting to achieve the objective of conversion and destruction of military-type chemicals. Solutions of a medical nature are proposed in a series of short papers, constituting the middle portion of text. Human safety in a working atmosphere is outlined, including the indirect utilization of an appropriate convention of the International Labour Organization, i.e., the *Working Environment (Air Pollution, Noise and Vibration) Convention*, adopted by the International Labour Conference in 1977. Such ILO conventions and recommendations are extremely valuable in establishing tolerable exposure limits to govern chemical contacts. It must not be minimized that national criteria and methods for determining relatively safe "exposure limits" differ considerably. Nevertheless, common criteria can be drawn from national experience to protect human beings. The World Health Organization (WHO) has shown special competence in dealing with the "recognition and control of envi-

tard gas) were dumped by the Allies in the ocean. The experience of Danish fishermen in the Baltic have particularly shown that this type of destruction was not of a permanent nature.

A. Ooms, *Verification of the Destruction of Stockpiles of Chemical Weapons*, in *CHEMICAL WEAPONS* 125.

13. *NUCLEAR ENERGY AND NUCLEAR WEAPON PROLIFERATION*, *supra* note 3.

14. V. Vojvodić & Z. Binenfeld, *Some Toxicological Problems in the Destruction of Chemical Warfare Agents*, in *CHEMICAL WARFARE* 95.

ronmental conditions and hazards affecting human health. According to Dr. Rosival, WHO has had considerable experience in cooperating with member states in perfecting environmental health projects. Accordingly, the need for an organizational structure at the international level is again stressed. In this portion of the book it becomes evident that the several distinct phases in the process of the destruction of chemical weaponry require international supervision. Whereas national agencies must control and destroy chemical agents in the first instance, international consultative bodies and committees of experts are required.¹⁵

The final series of papers considers in some detail the problems of verification that were originally raised in the opening portions of the text.¹⁶ This single phase within the total disarmament process is also the most difficult to realize, because of the lack of trust between the major military powers. Accordingly, Dr. E. Roberts places considerable emphasis on repeated inspections, encompassing frequent on-site inspections, as indicated earlier in this review.¹⁷ The significant thrust of Roberts' approach is the use of scientific verification techniques for the *building* of mutual trust and confidence. He recommends:

The simplest and most effective set of on-site monitoring devices would be a combination of temperature sensors installed in each of the major reaction units (probably three to five) plus a physical barrier that would deny access to the central control panel. Also motion-triggered cameras and seismic sensors could be used effectively to detect activity in critical areas. The integrity of both the sensors and the barrier would be preserved by the installation of tamper-indicating seals.

Policy makers and jurists would do well to consider the use of such approaches to verification. Here, the scientific community can render a significant contribution toward disarmament and

15. O. Reutov & K. Babievsky, *Some Aspects of the Problem of the Destruction of Chemical Warfare Agents*, in CHEMICAL WEAPONS 117 (a good summary of prior negotiations at the international level).

16. See R. Roberts, *Verification Problems — Monitoring of Conversion and Destruction of Chemical-Warfare Agent Plant*, in CHEMICAL WEAPONS 129; and A. Ooms, *supra* note 12, at 123. Significantly, he takes a position contrary to that of J. Robinson, *id.* at 9-56. Dr. Ooms maintains: "It is probable that the intelligence organizations of the USA and the USSR are aware of stockpile sites of chemical weapons and have made reasonable guesses of their sizes." *Id.* at 124.

17. R. Roberts, *supra* note 16, at 129.

world peace.¹⁸

Regardless of any available global machinery that is part of a program of an international organization, procedures for continued verification and assessment are required. The unfortunate refusal of states to participate has been indicated earlier in this review.¹⁹ Yet one basic fact must not be minimized: only the major industrialized states have the capability to employ sophisticated verification equipment.

The series of authors have conceded the reality of international life. Although they also recognize the hazards facing man and his environment from the mere existence of chemical weapons, they indicate the steps that should be taken. Tragically, military powers are not prepared to curtail their freedom of action or to ratify a chemical disarmament treaty. The book presents a wealth of information, though a few areas, such as the required organizational structure, might have been treated in more detail. In several cases, significant topics were covered in merely a few pages,²⁰ which resulted in the weakening of key topics.

The *Assessment* and the conclusions of the symposium are advanced by SIPRI in the second part of the book. The authors come to thirteen precise conclusions. On the whole, these conclusions do reflect the book's contents, even though SIPRI's position does tend to be more sweeping than the original presentations.

Considered as one segment within the continuing efforts of SIPRI's global disarmament program, this book constitutes a significant contribution; for the specialist in disarmament, the book deals in depth with a fundamental aspect of the total area, and for the policy maker or international lawyer, it provides an overview of a topic that easily might be minimized. Accordingly, this book has achieved its intended objective.

18. See generally Gormley, *The Contribution of Scientists Toward the Development of International Environmental Law*, 36 INDIAN J. POL. SCI. 358 (1975).

19. *But cf.* the shortcomings, indeed the dangers, of completely relying on remote sensing, R. Roberts, *supra* note 16, at 138.

20. *E.g.*, A. Ooms, *supra* note 12; L. Rosival, *Biomedical Aspects of the Destruction and Conversion of Chemical Warfare Agents*, in CHEMICAL WEAPONS 107; and B. Bosković & R. Kusić, *Long-Term Effects of Acute Exposure to Nerve Gases Upon Human Health*, in CHEMICAL WEAPONS 113.

THE DEFINITION OF LAW. Hermann Kantorowicz. Edited by A.H. Campbell, with an introduction by A.L. Goodhart. New York: Octagon Books, 1980. Notes and bibliography. Pp. 113. *Reviewed by John E. Semonche.**

Hermann Kantorowicz, a refugee from Nazi Germany who became Assistant Director of Research in Law at the University of Cambridge and Lecturer at All Souls College, Oxford, undertook in the late 1930's the foreboding task of putting together a three-volume publication to be entitled *The Oxford History of Legal Science*. Planning to garner original publications on law encompassing the ancient Chinese and Greeks to the present, he assigned responsibility for the projected chapters in the first two volumes before the project was temporarily halted by the outbreak of World War II. Neither the project nor its guiding spirit survived the war. What Kantorowicz did, however, was complete an introductory essay sketching the boundaries that he hoped would house the varying legal cultures that were to be traced in the projected volumes. After fairly liberal editing by A.H. Campbell, Regius Professor of Public Law of the University of Edinburgh, this essay was first published in 1957 with the author's notes and bibliography and with an introduction by A.L. Goodhart, Master of University College, Oxford. In this duplication of the original publication, the Goodhart introduction is especially useful in providing a perspective on the evolution of the author's thoughts on his subject.

To set the stage for the historical essays, Kantorowicz sought the broadest possible definition that would still have the effect of separating legal science from related areas of rule making. As he undertook this task, however, his own persecution by the National Socialists and the alarm with which he viewed Germany in the 1930's were factors that compromised his scholarly disinterest. He was personally committed to refuting John Austin's theories that law was no more than the command of the sovereign and that international law was not law but a matter of public morality.¹ The serviceability of Austin's views for Adolph Hitler was

* Professor of History and former Lecturer in Law, University of North Carolina at Chapel Hill. B.A., 1954, Brown University; M.A. 1955, Northwestern University; Ph.D., 1962, Northwestern University; LL.B., 1967, Duke University.

1. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

obvious. Kantorowicz's equation of law and science was not uncritical, for he recognized that, unlike the natural and physical sciences, law was concerned with values. What the equation primarily meant for him was that in his quest for a definition of law he wanted to vanquish all verbal magic with its pretensions to truth and seek a formulation that would be useful "by connecting what ought to be connected and separating and what ought to be separated."² Then, and only then, could meaningful statements be made. He called his approach "conceptual pragmatism,"³ which, in essence, was what F.S. Cohen had labelled the functional method.⁴ Kantorowicz began by criticizing a series of partial definitions of law, including the restriction of the term to positive law, to rules that are enforced, and to decisions of judges (legal realism), that fell short of embracing the totality of law.

He devotes the remaining chapters of the book to defending his definition of law as "a body of social rules prescribing external conduct and considered justifiable"⁵ against both charges of narrowness and expansiveness. This formulation is concise but hardly unambiguous. By "a body of social rules" he means a body in which the components possess common characteristics that make them coherent and interdependent. Following the author thus far causes no real problem, but when he reduces all law to prescriptions, some difficulty is introduced. For instance, W.N. Hohfeld has argued that a permissive right may be conferred by law without the necessity of protecting it from interference, thereby suggesting that a formula of prescription that seeks to elide all rights into corresponding duties would be deficient.⁶ Campbell, the editor of the book, is impressed with this objection. It is possible, however, to argue that a case can be made for excluding the permissive right from a definition of law. At any rate, this problem is relatively minor in comparison to those introduced by the remaining words of the definition.

By restricting law to external conduct the author intended to exclude moral precepts or what others have called moral law.

2. H. KANTOROWICZ, *THE DEFINITION OF LAW* (1980).

3. *Id.* at 5-10.

4. See F.S. COHEN, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 835-42 (1935). Cohen acknowledges the work of Kantorowicz. *Id.* n.72.

5. *Supra* note 2, at 79.

6. W.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 39-44 (1923).

Contending that law concerned itself only with external conduct and the realm of morals with internal conduct, Kantorowicz sought to pierce through the ever-present fog and present a clear dividing line between the two. Noting that the law is loaded with terms such as good faith, malice, meeting of the minds, the author stated that the law considers only external conduct in making these assessments. Although we might agree that this practice is often the case, it certainly is far from universally true. Presumptions can be rebutted. What seemed to worry the author was the Nazi claim that law and morality were one, a claim that obviously posed threats to the individual conscience. Kantorowicz acknowledged that many societies have had laws against heresy, but he argued that the enactment of such legislation no more makes the rule part of the law than the enactment of the multiplication tables in a statute would make them the law. Throughout his treatment the author is critical of attempts to dismiss, as non-law, rules that are not enforced or rules that are not just, but here he seems to say that what is obviously part of the positive law is not law at all. Since a ban on heresy seeks to condition belief, Kantorowicz argues, its enactment into a code cannot legitimize its bastardy within a system that is designed to concern itself exclusively with external behavior. There is a difference, however, between an admonition against heretical thoughts and a law that has to work with the manifestation of such thoughts in external behavior. Galileo was forced to recant his belief in a heliocentric universe and to forebear teaching such a doctrine not because he held uncommunicated thoughts but rather because he made them part of his external behavior. The law continues to deal not with what people believe but with what they say they believe. Kantorowicz wanted to build a wall between internal and external behavior, but the cement that will hold such a wall together has not been found. Just as what is internal can easily become external, so can external manifestations lead to a probing of the internal self. The author is correct in his view that the law is not concerned with whether an act was motivated by moral or immoral thoughts, but to argue that the state of the subjective mind is of no concern to the law is simply not correct. The psychiatrist who is evaluating a defendant's claim of insanity is indeed observing what the individual does and says, but he is charged with the very subjective task of determining the actual mental state of an individual at a time prior to that of his examination. Certainly this is an internal inquiry that an evaluation of external conduct can aid

but not presume to decide. We can sympathize with Kantorowicz's attempt to isolate the internal side of man from the tentacles of the law, but the physiological and psychological validity of creating an impassable barrier is doubtful.

Finally, Kantorowicz seeks in the last part of his definition to distinguish social custom from law. Recognizing that content does not differentiate the two bodies of rules, the author resorts to the phrase "and considered justiciable." In the most compressed part of his definition, Kantorowicz first tries to accommodate unenforced rules by adding a subjective criterion that the people who apply the rules or those who want to see them applied consider them fit to be applied, whether they actually are or not. Where other aspects of Kantorowicz's formulation are too narrow, the reduction of law to a body of rules that an interested party considers justiciable is far too broad. Any practicing lawyer is regularly confronted by clients who consider as justifiable, claims that the courts, in their most expansive posture, would not entertain. By deliberately avoiding a definition of law that hinges upon its source or one that hinges upon its enforceability, the author introduces a subjective factor that seems to make the content of law subject to the whims and perceptions of the individual. Kantorowicz did not wish to qualify the range of consideration because such a limitation would have introduced into his definition a repository of authority, but the ensuing result runs the considerable danger of having the subjective factor swallow up the objective ones.

The word "justiciable" was used by the author as a substitute for "judicial organs," which are defined in terms of impartial parties, following a set of regular procedures in applying the rules, either consciously or unconsciously, to conflicting parties. Kantorowicz chose the more general expression because the term "judicial organs" is so close to courts. He rejected the notion that the term "law" should be restricted to enforced law, but he did not reject the line of reasoning that introduced the concept of potential enforceability by an impartial agency following regular procedures. In this way, unenforced law could still be considered law as long as it could be considered potentially enforceable. This solution seems to work, but by positing a scheme of potential exterior enforcement Kantorowicz may not have attained the cross-cultural breadth he sought in this definition. Cannot we conceive of rules that would be viewed as law in their regulation of conduct without the existence of exterior organs that could potentially en-

force them? Does exclusive self-enforcement necessarily mean that custom and not law is being enforced? In feudal Japan a samurai who had been dishonored resorted to *seppuku* (suicide). Should he have not chosen to kill himself, no exterior agency would or could have meted out a death sentence. Kantorowicz would have no difficulty in saying that the rules here are custom and not law, but can we be sure that such ready categorization is not simply the result of Occidental provincialism?

By using the criterion of justiciability Kantorowicz excluded much social custom from law. The elders of a tribe may not be summoned to mind by the phrase "judicial organs," but their decisions are based on rules and a regularized procedure that the author accommodated within his definition. On the other hand, despite the fact that a social climber struck from the guest lists of the local elite for a social *faux pas* would be effectively sanctioned, it would not be, within the author's definition, for a violation of law. Kantorowicz did recognize, however, that his formulation encompassed a number of "borderline cases."⁷ Citing love-making in medieval times, the chivalrous duel, beer drinking in German fraternities, and, of most general import, the rules of sports and games, the author rejected the conclusion that by including such activity within his definition he had confessed his failure. According to Kantorowicz, unlike the sociological literature that concerns itself with custom, the literature in the areas of the "borderline cases" is remarkably similar in character to that of law. To exclude these cases, he maintained, would "deprive the whole concept of law of its usefulness."⁸

Although this rationale seems both circular and self-serving, this reader has some sympathy for it. To encompass the entire history of law in human society, breadth is essential, and that what has not been studied in law partakes of many essential characteristics of law should not be surprising. Once the focus has been shifted away from some connection between formal government and law, there is bound to be considerable difficulty in isolating what is considered as law from other social activity taking place within a structure of rules. The loose kinship is there and more is gained philosophically by recognizing it than is by respecting the artificial barriers that so many legal scholars continue to erect and defend. Lawyers have been involved in private

7. *Supra* note 2, at 82-89.

8. *Id.* at 87.

rule making for hundreds of years, but the forty years since Kantorowicz constructed his definition have seen the pace and extent of such practice accelerating, even to the point where it is recognized in law school curricula with such titles as School Law and the Law of Sports. As the legal realists counseled long ago, look at lawyers and inspect what they are doing to find out what law is. These more recent developments only further confirm the usefulness of a definition that seeks to move beyond the cramped notion of law as governmental edict.

As long as there is value in the jurisprudential quest for a definition of law, Kantorowicz provides a useable model. Avoiding the verbal magic that distorts the quest, we always must ask for what purposes the law is defined. To say that we seek not the truth but usefulness in such a definition is not to degrade the inquiry but rather to upgrade it to a level where the task has direction and where a basis of evaluation is presented. Kantorowicz's definition of law as "a body of social rules prescribing external conduct and considered justifiable"⁹ was intended to provide a framework upon which a discussion of the history of law in human society could be built. His lack of complete success leads this reader to wonder whether a definition can be formulated that would achieve the author's purpose. Despite the existence of some common characteristics, much of law is as culture bound as are the scholars who seek to define it.

9. *Id.* at 79.