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Book Review

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BOOK REVIEW

THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW. Jerome B. Elkind, ed. St. Paul: West Publishing Company, 1978. Pp. xvii, 372.

Selection of a book title is an important editorial act, especially in the field of scholarly literature where a precise description of a book is necessary to ensure its proper classification and increase its potential use. There can be no greater disservice to authors than the assignation of wrong titles to their works by inept or ambitious editors and publishers. Finding a suitable title is especially difficult for the collective work of a number of authors writing on unrelated topics. It is for this reason that the tradition of using such terms as "essays," "Feitschrift," or "melange" in the titles of collective works has evolved in Europe. These terms trigger the attention of bibliographers to the fact that the respective works might require separate in-depth indexing for the individual contributions in trade journals, indices, and trade services. Subject classification and indexing become particularly indispensable attributes in scholarly literature, since the predominant function of scholarly literature is to communicate information rather than offer literary pleasure.

The question of title selection becomes especially relevant in the context of a discussion of the book herein under review, *The Impact of American Law on English and Commonwealth Law.* The title is overly ambitious. It suggests a work of broad compass, perhaps containing a systematic survey of the influence and application of the American[1] legal doctrine in other common law countries. A definite need exists for a study of that kind. While legal scholars in the United States and other common law countries have published innumerable works comparing their respective laws in specific areas, no comprehensive study has yet been undertaken concerning the acceptance of American legal ideas and methods in England and other Commonwealth countries. An empirical analysis of whether and to what extent American law has had any impact at all on the development of the law in the other common law countries would be both interesting and valuable. Unfortunately, despite its title, this book does not provide that analysis.

1. In accordance with the author's usage of the terms, "American" and "United States" are used interchangeably throughout this book review.

The Impact of American Law on English and Commonwealth Law is merely a collection of seven essays on unrelated legal topics. The authors are present or former members of the University of Auckland Faculty of Law, the largest and foremost of the four law schools in New Zealand. The editor of the book, Jerome B. Elkind, is an American attorney who teaches now at the University of Auckland. He inspired the emphasis on American law in the writing of the essays, and he eventually combined them under a title highlighting the American law emphasis.

The essays deal with such diverse subjects as constitutional protection of personal rights, judicial review of the constitutionality of legislation, legal elimination of racial discrimination, product liability, defense to restitution, inequitable incorporation, divorce without fault, and statutory interpretation. All of the essays have two common elements which establish a tenuous link among them despite their significant thematic differences. First, the description and analysis of the relevant legal developments in all of the subject areas extend more or less broadly across the jurisdictional boundaries of England, Australia, Canada, New Zealand and other"Commonwealth" countries which embrace the jurisprudential tradition of the common law. All of the essays adopt a comparative approach of presentation in the sense that the discussion on each subject proceeds sequentially from one jurisdiction to another. Although this approach is informative in its description of the relevant state of law in each jurisdiction, it falls short of the more penetrating and conceptual method of comparison practiced by such leading comparativists as Rabel, Schlesinger, Zweigert, Tunc, and others.[2] Second, in accordance with the editor's instructions, an effort is made in each essay to examine the state of American law on the topic in question and to determine the extent of its potential influence or utility in the development of the respective legal systems in the Commonwealth countries. In some instances the references to American law are sketchy; elsewhere the discussion is more detailed and thorough, demonstrating a good understanding of relevant American law.

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2. *See, e.g.*, E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY (2d ed. 1958); E. RABEL, DAS RECHT DES WARENKAUFS (1967); M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW (1972); R. SCHLESINGER, FORMATION OF CONTRACTS (1968); INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (K. Zweigert & U. Drobnig eds. 1971). The scheme of comparative analysis adopted for use in the *Encyclopedia* was described in Drobnig, *In the International Encyclopedia of Comparative Law: Efforts Toward a Worldwide Comparison of Law*, 5 CORNELL INT'L L.J. 113 (1972).

In his essay on race relations, Jerome B. Elkind comes close to the development of a useful conceptual analysis through a skillful discussion of American decisions and statutes, within the context of the problem encountered by the English antidiscrimination legislation in the course of its rough and uneven development. R.J. Sutton's essay on restitution, although very narrow in scope because it deals only with the defense of "change of circumstances," contains a lengthy review of recent American law on this point. Pauline Vaver presents a good overview of the historical evaluation of no-fault divorce in the United States in an essay which shows a definite influence of the late Max Rheinstein, with whom Ms. Vaver must have studied during her time at the University of Chicago as a Bigelow Fellow. Although these authors present an accurate description of the state of the law, none of them offer convincing evidence of the influence of the American law on the laws of the Commonwealth countries. Some, like Elkind, endeavor to find a link between the laws of the respective jurisdictions whose origins may lie in the United States, but none are able to present a convincing case for even a moderate embracement of the American law within the Commonwealth. Reasons for this will be explored at the conclusion of this review.

The essays differ considerably in style and editorial organization. Some, like David Williams' essay on constitutional law, Michael Whincup's essay on product liability, and Pauline Vaver's discussion of divorce without fault, are descriptive surveys. R.J. Sutton's essay on the defense of "change of circumstance" consists really of two papers, one on English law and the other on American law. Michael Whincup's discussion of inequitable incorporation is in effect a brief in favor of a reform of the English law on that point. Jerome B. Elkind uses an analytical approach in his essay on race relations and goes beyond mere comparative description, viewing English law in the context of United States issues. The book also contains a second essay by Mr. Elkind, inappropriately entitled "Overview and Conclusion," since it is merely another essay which examines the different approaches toward statutory construction developed in the United States and England. This essay is particularly interesting because, in addition to its readability and schoarship, it reaches the rather surprising conclusion that the American legal attitude on statutory construction more closely resembles the methods developed in the civil law countries of Western Europe than the traditional legislative approaches of England and other common law jurisdictions. This thesis is one

which has not received general scholarly acceptance.[3]

Has the American law influenced legal development in other countries? The question is not at all academic when it is remembered that the United States has consciously spent many millions of dollars in the past three decades on the dissemination of American legal ideas throughout the world—perhaps as a countermeasure to the spread of Marxist ideology, in which case the experiment has not been very successful.

There is nothing particularly unusual or distinctive about the deliberate borrowing of one country's legal texts and ideas by another country; transplantation of law is a common historical occurrence.[4] The successful migration of the English legal system to many other parts of the world or the adoption of the Justinian interpretation of Roman law by the European countries offer cogent examples of that fact. In addition, many historical examples of direct copying exist, both as a result of voluntary cooption and involuntary enforcement of the laws of another state. French, German, and Swiss codes have served as models for the codification and modernization of laws in Africa, Asia, and Latin America; Soviet codes have been adopted in Eastern Europe and Cuba (the new Cuban family code, for instance, is a fairly accurate facsimile of its Soviet counterpart); and, more recently, legislation on economic and technological matters in some of the developing countries of Africa shows a considerable predisposition for similarity to that of the Common Market countries.

Of course, the adoption of foreign laws as one's own is dependent upon the existence of the appropriate socio-political and economic conditions, since law is a subordinate instrument of the ideological, moral, or practical goals of the society it is expected to serve. All of the above examples illustrate successful transplantations of law where the economic and political circumstances were conducive to their reception and enforcement. Although nothing at all has been written about unsuccessful transplantations, an opportunity may exist presently to study such a failure in Ethiopia,

3. *See* K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (1977). This work was originally published in German as K. ZWEIGERT & H. KOTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIETE DES PRIVATRECHTS (1971). *See also* W. FIKENTSCHER, METHODEN DES RECHTS (1975-1978).

4. *See* A. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974); Kahn-Freund, *On Uses and Misuses of Compative Law,* 37 MOD. L. REV. 1 (1974); Stein, *Uses, Misuses—and Nonuses of Comparative Law,* 72 NW. L. REV. 198 (1977); Watson, *Legal Transplants and Law Reform,* 92 L.Q. REV. 79 (1976). (1976).

where intensive work on legal reform by a large number of eminent legal scholars over a period of several decades may be rendered useless as a result of radical political change.[5]

In view of the absence of satisfactory documentary evidence about unsuccessful transplantations, legal science knows very little about the precise mechanisms for the acceptance or rejection of foreign legal norms by other countries. It is possible to speculate in such circumstances about the interdependence of law and political or economic conditions, but a profusion of minute factual differences between one situation and another produces too many variables to derive any meaningful conclusions. Further, the acceptance or rejection of a foreign legal concept may frequently depend on the whim of an individual. A judge may not wish to follow a foreign precedent because he lacks knowledge about that legal system, or a legislator may refuse to use a foreign law as a model for political reasons.

What seems to distinguish the recent American efforts to disseminate its legal ideas abroad from other transplantations of foreign law are the policy reasons which initially induced the United States to enter the field of transnational legal reform and the method which scholars and officials developed to further that policy.[6] It may be fair to say that the United States stumbled into this field by accident, but that it thereafter pursued the accidental goals with characteristic national vigor and a doctrinaire sense of commitment. In the course of its involvement in transnational legal reform, the United States dedicated immense financial, professional, and educational resources toward the furtherance of legal values which it believed to be necessary for the improvement of living conditions and personal rights in other countries. It is not surprising that these values also happened to represent fundamental principles of American law. Lawyers in the United States as elsewhere tend to have conservative and patriotic attitudes in matters relating to their professional education and training without regard for their political tendencies. When they are asked to develop legislative models for other countries, they tend to see them in the image of American law.

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5. On the law reform in Ethiopia, see Beckstrom, *Handicaps of Legal-Social Engineering in a Developing Nation,* 22 AM. J. COMP. L. 697 (1974); Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia,* 21 AM. J. COMP. L. 557 (1973).

6. *See* Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement,* 25 AM. J. COMP. L. 457 (1977).

The first indications of the United States' involvement in transnational legal reform occurred in the last days of the Second World War and during the immediate postwar years. The United States had emerged from the war as the wealthiest and strongest nation in the world. Relatively unaffected by the ravages of war, it possessed a highly developed industrial system, an excess of food products, and a sound economic base.

The effects of the war were unbelievably devastating and horrible in Europe and Asia. Millions of people, most of them innocent victims of circumstance, had needlessly lost their lives. Many more millions were displaced from their homelands. Cities were destroyed; industry was obliterated. All of the vanquished and most of the victorious nations were completely impoverished; their people were physically and spiritually exhausted. Through the complete annihilation or extensive weakening of states which had wielded international dominance in the years prior to the war, a serious vacuum came into existence in the political and legal structure of the world, and the situation was further aggravated by actual or threatened territorial encroachments of the Soviet Union. Alone among the countries of the western world, the United States was economically and militarily capable of stepping into the international void with the practical effect of restoring some semblance of peace and order. It assumed the role of leadership in the western world. History will tell whether the United States has performed well the responsibilities hoisted upon it by the sudden imposition of global supremacy.

The United States has performed one meritorious deed in this capacity which already stands to its credit. Although this deed is frequently forgotten today, it is without precedent in the whole history of mankind. Immediately after the conclusion of the war, the United States engaged in an act of exceptional humanitarian generosity by establishing a massive program of economic and technical assistance to all needy nations of the world. Though it is pointed out from time to time that the program was motivated by political considerations, it remains nevertheless a monument to American magnanimity. This aid was the only practical method of enabling the world to endure the first postwar years and then begin a steady climb toward recovery. In later years, when the range of this international assistance program was expanded, the consequences of its benefits became applicable to countries in the less developed areas of the world.

Concurrently with the development of economic aid, the United States also found itself in the position of being required to administer occupied territories and redesign the legal systems of the van-

quished nations.[7] A large task force of American lawyers was mobilized to perform these functions, and it is therefore not surprising that the postwar legislation in Germany and Japan bears some resemblance to American laws. For the American lawyers it was the first experience of transplanting their legal ideas and values to other countries. Although United States laws had been previously utilized in foreign countries, those countries were generally underdeveloped (as in the case of the Philippines and the islands in the Caribbean) or the circumstances were unique (as in the case of the Canal Zone and the American Court in China). In the case of postwar Europe and Japan, United States lawyers for the first time faced the necessity of redeveloping socieites which could fully relate to American ideas. Because of their own levels of development the situation presented an opportunity to turn those ideas into concrete legislative concepts. This instant "social engineering" could not have been more satisfying to United States lawyers nurtured on the ideas of Pound, Llewelyn, and other American pragmatists.[8] For whatever reasons, the transplanations were successful and the experience was exhilerating.

It is suggested that this first experience and its relative success were directly responsible for the subsequent unshakable belief of American lawyers in the universal applicability of their legal values. An opinion slowly began to form among enthusiatic comparativists that American law not only reflected the operation of an economy in a highly advanced industrial society, but also was its motivating force. From this belief it was only a short step to the conjecture that American legal methods could be used in combination with economic and technical means to erase the endemic poverty and injustice in less developed countries.

Government and private institutions, including the Agency for International Development, the Ford Foundation and the International Legal Center, and the Asia Foundation were persuaded to make substantial grants for the study and modernization of foreign legal systems, especially in developing countries. The modernization efforts under such grants were to be carried out within the conceptual framework of the American legal system as a means toward the ultimate improvement of social and economic condi-

7. *See* H. HOLBORN, AMERICAN MILITARY GOVERNMENT (1947); A. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK (1976).

8. On social engineering, see R. POUND, SOCIAL CONTROL THROUGH LAW (1942); Pound, *The Theory of Judicial Decision* (*pts.* 1-3) 36 HARV. L. REV. 641, 802, 940 (1923); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America,* 58 VA. L. REV. 999 (1972).

tions in developing countries. Many legal scholars from the United States began to travel to foreign countries in order to teach and learn there. Language was a frequent barrier to meaningful research into the intricacies of laws in foreign countries. Yet the immediate results seemed surprisingly successful. Foreign lawyers and law students acquired knowledge about the American legal system and expressed admiration for the refreshing, problem-oriented, instructional methods of their American teachers. At the expense of the United States government or American private foundations, many students from foreign countries were brought annually to the United States to study American law in American law schools. The full substantive impact of this educational process has not yet been fully appreciated. Although the question of whether the subsequent attitudes of those foreign students toward American law correspond to the objectives of the institutions they attended, the institutions in question clearly had some effect upon the students. Many foreign students indicated an admiration and a preference for American legal values, while others expressd a disappointment in the United States and the decline of its values. This educational impact issue becomes increasingly important since many of the foreign students of American law schools now occupy high professional or political positions in their own countries.

Meanwhile, in the early 1950's, American business enterprises began to increase their activities and to establish foreign branches. Economically dominant, they were able to exert an incredible influence on the living patterns and cultural preferences of people in many other parts of the world. From soft drinks and movies to automobiles and kitchen appliances, United States business was more responsible for the acceleration of changes in consumer expectations and wants than any other single force. Although American business abroad was subsequently berated in Servan-Schreiber's *American Challenge*[9] and a number of successive books, and eventually earned the pejorative name of "transnationals," the business methods and industrial processes of American enterprises were eagerly copied by the governments and people of foreign countries. The ensuing changes in international postwar economic practices gave rise to a greater curiosity in American commercial and corporate law principles. New laws to deal with more liberal credit and investment attitudes became necessary, to provide the flexibility and self-determination in fi-

9. J. SERVAN-SCHREIBER, AMERICAN CHALLENGE (1965).

nance, corporate organization, and labor relations. Although American laws were sometimes copied directly in such circumstances, they were more frequently studied carefully for alternative solutions for the new practical problems faced by other nations. Thus, aside from the impact of American legal education methods which were received with acclaim by the law students in many foreign countries, the areas of American law with the greatest influence abroad are its commercial and corporate segments. This obvious conclusion is frequently disregarded by American legal scholars who are ideologically committed to the "social engineering" aspects of law and who wish to use it in a transnational setting as a tool to improve the economic and social conditions of foreign societies through legal reform.

It required the sobering adjustments of the 1970s, when the economic and political costs of financing international development projects suddenly became prohibitive, for the various research groups to realize that their efforts to introduce American legal values in other countries may not have been justified. Contrary to the earlier beliefs, legal ideas were found to be less easily exportable than food or industrial know-how. It was also determined that an externally induced legal reform is not necessarily a panacea for social and economic ills and can sometimes produce spurious or converse results.

With regard to the reception of American law by foreign countries the researchers could report only a few scattered instances of direct causality between their efforts and the ensuing acceptance of the legal solution suggested by them. In all other respects the transplantation effort was largely a failure. The story of that failure is candidly analyzed in several recent articles by distinguished comparativists and "law and development" specialists, including Merryman and Trubek.[10] John Hazard, the leading expert on comparative law in the United States today, concludes that:

> [T]he action-oriented American approach has been incompatible with the intellectual styles and legal cultures of most developing countries, because the principal legal tradition in these countries, like the civil law on which it is based, is more academic and more concerned with theory than the American approach. The American law and development movement has failed largely because of a lack

10. Merryman, *supra* note 5; Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,* 1974 WIS. L. REV. 1062.

of communication—the developing countries are not able to understand the "language" of the American approach.[11]

The editor of *The Impact of American Law on English and Commonwealth Law* quite sensibly wishes to avoid the rise of disappointment created by such doctrinal differences between American law and civil law. To be on the safe side of finding at least some favorable instances for the receptability of American law abroad, he confines his inquiry to the influence of American statutes and case law on legal developments in the other common law countries. In this respect his inquiry stands on more comfortable ground. American law will undoubtedly be better understood in other common law countries because the antecedents are the same. The findings with respect to United States transplantation in common law countries may also be more valuable from a scholarly as well as a practical standpoint. The degree of acceptance of American law in the Commonwealth countries, espousing the uniform tradition of the common law but with significantly different levels of legal and economic development, may produce a useful measuring rod for the intrinsic exportability of Amercian legal ideas and concepts.

Yet, as the different essays in this book conclusively demonstrate, the results of this inquiry are just as disappointing as the findings of legal scholars investigating the reception of American law in other parts of the world. The use of American case law in the Commonwealth countries is desultory and frequently erroneous (for example, it is evident in the essay on constitutional law that the application by the Indian Supreme Court of American constitutional cases in the interpretation of the Indian constitution is more literary than jurisprudential, though the author of the essay does not point out this curious aberration).

In contrast to United States case law, American statutes seem to receive more attention in the numerous law reform inquiries conducted by various permanent or temporary commissions which exist now in almost all Commonwealth countries. However, although they are frequently observed, American statutes are almost never used in the drafting of legislation. A marked difference exists in the style, language, and approach of American drafting and English statutory drafting which continues to be used in Commonwealth countries. Little room remains, therefore, for adoption of the more ostentatious language of American statutes. Some of the

11. Hazard, *Development and "New Law,"* 45 U. CHI. L. REV. 637 (1978).

contributors to this book try to establish tenuous relationships between statutes of American origin and their Commonwealth counterparts, but these efforts are inconclusive. In the end, the editor is forced to admit that "English and Commonwealth judges strenuously resist using American law . . . [and] when they do . . . it is often with little real understanding."[12] It follows that "practitioners do ignore American law."[13] Perhaps the American law, in the words of Erwin Griswold, is "the most complicated legal structure that has ever been devised and made effective in man's effort to govern himself."[14]

Nevertheless, teachers and students continually discover that no fundamental differences exist between American law and the laws of the traditional Commonwealth countries (England, Australia, Canada, and New Zealand). The major principles, concepts, and methods are virtually identical, and exchanges between lawyers of those jurisdictions are quite intelligible and meaningful. A scholarly tradition of comparing special subject areas of American law with their Commonwealth counterparts, of which this book of essays is a good example, is actively pursued in all of the common law countries. More than thirty articles of this type were published in American and Commonwealth law reviews in the last four years alone.[15] Several treatises, including John Fleming's classic *Law of Torts*,[16] have successfully straddled the geographic boundaries of

12. THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW, at ix (J. Elkind ed. 1978).

13. *Id.*

14. E. GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES 3 (1964).

15. For some typical recent examples, see Covington, *American and British Employment Discrimination Law: An Introductory Comparative Survey*, 10 VAND. J. TRANSNAT'L L. 359 (1977); Davidow, *Obscenity Laws in England and the United States: A Comparative Analysis*, 56 NEB. L. REV. 249 (1977); Davies, *Canadian and American Attitudes on Insider Trading*, 25 U. TORONTO L.J. 215 (1975); Farrar, *Aspects of Police Search and Seizure Without Warrant in England and the United States*, 29 U. MIAMI L. REV. 491 (1975); Gibson, *Products Liability in the United States and England: The Difference and Why*, 3 ANGLO-AM. L. REV. 493 (1974); Grosh, *Trustee Investment: English Law and the American Prudent Man Rule*, 23 INT'L & COMP. L.Q. 748 (1974); Honsberger, *Bankruptcy Administration in the United States and Canada*, 63 CAL. L. REV. 1515 (1975); Laskin, *Comparative Constitutional Law—Common Problems: Australia, Canada, United States of America*, 51 AUST. L.J. 450 (1977); Mason, *Share Dealings by a Company's Officers: An Australian-American Comparison*, 12 U. W. AUST. L. REV. 153 (1975); Palmer, *Social Engineering in New Zealand and the United States: A Comparison of Approaches to Tort Reform*, 4 WM. MITCHELL L. REV. 315 (1978); Ziegel, *American Influences on the Development of Canadian Commercial Law*, 26 CASE W. RES. L. REV. 861 (1976).

16. J. FLEMING, THE LAW OF TORTS (5th ed. 1977).

the major common law jurisdictions and merged their respective case law into a common system. Students and teachers can easily move between law schools in the United States and other common law countries without losing their ability to understand and communicate.

The limited use of American case law in the Commonwealth countries should not be surprising. With the exception of English cases, the decisions of other Commonwealth countries receive the same indifferent treatment in all Commonwealth jurisdictions; the English courts studiously ignore the decisions of other Commonwealth countries. For that matter, American courts do not consult the case law of English and other Commonwealth countries all too frequently. *Espinoza v. Farah Manufacturing Co.*[17] is a recent example in point. In that case the Supreme Court was asked to interpret the meaning of the terms "nationality" and "national origin" as used in the Civil Rights Act of 1964. In delivering the opinion of the Court, Justice Thurgood Marshall did not make any reference to the English case of *Ealing London Borough Council v. Race Relations Board*[18] which had been decided by the House of Lords one year earlier. The editor of the book under review discusses the two cases in his essay on race relations and then again in the concluding essay on statutory interpretation, but he does not point out this obvious "parochial" oversight of the United States Supreme Court.

It is, of course, possible that the true quality of the common law is not in its cases, statutes, or other external manifestations. Perhaps its primary influence is indirect, and one must look for the principal attributes of the "migratory" values of the English law as the source for all common law in its uncanny ability to induce local autonomy in each of its successful transplanations and yet make them all cling to certain common traditions in legal methodology, reasoning, and attitude. It is in these areas of jurisprudence that the common law has its greatest impact on societies with other legal traditions or cultures. The successful influence of the common law may thus be described as subtle and indirect, imperceptibly altering social and political opinions rather than formally changing legal rules. In a wider sense of inquiry the common law is inextricably bound with political ideas of human equality, individual freedom and judicial impartiality. *The Impact of American*

17. 414 U.S. 86 (1973).
18. [1972] 2 W.L.R. 71; [1972] 1 All E.R. 105.

Law on English and Commonwealth Law might have profited from deeper analyses along these lines.

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