As a purely tentative suggestion, could we not talk about "value judgments?" They compare conveniently with law judgments or indeed with court decisions, or the total content of the law in a general sense. For my part, I quite agree that moral values are more than "criticized experience" or other pragmatic concepts, no matter how expertly these concepts are developed. But I submit that value judgments are made in the active sense by human beings and that the whole of the human conscience, understanding, and will (along with consciousness and other elements which may be included) are used in producing these value judgments. On conscience, then, we can all stand, in giving every element of the Good to the law that is so dear to us, while each retains for himself the sources of spiritual strength which he derives from his own personal allegiances.

PAUL SAYRE.†

SEX AND THE LAW. By Morris Ploscowe.* New York: Prentice-Hall, Inc., 1951. Pp. ix, 310. $3.95.

Sex and the Law is a comprehensive, well-organized examination and analysis of the case and statutory law, both civil and criminal, regulating sexual activity in the United States at the present time.

Judge Ploscowe's approach to such a diversified and far-reaching subject is ideal, for he not only compares and discusses state by state the various laws, pointing out the defects, inconsistencies, and problems caused by their differences, but also makes an internal analysis of the laws within various states. In consequence, the full effect of society's attempt, through law, to regulate sexual behavior is exposed.

Nowhere is the sex law more incongruous and lacking in reality than in the regulation of marriage. For example, every jurisdiction has, either by statute or by common law, established an age of consent for marriage—that is, the age at which a boy or girl may enter into a legally binding marriage. At the English common law, the age of consent was fourteen for the boy and twelve for the girl. The age most frequently found throughout the United States at the present, however, is eighteen years for males and sixteen years for females. In no instance has a legislature set the age at twenty-one, which is the usual age of consent in the case of ordinary contracts. The anomaly exists, therefore, that while a boy or girl under twenty-one years is not bound by an agreement to

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buy a twenty-five cent comic book or a dollar hair ribbon, the same boy and girl may enter into a binding marriage with one another.

More bewildering is the fact that even though the boy or girl may not be of the age of consent set by the statute, so long as the under-age party is not under seven years, the marriage is generally not regarded as void but only voidable, and then only by the parties themselves. Unless disaffirmed, such a marriage will become completely binding upon reaching the age of consent.

Parental consent when the boy is under twenty-one years and the girl is under eighteen years is another requirement found in almost every state. If one party is above the age of consent for marriage but within the statutory age limit requiring parental consent, the law requires that before a license shall be issued the parent must acknowledge his consent in writing. Such statutes have, in general, one defect: their violation merely subjects the license clerk to a penalty; the courts have almost universally held the resulting irregular marriage to be valid and binding upon all concerned.

Should the clerk refuse to issue the license, however, and if a minister or other person authorized and willing to perform the marriage ceremony can be found, the marriage will, in most jurisdictions, be binding, for the license statutes have generally been interpreted to be directory rather than mandatory. If a willing minister cannot be found, the parties may still, in twenty-odd states, enter into a common law marriage, which is just as binding as a formal ceremonial marriage. The fact that legislatures permit the anomaly of the licensing and parental consent statutes and the common law marriage to continue in co-existence is not only logically indefensible, but causes real tragedy by the recognition of common law marriages. All that is generally required for such marriages is an agreement by two competent persons to take each other as husband and wife. As far as the law is concerned, there need be no witnesses, no formal words, the agreement may take place at any time or place, may be oral or written, and may be proved by the express words of the parties or implied from their conduct. Even the layman will immediately recognize that the determination of whether or not a common law marriage actually was entered into could, in many instances, be arrived at with almost as much certainty by the toss of a coin. Yet, upon this decision rests rights to property, legitimacy of children, and social approval or disapproval. The pity of it all is that there is absolutely no need today for the common law marriage, since marriage license officials and persons authorized to perform marriage ceremonies are everywhere readily accessible.

Unfortunately, in real life, not all persons when once married live happily ever after. Many attempt to make the most of a bad situation, but others, in ever-increasing numbers, turn to the divorce courts to rid themselves of their unwanted spouses.

Traditionally, it was felt that divorce should be granted only for the gravest kind of misconduct—misconduct so serious that it would render any further cohabitation unsafe or intolerable. Today, however, the legislatures have expanded the grounds for divorce to include such causes as non-support, personal indignities and incompatibility of temperament. An even greater expansion has been effected by the courts through their liberal interpretation of the meaning of such words. Judge Ploscowe clearly states the situation, using mental cruelty as an example, when he says:

> It is obvious that with the boundaries of mental cruelty so poorly defined and with so much discretion in the hands of the trial court, whether or not a judge will grant a divorce in a particular case on the ground of mental cruelty will depend to a considerable degree upon his general attitude toward marriage and divorce. (P. 69.)

There are many other grounds which are just as poorly defined and to which his statement is, in general, just as applicable.

Another traditional concept of American law has been that a divorce is granted only to a party who is himself free from misconduct. If both parties are guilty of conduct which would, standing alone, be grounds for divorce, the court is obliged to affirm the marriage. Since the law forbids divorce by consent of the parties, such couples, theoretically, must remain married or the law must be violated. In actual practice, the latter is far more frequent than the former and is accomplished by the quite simple method of having one of the parties "consent" to the divorce by not contesting it. Since the courts lack means with which to make their own investigations, they are generally content to accept the plaintiff's evidence at face value. Thus, there is ample opportunity to fabricate the evidence required for divorce with a better-than-even chance of getting away with it.

A layman might well conclude that marriage would appear to be the only *real* requirement for divorce: and as long as common law marriages are recognized he cannot even be certain of that!

The crazy-quilt legislation produced by the state legislatures in the area of the *criminal* law is further evidence of the thorough revision needed if a rational sex policy is to be achieved. Every state has a so-called statutory rape statute—*i.e.,* a statute declaring intercourse by a

man or boy with a girl under the age set by the statute to be rape, even though the girl consented. Under these statutes, the girl is conclusively presumed to be incapable of consenting to sexual intercourse, on the theory that she is too young to understand the nature and consequences of her act. As long as the age of consent set by statute reasonably approaches reality one cannot complain too strenuously. When it is found, however, that some twenty-one states set the age of consent at eighteen years, and Tennessee at twenty-one, and that in most jurisdictions the conclusive presumption that the girl did not know the nature and consequences of her act applies even though she was unchaste or in fact a prostitute, one begins to wonder whether our legislators are aware of the facts of life.

Also, in many states the statutory age at which a girl may consent to marriage (and indirectly, of course, to sexual intercourse) is lower than the age at which her consent to intercourse outside the bonds of marriage will serve as a defense to a charge of rape. Therefore, although the girl may be married, if she consents to intercourse with one other than her husband, her paramour may be convicted of rape. And, if the particular jurisdiction does not have an adultery statute, it would be possible to have a situation whereby the paramour is guilty of rape as a result of intercourse with a seventeen year old married prostitute, whereby he would have been guilty only of a transgression of the mores had he had intercourse with an eighteen or nineteen year old married female who was not a prostitute.

At the present time, adultery is not punished at all in Louisiana, New Mexico, and Tennessee, and thirteen states do not punish single or occasional acts of intercourse, but make criminal only the "living" or "cohabiting" in adultery. The possible penalties upon conviction of adultery range from a maximum five year imprisonment and/or $1,000 fine imposed by Vermont, to a flat, mandatory fine of $10 exacted by Maryland. Between these poles may be found many gradational variations.

An even clearer illustration of the whimsical character of the criminal law is found upon examining the regulation of fornication. In thirteen states fornication is not punished at all and fifteen jurisdictions prohibit only the "cohabiting" or "living" in a state of fornication. Upon conviction for a single act of fornication the maximum jail sentence is found upon the statute books of Oregon, where the penalty is from one to five years. (The statute applies only when the girl is under eighteen years of age.) The minimum incarceration is imposed by North Dakota where thirty days is regarded as adequate. The possible fines in states

prosecuting single acts of fornication range from a minimum of not more than $10 in Rhode Island to a maximum of $1,000 in Georgia, while Virginia and West Virginia grant the court discretion to impose any amount deemed adequate.

Relatively light punishments are also inflicted by states which penalize only the living in a state of fornication, as is evidenced by the fact that in only five jurisdictions is the permissible sentence greater than six months, while six states set a six months' limit and seven others prohibit incarceration entirely. The fines imposed for cohabiting in fornication vary from the $1,000 maxima imposed by Kansas, Missouri, Georgia and Nevada to the Arkansas, Nebraska, and Wyoming exactions of $100, while North Carolina and Alabama prescribe no limits whatsoever. A comparison of statutes regulating incest, sodomy, seduction, and rape show the same widespread divergencies.

One would hardly expect that forty-eight legislatures would produce identical legislation in regard to any specific phase of sexual activity. It is astounding, however, in a nation whose mores have always prohibited all sexual activity outside the bonds of marriage, that such great discrepancies should be the rule rather than the exception.

Judge Ploscowe's examination clearly shows the need for a thorough revision of the sex law if it is to effectively and realistically meet the every-day needs of society. Equally important, however, it shows that to reach this goal such revision must be made by experts who have the time, inclination, and facilities to treat each question in the regulation of sexual activity as part of an integrated whole, instead of dealing with each as though it were an isolated entity incapable of affecting any other.

While the book is a scholarly analysis of the laws regulating sexual behavior, it is easy to read and to understand and should be as interesting to the layman as to the lawyer or social scientist. Needless to say, it should be required reading for every state legislator.

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