BOOK REVIEWS
REVUE DES LIVRES

Canadian Anti-Combines Administration 1952-1960. By G. ROSENBLUTH and H. G. THORBURN. Toronto: University of Toronto Press. 1963. Pp. vi, 106. ($4.00)

In their Preface to the book under review, Professors Rosenbluth and Thorburn stress the need for inter-disciplinary studies of public policy problems, pointing out that this book itself is the result of the collaboration of an economist with a political scientist. A law teacher's natural reaction on reading this is to inquire whether the legal viewpoint, too, would not have had a place in such a study and, if so, what would have been the jurist's contribution. The first question should surely be answered in the affirmative; after all, the law of restrictive trace practices does present many important problems to lawyers. Nevertheless, it is difficult to determine with any precision the possible contribution of the legal point of view. Most probably, its presence would have led to greater awareness and more detailed analysis of the problems of legal technique which arise in legislation, administration and litigation. These are, no doubt, very important problems, but one cannot help wondering whether the jurist is always limited, by the very nature of his task, to devising ways and means for the application of policies which have been decided by others. It may be argued, of course, that an economist or a social scientist does, to some extent, the same thing and that, furthermore, bringing together and implementing effectively policies of various kinds and origins is no mean task, nor does it lack creativity. This is a major jurisprudential question which cannot be answered here, but it is a question which comes to mind with great force on reading studies such as this.

Canadian legislation on combines and monopolies dates back to an Act of 1889, whose provisions were later incorporated in the Criminal Code. Enforcement activities before the Second World War were limited; their extent is reflected, as the authors point out, in the pitifully small appropriations and minimal staff at the Commissioner's disposal. Activities increased, in number and importance, in the late Nineteen Forties. In 1949, however, acute differences of opinion on anti-combines policy between the Com-

missioner administering the Act and the Cabinet led to the Commissioner's resignation and ultimately to the appointment of the MacQuarrie Committee, charged with "studying" the legislation. Professors Rosenbluth and Thorburn provide an excellent analysis of the political and economic background of the incident and discuss critically the various proposals submitted to the Committee as well as the Committee's final report. The Committee accepted some of the proposals, in particular those relating to the administration of the Act, but it rejected several other suggestions, calculated to weaken the effectiveness or limit the field of application of the Act. Professors Rosenbluth and Thorburn stress the MacQuarrie Committee's recognition of the importance of and need for research on monopoly and restrictive trace practices. Its recommendations on this point were implemented only in part and after great delay. A few research reports have been published and, less than three years ago, a research section was established at the Combines Branch.

The authors examine critically the combines legislation as it stood after the 1952 amendments and the administrative machinery for its implementation.[1] But the core of the study is their attempt to assess the effectiveness of the legislation.[2] This is a difficult task, because effectiveness can not be accurately measured in terms of convictions or reports; ultimately, only a study of the degree of concentration in the Canadian economy at various dates could provide a more definitive answer, and even then the effects of a multitude of other factors would have to be identified and distinguished. Professors Rosenbluth and Thorburn approach the problem from two directions: they attempt first an assessment of the importance of anti-combines administration within the governmental structure, and then they proceed to an evaluation of its effectiveness in combating monopolistic practices or undue concentration.

As a criterion of the administration's importance, they use its level of expenditures. They have no difficulty in showing how low this level is, both in absolute terms and when compared to public expenditures in other fields. It is true that appropriations to the Combines Branch and, correspondingly, the number of its staff, have greatly increased in absolute and relative terms, since the pre-1952 period. However, there has been no significant increase since 1954; neither has there been a consistent increase in the relative level of expenditures when the rise of the gross national product is taken into consideration. The authors use several yardsticks in assessing the importance of expenditure figures and they all seem to lead to similar conclusions. Their argument is con-

[1] Pp. 26-43. [2] Pp. 44-83.

vincing, though one should avoid the temptation of reading too much into appropriation and expenditure figures. Lack of money is only one of the problems faced by anti-combines administration; for instance several other reasons account for the difficulty the Combines Branch, like other parts of the civil service, has in attracting a greater number of mature and able lawyers and economists.

To study the extent to which the Canadian economy is affected by the anti-combines legislation, Professors Rosenbluth and Thorburn establish two sets of tables, showing respectively the situations effectively handled by the combines machinery and those not effectively handled. They accompany these tables with a detailed annotation on their sources, or, more precisely, on the authors' interpretation of the statements in the annual reports of the Director of Investigation and Research under the Act on which most of the tables are founded. The result is that, of the situations based on these reports and in terms of the relative size of the market, those not effectively handled represent a slightly larger market portion. However, the authors add in the "not-effectively-handled" category another group of situations, termed "examples of industries and products where concentration is high and business policies should be investigated." Since these industries and products represent by themselves a portion of the market almost five times bigger than that of situations "effectively handled," the picture changes radically. Now, it cannot be disputed that, to assess the effectiveness of the Act, it is necessary to examine the situation in those industries where no attempt has been made to apply the Act. But this in itself is the possible object of a whole study; to include the authors' conclusions on this question with a minimum of discussion and references[3] seems less than sufficient. The basic finding that the activities under the Combines Investigation Act have affected but a small part of those industries that could and should have been affected is certainly difficult to dispute both on the grounds of common knowledge and in view of Professor Rosenbluth's authority in the field.[4] It is still to be regretted, however, that the argument is not documented and supported more fully.

In many instances, the authors show themselves well aware of legal ways and problems. When dealing, for example, with the decisions in the *Beer* and *Sugar* cases,[5] they refuse to place the whole blame for the outcome on the courts; they rightly point ou

[3] Pp. 78-79.

[4] *Cf.* Rosenbluth, Concentration in Canadian Manufacturing Industries (1956); Rosenbluth, "Concentration and Monopoly in the Canadian Economy," in Oliver, ed., Social Purpose for Canada (1961), p. 198.

[5] *Reg.* v. *Can. Breweries Ltd.*, [1960] O.R. 601; *Reg.* v. *B.C. Sugar Refining Co. Ltd.* (1960), 32 W.W.R. 577.

that study of the court records is necessary to determine the role that the prosecution may have had in the formation of the decisions.[6] It is unfortunate that the authors could afford neither the time nor the expense necessary for such a study and it is to be hoped that their suggestions will be taken up by somebody in a position either to pursue or to finance a study of this sort.

Their treatment of the *Morrey* case, on the other hand, does not show the same awareness of the realities of legal practice. It is only a detail, but it is fairly typical of at least one aspect of the authors' attitude toward the day by day administration of the Act. To begin with, they over estimate the importance of the case. In *Reg.* v. *Morrey*,[7] a majority of the British Columbia Court of Appeal refused to construe the "detriment to the public" provision of the Combines Investigation Act as having the same meaning as the "unduly" of the Criminal Code. This construction (as a result of which evidence of specific detriment to the public would become necessary for a conviction under the Act) was contrary to the, admittedly scarce, authority then existing and it was not followed in subsequent cases.[8] In prosecuting under section 32 of the Act, rather than under the then section 411 of the Criminal Code, the Combines Branch and its legal counsel may have been attempting to establish the identity of meaning of the two provisions. As with any other unsuccessful venture of this sort, they may be properly criticized for not chosing better the case and the court. It is difficult, however, to agree with Professors Rosenbluth and Thorburn in their criticism of the subsequent conduct of the Branch.[9] When leave to appeal to the Supreme Court of Canada against the Court of Appeal decision was refused, the Branch had the choice of dropping the case or starting all over again with a new trial. It followed the first course, on the ground that the price-fixing arrangement had been discontinued and further proceedings would cause "undue hardship" to the defendants. To legal eyes this course of action appears reasonable. The case itself was of minor real importance: at the trial, the defendants had been fined one dollar each. Having lost once in the British Columbia courts, the Branch and its counsel apparently did not think much of their chances of winning at a new trial, now that they had against them a Court of Appeal decision on the law; they were evidently unwilling to risk establishing a series of unfavorable precedents. The authors further criticize the Combines Branch for a "change of view" after this case, manifested in the altered language concerning section 32 of the Act in the Director's annual reports.[10] However,

[6] P. 67.
[7] (1956), 6 D.L.R. (2d) 114, 19 W.W.R. 299.
[8] *Cf. Reg.* v. *Can. Breweries Ltd.*, *supra*, footnote 5, at p. 605.
[9] Pp. 69-70, 102 (note 6). [10] P. 70.

the Director, as a civil servant, had no choice but to describe in his report the state of the law in the matter, regardless of his own opinion as to the correctness of the decision; furthermore, it is not possible, in a report of this sort, to give the facts of a case every time one cites it.

In their conclusions, the authors examine in a perceptive and stimulating manner the whole function of anti-combines law and policy in the Canadian system. They suggest that the government's public policy aims conflict in this instance with the interests of an influential segment of the public. A compromise is the result that should be expected, but, up to now, the successive compromises have tended to favor the interests of business rather than those of the general public. In periods of prosperity, monopolistic situations are not greatly resented and the enforcement of anti-monopolistic law is bound to be unenthusiastic and ineffective. Situations may change, however. In periods of inflation, action against monopolistic arrangements may be politically feasible or even necessary. The ban on resale price maintenance in 1951 is convincingly shown to be due in major part to the desire to combat inflation.[11] On the other hand, the Cabinet's dislike of too independent a Commissioner combined with the businessmen's (and, the authors point out, lawyers') objections to an official who was "both judge and prosecutor," to bring about the 1952 amendments of the administrative machinery of the Act.[12] In the final analysis, the authors rightly insist, it is the lack of enthusiasm on the part of the government that lies at the root of the ineffectiveness of the Combines Investigation Act.

There is, however, another major cause, Professors Rosenbluth and Thorburn point out: both the government and the civil servants who administer the Act are working on the basis of a "cops and robbers" conception of the law on restrictive trade practices, an approach founded on criminal law.[13] They act as if only a few criminal elements among businessmen were liable to abuse a position of economic power. This view colors the approach to anti-combines enforcement of everybody concerned: the Combines Branch, the government, the courts and the businessmen themselves. The authors show convincingly that such an approach does not make sense in economic, political or even moral terms. "[T]he propensity to monopolize", they point out, "being part and parcel of the propensity to seek maximum profit, is common to all businessmen and not the special characteristic of a criminal minority".[14] The preservation of competition is part of the supervisory function of government; but this does not necessarily mean that those

[11] P. 99. The parallel to the recent British moves to abolish resale price maintenance is evident.
[12] Pp. 15-16. [13] Pp. 29-32, 101-103. [14] P. 30.

against whom the government is acting are criminals. Moreover, the means whereby competition is preserved should not be criminal penalties only, but a wide variety of regulatory measures, ranging from taxation and credit policies to legislation prohibiting certain actions.

One may observe at this point that the "cops and robbers" approach is not only a matter of attitude; the whole question has an important constitutional law background, of which the authors are aware[15] but which they refrain from discussing. Their reticence is regrettable because it deprives us of a re-examination of the constitutional problems of the trade and commerce clause of the British North America Act from a fresh, non-legal point of view.

Professors Rosenbluth and Thorburn end by suggesting certain concrete changes with which no student of Canadian anti-combines law can disagree: more emphasis on research, diversification of remedies, improvement and "streamlining" of administrative arrangements, abandonment of the "cops and robbers" approach, and, most important of all, a basic commitment of the government to the policy against restrictive trade practices. Since 1960, some of the particular policies they propose have been adopted in the administration of the Act: a research section has been established, more use is being made of section 15 of the Act which allows in some cases the bypassing of the procedure before the Restrictive Trade Practices Commission. The Combines Branch's "program of compliance" may even indicate the beginnings of a change of approach; but no radical commitment on the part of the Canadian Government can be detected as yet.

This is an important and stimulating study of a topic which should cause great concern to Canadians. By directing their inquiry at the realities of the legislative process and at the actual operation, rather than the hazy conceptual complexities, of the Combines Investigation Act, the authors have greatly contributed to our understanding of anti-combines policy and, more generally, of governmental process as a whole. No other study has dealt in so illuminating and convincing a manner with the political and economic background of the recent developments in combines legislation. Their positive suggestions are persuasive and useful, and the identification, description and criticism of the "cops and robbers" approach is a lasting contribution to the literature on restrictive trade practices. The discussion of the administration of the Act is also highly stimulating, but one cannot help regretting that the authors have not gone further and deeper in their inquiries to give us their interpretation of the concrete details of administration and of the substance of investigation reports or court decisions. While recognizing the deficiencies of the legislation, the

[15] *Cf.* pp. 5, 6, 104.

indifference of the successive Cabinets and the unfavorable attitude of the courts, the authors direct the bulk of their criticism against the civil servants (and lawyers) in charge of the administration of the Act. Greater awareness of the trivial realities of courtroom or administration that a lawyer or a civil servant is constantly faced with might have tempered some of their criticism.

What the Canadian law on combines and monopoly most needs today is study, criticism and discussion of the legislation and administration from new angles and with respect to new problems. The sad truth is that the recent enactment of restrictive trade practices legislation in the United Kingdom, Germany, and the Common Market has resulted in more studies, of better quality, than have been written in the seventy-five years of the Canadian Act's existence. The work of political scientists, economists, lawyers, and others is needed to create among the public, the legal profession and the government more awareness of the problems of anti-combines law and thus prepare the way for new and better legislation and for a more constructive judicial interpretation of the Act. Professors Rosenbluth and Thorburn's study needs no better recommendation than to say that it may well prove to be the harbinger of such new interest and concern.

A. A. FATOUROS*

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Current Law and Social Problems. Volume III. Edited by E. E. PALMER for the University of Western Ontario, Faculty of Law. 1963. Toronto: University of Toronto Press. Pp. v, 237. ($6.00)

This third volume in a series by the University of Western Ontario Faculty of Law marks a transition to emphasis on a single theme. The theme chosen to portray the shift —labour law —was eminently suited to promote the objectives of the series, so well-stated by Professor R. St. J. Macdonald who edited the first two volumes as a member of the sponsoring law staff, namely, "collaboration between lawyers, social scientists, juristic philosophers and others who are interested in exploring social values, processes and institutions". There is, however, a considerable disunity in the contributions, even making allowance for the wide scope offered by labour law as a focal subject. What pinpoints the disunity is as much the range of the topics covered as the limitation of their treatment in terms of the jurisdictions studied.

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More than one-third of the book is taken up by Professor Johnston's concluding half of an article on The International Law of Fisheries: A Policy-Oriented Approach, of which the first half was published in volume 1 of the series in 1960. This reviewer claims no particular competence to assess the merits of the article but he can say that he appreciated the documented analysis on which the author pitched his thesis that fisheries is a resource whose exploitation and conservation should be based on the widest possible sharing under a regulatory international regime which, while rejecting the chaos that would ensue from attaching fisheries to a concept of freedom of the seas on the one hand and territorial water claims on the other, would yet recognize that there must be priorities, as, for example, in favour of contiguous or coastal states, particularly if they are heavily dependent on fisheries.

The book otherwise consists of six papers on aspects of labour relations, of which the first one, on Law and Industrialism by Dean Rand, may be regarded as a philosophic introduction to the demands on law made by an ever-developing technological society. Dean Rand sees the strike weapon today in the context of an industrialism which has become so integrated with organized social life as to bring danger to the public weal if it is disrupted by strikes. Hence, he stresses the need for new thinking on compulsory arbitration, and, in any event, would require "when the public interest is directly involved", that strike action be posited on the affirmative results of a secret ballot of employees. This is half only of the total picture in a threatened strike, and he sees the other half in the need to provide a better means of sharing the fruits of national production since he regards the great issue in labour relations as that of remuneration, and points to profit sharing as a possible measure for more equitable sharing.

Of the remaining five papers, two are rather light because largely descriptive. Professor Herbert draws on his own experience in a piece on Conciliation Boards in British Columbia, and Professor Beaulieu traces the development of Labour Legislation in the Province of Quebec, a development which, since the preparation of his paper, has come under re-examination in proposed new legislation. The other three papers admit of more detailed comment because they have more to say in analysis and criticism, and Professor Palmer, the new editor of the series, should take satisfaction in bringing these papers together. Professor Mackay, like Professor Johnston a member of the sponsoring law faculty, has contributed a useful examination of the criminal law of picketing in Canada. The absurdities of the law as formulated (and today it is so far removed from its origins and raison d'être as to be an anachronism) and the uncertainties surrounding its meaning are tolerable only because it is so rarely invoked for prosecution pur-

poses. It has, however, played a role in providing a peg for civil liability, but even here it has outlived its usefulness, and Professor Mackay might well have called for its repeal, at least in its form in clause (f) of section 366 of the Criminal Code.

The two weightiest and most extensive contributions are those by Professors Crispo and Arthurs (a successful collaboration of an industrial relations economist and a law teacher) on Jurisdictional Disputes in Canada: A Study in Frustration, and by Dr. W. F. Frank (trained in both economics and law) of the Lanchester College of Technology, Coventry, England, on The Drift Towards a National Wages Policy. The articles are respectively forty seven and forty pages in length, so that together they constitute better than one-third of the volume. The Crispo-Arthurs paper is a sober study of efforts, both public and private, to contain jurisdictional disputes which recur in the construction industry, although by no means limited thereto. It is their conclusion that it is the structure of the labour movement that throws up these work-claim disputes. Although this is certainly so, and although technological change in itself may have had no independent effect but has merely aggravated frictions already immanent in that structure, it is difficult to see how any change in structure would eliminate such disputes. The authors' solution is that the unions should try to eliminate jurisdiction instead of trying to eliminate disputes. But surely this is tweedle-dum and tweedle-dee, since, in the end, it means attempting a permanent division of jurisdiction, rather than relying on *ad hoc* decisions; and how much permanence can there be when it is not the unions that will call the tune on changes in industrial practices. Even if all unionists were in one big union, there would be need for definition and *ad hoc* decision. Would it not be wiser to acknowledge the likelihood of continuing differences in this area, and to concentrate on resolving machinery?

The traditional common-law remedies in this field were the remedies against unlawful strikes and picketing invoked by the employer who was often the innocent victim of a grinding operation between competing unions. The common law, however, was inadequate to assess the merits of jurisdictional claims because it had no criteria for doing so. In today's scheme of statutory labour relations law, bargaining unit definitions can help, but they are often lacking in the needed precision, and where this is so the difficulty of reaching a satisfactory result by compulsory collective agreement arbitration is aggravated because one of the competing unions is outside of the embrace of the agreement and of the decision. Private settlement machinery is apt to suffer from a similar defect, expecially where it is voluntary, but under statutorily-prescribed collective agreement arbitration there is no escape from a duty of decision between a union and an employer even though

the work-claim issue involves another union not party to the agreement or to the arbitration. It may be possible to invite it to become a party to the adjudication, and there has been some limited experience in this connection. *The Cadillac Contracting Co.* case[1] (which the authors do not like and on which this reviewer will not comment because he was the arbitrator there) would undoubtedly have been easier going if the two interested unions and the two interested employers had been parties to the arbitration.

Defects though there be in private machinery, the success of The National Joint Board for Settlement of Jurisdictional Disputes (established in the United States but applicable also to Canadian building trades unions) has been considerable. It may be noted, however, that its creation was to some extent a response to the Taft-Hartley prohibition of concerted action to support a work assignment objective connected with a jurisdictional dispute. Besides adverting to the role of the National Labor Relations Board in this area, as recently underlined by the Supreme Court of the United States, Professors Crispo and Arthurs devote a section of their study to the 1960 Ontario statutory provision for establishment of jurisdictional disputes commissions whose orders on work assignment are ultimately appealable to the Labour Relations Board.[2] As in Taft-Hartley, so in Ontario adequate room is left for private mutual adjustment, but no private machinery has so far been created in Ontario. The one operating commission created in pursuance of the legislation is the Ontario Jurisdictional Disputes Commission for the construction industry. The narrowness of its authority under the governing legislation was underlined in the *Canadian Pittsburgh Industries Ltd.* case[3] in 1961 which emphasized the limitation of intervention to work assignment disputes involving employees of the employer; and there has been only slight alleviation by the recent decision in the *Wood, Wire and Metal Lathers* case[4] which merely pointed out that it is not necessary that protesting employees be engaged in the particular project on which the dispute arises.

Dr. Frank's paper, the only non-Canadian contribution, is concerned with more than aspects of labour law. It is a historical, legal-economic survey of wages policies in England from 1348 on, culminating in the present disposition to self-determination under collective bargaining, or, as it has been termed, collective laissez-faire. The author reminds us that "wages form part of the national income" and "a wages policy can therefore not be separated from an incomes policy". In this context, the remaining discussion is

[1] (1961), 11 Lab. Arb. Cas. 333. [2] R.S.O., 1960, c. 202, s. 66.
[3] *R.* v. *Orliffe, Ex parte Canadian Pittsburgh Industries Ltd.*, [1961] O.W.N. 223.
[4] (1963) 40 D.L.R. (2d) 833.

pointed to the tasks facing the National Economic Development Council set up in Great Britain in 1961. Dr. Frank's suggestions and his programme go beyond merely indicative planning. There are sobering words here for the recently established Economic Council of Canada, even though it neither has nor can it, under present constitutional limitations, be given the powers to enforce policy. Dr. Frank is of opinion that "any effective national wages policy will spell the end of collective bargaining as we know it today"; and he calls for the socialization of the collective bargain, that is for subordinating it to legislative norms so that it would operate under State-prescribed policies. On this continent we have gone beyond Great Britain in making collective agreements enforceable and in treating unions as responsible juridical entities. Dr. Frank calls for these steps, and for a consequential and crucial one of providing for arbitration of wage demands if normal bargaining breaks down; but arbitration according to criteria which will take account of both a national (political) decision as to the share of national income to go to labour and of the allocations to particular industries. It is strong medicine that he prescribes, but he justifies it because he regards sectional wage bargaining as outdated today as the horse and buggy.

BORA LASKIN*

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Criminal Responsibility and Mental Illness. By F. A. WHITLOCK, M.R.C.P., D.P.M. Toronto: Butterworth & Co. (Canada) Limited. 1963. Pp. 222. ($9.00)

Sir James F. Stephen once said:

> To deal with matters so obscure and difficult the two great professions of law and medicine ought rather to feel for each others difficulties than to speak harshly of each others shortcomings.[1]

Reading and re-reading of Dr. Whitlock's book does not lessen the difficulties, but it does help to bring matters into perspective in a most practical way. It serves to explain some of the psychiatrist's uncertainty and his frequent perplexity with some legal terms in criminal matters. On the other hand, the many criminal lawyers who are faced with the considerable gap between the meaning of psychiatric terminology and legal definition when preparing a defence can learn much from this little book.

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[1] History of the Criminal Law (1883).

In writing this book Dr. Whitlock has made a real attempt to interpret the decisions in many English and Scottish cases over the years and show the development of legal thinking on matters affecting mental illness. It is refreshing to find well documented references to cases ranging from 1550 to 1962.

This use of legal material should prove helpful to the criminal lawyer and a real asset to the trial practitioner in preparing his defence.

For example, some of the anomalies and implications of the *Podola*,[2] *Bratty*[3] and *Gallagher*[4] cases are discussed. The somewhat strange variations over the years in decisions of the English appellate courts on the defence of insanity are reviewed.

Many subjects which are of importance, such as amnesia, fitness to plead, insanity, irresistible impulse, delusional states, and diminished responsibility receive full and free treatment.

For the average practitioner reading of the United Kingdom Royal Commission *Report on Capital Punishment*[5] constitutes a magnum opus. Dr. Whitlock, however, makes use of the text of the *Report* freely and extracts from it the substance so far as it relates to the problems under consideration in his book.

At the present time, as is well known, a psychopath is not thought to have a defence recognized by our system, nor indeed in England or in Scotland, and it is of interest to read the views of Dr. Whitlock on this question:[6]

> It appears generally to be accepted that psychoneurosis and character disorder — including psychopathic personality — cannot be classed as diseases of the mind which would bring them within the terms of the McNaghten rules.
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> In these circumstances, whatever the views about the responsibility of the psychopath, there is a clear need for some form of control while treatment is being given. That the ordinary mental hospital fails to provide the proper facilities is a fact which is all too obvious today.

Two somewhat obvious and yet important facets of psychiatry which are discussed are free will and responsibility. Dr. Whitlock describes free will in dealing with determinism, and I would quote:[7]

> In the words of Dr. Eliot Slater "No theory of mental medicine could develop without the working hypothesis of determinism. . . . . The free will on which law and origin are based proves a historically sterile idea". . . .
>
> Let the argument be pressed a little more strongly; we can then put forward a case for the hypothesis that all our actions are governed by an absolute determinism which we are powerless to alter. Psy-

[2] *R.* v. *Podola*, [1960] 1 Q.B. 325, [1959] 3 All E.R. 418.
[3] *Bratty* v. *A.-G. for Northern Ireland*, [1961] 3 All E.R. 523.
[4] *R.* v. *Gallagher* (1929), 21 Cr. App. Rep. 172 (C.C.A.).
[5] (1949-1953). [6] Pp. 31 and 81. [7] P. 56 *et seq.*

> choanalytic theory will point to the unconscious drives behind conscious actions. We have no knowledge of these impulses until we learn of them during treatment on the analyst's couch. We are what we are and we behave in the manner observed because of the early childhood experiences that we have encountered and the inborn physical and mental constitution with which we are endowed. It follows that even the most apparently rational of our actions occur only because of the unconscious bias and drive which causes us to act as we do and to make us believe we act freely. The point has been well put by Professor John Hospers. The poor victim (the criminal) is not conscious of the inner forces that exact from him this ghastly toll; he battles, he schemes, he revels in pseudo-aggression, he is miserable but he does not know what works within him to produce these catastrophic acts of crime. His aggressive actions are the wrigglings of a worm on a fisherman's hook. And if this is so it seems difficult to say any longer, "he is responsible". Rather, we shall put him behind bars for the protection of society, but we shall no longer flatter our feeling of moral superiority by calling him tacitly responsible for what he did.

With these views Dr. Whitlock does not, of course, easily agree as he later says:[8]

> Determinism and fatalism have no place in Courts of law nor, for that matter, in everyday assessments of behaviour. It would seem that whether it is right or wrong, the doctrine of psychological determinism is out of step with common sense opinion which holds obstinately to the view that we are, in fact, free to make decisions in a manner which separates us from the automatom or the animal responding by reflex action to a condition stimulus.

The book contains a critical appraisal of many of the apparent incongruities which strike the lay mind when considering psychiatric medical opinion.

For years now, both in Canada and in England, the McNaghten Rules have received criticism varying from mild to violent. For those persons interested in changes in the law in relation to the defence of insanity as laid forth in section 16 of the Criminal Code there is much food for thought in the review of the various aspects of the defence of insanity made in this book. It will be recalled that in 1949 the McRuer Commission recommended no substantial change in section 16. In recent time there has been a resurgence of thought towards the adoption of the Scottish defence of diminished responsibility! This defence was adopted in England in 1957 by the Homicide Act.[9] There is a chapter in this book devoted to the subject of "diminished responsibility" that reviews decisions in the English courts made since the passing of the Homicide Act in 1957. It seems clear that the conclusion reached by Dr. Whitlock is that diminished responsibility has fitted into

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[8] P. 58.

[9] 5 & 6 Eliz. 2, c. 11.

the existing framework of English law well and is being interpreted by juries reasonably.

Diminished responsibility is, of course, a defence that is advanced to a charge of capital murder and is intended to reduce the charge from one of capital murder to one of manslaughter, thus avoiding the consequence of hanging for the accused person. The criticism often advanced to those persons opposing adoption of this doctrine in Canada is that it would not work satisfactorily in Canada as it had not been tested in a common-law situation. It now appears on the basis of the work which has been done bringing the Scottish and English cases and facts before the reader in this book that this criticism is answered by Dr. Whitlock. Thus, material will be found here for the Canadian lawyer who wishes to become up to date on existing English law and practise in the field.

As one who has tried, not always successfully, to understand and present psychiatric evidence in criminal cases, I would recommend this little book to court practitioners in Canada.

The Rubicon between law and psychiatry is gradually drying up!

JOHN CASSELLS*

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The Origins of Lincoln's Inn. By SIR RONALD ROXBURGH, Past Treasurer of the Honourable Society of Lincoln's Inn, member of the Honourable Society of the Middle Temple, formerly one of Her Majesty's Judges of the High Court and Whewell Scholar and Scholar of Trinity College in the University of Cambridge. Cambridge: At the University Press. 1963. Pp. xii, 90. ($3.00)

The beginnings of the societies of lawyers and students which subsequently developed into the Inns of Court and the smaller Inns of Chancery are by no means clear. In 1289, towards the end of the reign of Edward I, England experienced its first, and last, great judicial scandal. Edward's reaction to it was curiously modern; he appointed a Royal Commission. The Commission reported in 1290, and its report was followed by a wholesale removal of judges and the promulgation in 1292 of the Order in Council *De attornatis et apprenticiis*, the purpose of which was to ensure a supply of trained lawyers. The formation of these societies is thought to have been a result of this Order.

Such is the probable beginning of Lincoln's Inn. The particular

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puzzle posed by the history of this Inn, however, is how it came by its name. The earliest records of the Society, the *Black Books*, begin in 1422, but the first entries in them are clearly a record of an existing institution, and not the first records of a new one. The origin of the name must, therefore, be sought in the pre-history of the Society, before its earliest records. It is this search which provides the central theme of this book.

Until about 1900 the accepted tradition was that Lincoln's Inn had been founded by, and named after, Henry de Lacey, Earl of Lincoln, who was one of the members of Edward I's Commission of 1289. As well as being a Commissioner, he was said to have been Lord High Steward, and as such in charge of the administration of justice, and a late sixteenth century chronicler added that he founded the Society in his own house in London. In the early middle ages the word "inn" still had its original meaning of a residence, and the Earl's house would naturally be known as Lincoln's Inn.

Since 1900, however, a lot of new information has come to light. First, the site of the Earl's own house was established, and it is not in Lincoln's Inn. Then came the discovery of a fourteenth century Sergeant-at-Law named Thomas de Lincoln, who, in 1331, bought a house on Holborn where he and his students lived, which was undoubtedly named Lincoln's Inn after its owner. And the name survived him; the property was sold to the Abbot and Convent of Malmesbury in 1369, but was still called Lincoln's Inn by its new owners in 1399.

During this same period, the first detailed study of the history of the Stewardship of England was published. This showed that there is no evidence that the Earl of Lincoln ever held that office, and that the authority over the administration of justice claimed for it has nothing to support it except a tract which looks very like a piece of propaganda published by the Steward of Edward II to justify his opposition to the King and his favourite Piers Gaveston.

This was the situation as revealed shortly before 1930. It looked as if the Society had been founded by Thomas de Lincoln, and had moved from his inn to its present location between 1369 and 1422 (when the first *Black Book* begins) taking his name with it. Any connection with the Earl of Lincoln was a myth.

On the 21st July, 1931, Sir Frederick Pollock, the Treasurer of Lincoln's Inn, addressed the Canadian Guests of the Society on the origins of the Inns of Court. Despite the evidence of Thomas de Lincoln and his inn, Sir Frederick refused to renounce the Earl of Lincoln as the traditional founder of the Inn. Perhaps some of the readers of this review were among his audience on that occasion. They will find this little book of interest, and so will any-

one else who wishes to study the history of the Inns of Court. For Sir Frederick was quite right. The traditional connection between the Earl and the Society cannot be proved to-day any more than it could be sixty years ago, but a close study of the evidence unearthed before 1931, and of more that has been found since, shows that the champions of Thomas de Lincoln have a practically impossible task. For one thing, the Abbot of Malmesbury, shortly after he bought his property, built a new inn on part of it, but left the Sergeant's old inn still standing. It was this new inn, and not the old one, which the Abbot named "Lyncolnesynne", and there is no evidence that any lawyer ever lived in it.

The claims of the Earl on the other hand have received fresh support. Although he never lived in Lincoln's Inn, no one before 1598 ever said he did; the earlier versions of the tradition merely say that he provided a house for the Society, not that he provided his own. And if the Earl of Lincoln was not Steward between 1296 and 1307, who was? And even though none of his predecessors had any authority over the administration of justice, what prompted his successor to claim it?

In addition to the discussion of these topics, Sir Ronald Roxburgh has included a bonus in the form of the story of the dispute between the Society and the Bishop of Chichester in the seventeenth century complete with a transcript of the official report made to the Masters of the Bench of the hearing and disposition of the case by King Charles I in person in November, 1635. In view of the hostile reaction to James I's desire to hear cases himself, how did a Society of lawyers come to agree to submit their own case to the personal decision of his son, and a case against a bishop at that? However, their confidence was justified; the decision was in their favour and the remarks made by the King during the course of the argument prove that he clearly understood the points at issue and show him in an unusual and unexpected light.

RONALD B. CANTLIE*

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An Introduction to the Legal System of the United States. By E. ALLAN FARNSWORTH, Professor of Law, Columbia University. New York: Oceana Publications. 1963. Pp. 184. ($5.00 U.S.)

This is a short introductory text on the legal system of the United States, intended primarily for students from a civil-law background. Part One deals with the sources and techniques of American law, and Part Two provides an outline of substantive law.

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The book makes no claim to be anything more than a "survey", but despite the brevity and simplicity of presentation, it must be said to escape any invidious connotation in that word by reason of the footnotes, the suggested readings at the end of each of the twelve chapters, and the general sophistication of treatment. The chapter on case law is especially good. The discussion of substantive law will be of value only to civil-law readers, but the analysis of sources and techniques may also be of assistance to common-law readers who wish to focus on the distinctive characteristics of American common law.

MARK R. MACGUIGAN*

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Canadian Yearbook of International Law. Vol. 1. Edited by C. B. BOURNE. Vancouver: University of British Columbia. 1963. Pp. 325. ($8.50)

The reviewer's reaction to the publication of the first volume of the *Canadian Yearbook of International Law* was somewhat mixed. His immediate impulse was to offer a welcome to any publication in his own field. But this was tempered by a resistance due to the realisation that this would mean yet another periodical to read and take up more library space. There are well-established periodicals in English and French in international law, why the need for yet another? As, however, Professor Maxwell Cohen points out in his introductory paper on a Canadian perspective of international law, there are many topics on which Canada and Canadian scholars have a distinct contribution of their own to make—boundary rivers, the St. Lawrence Seaway, air law, the interrelationship of municipal and international law, the international problems of a federal State, and, increasingly, problems relating to United Nations forces. Even a cursory glance at the table of contents of this first volume of the *Yearbook* emphasises the validity of the impulse to welcome and the destruction of all reservations. The welcome will in fact be even more emphatic if the contributors to the *Canadian Yearbook of International Law* take to heart the injunctions of Professor Cohen concerning the liabilities of the older and wealthier States to those which have only recently become independent, and like him realise that even the latter have their own concepts of legal order that may not be discounted out of hand.

Such a broad and universal perspective is the negation of the concept of regional international law. On the other hand, in international society as it is now, it is impossible to discount the reali-

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ties and prejudices of politics and national emotion. Equally, it would be futile to ignore the bipolarisation that exists between the Soviet and the non-Soviet world, even though it might appear that China is trying its hardest to change the direction of the polarisation. At the same time, we must recognize that the creation of "Europe" is making a special contribution to the development of international law within a region and between that region and the rest of the world. The impact of the Soviet-Western bipolarisation upon international law is examined by Professor McWhinney, while Dr. L. G. Jahnke explores the implications of the European Economic Community so far as a specific issue of international economic law—the most-favoured-nation clause—is concerned.

In approaching the Soviet attitude to international law, Professor McWhinney contends that "international law is recognized by Soviet policymakers—more consistently, certainly, than in the West—as an instrument, and one among a number of alternative available instruments for the effectuation of national policies. As such, there is a continuing and close correlation between the process of the development of Soviet international law doctrine, and the special needs from time to time of the practical conduct of Soviet foreign policy". It may well be that the effect of Professor McDougal's recent writings on international law may achieve the same "correlation" in the West. Should this prove to be the case, what Professor McWhinney calls an "inter-Bloc law" will become of major significance truly representing "not just a temporary truce between two great military antagonists, but . . . something in the way of a continuing, evolving process with the number and range of the 'rules of the game' continuing to expand all the time, and with their degree of explicitness and correctness also improving constantly".

The paper on the European Economic Community is significant, not merely as a study in European integration and its legal consequences, but because, since the European Common Market was first mooted, there has been a plethora of suggestions in various parts of the world for similar institutionalisation. It is because of its precedent significance that Dr. Jahnke's conclusions become important. He reminds us that today customs unions only form exceptions to the operation of the most-favoured-nation standard if they take a political as well as an economic form. He also suggests that if a common external tariff is to be legal there must be no repetition of the practice of selecting the highest possible tariffs to assess the arithmetical average, ignoring the quantity of each country's trade, and that in so far as the Rome Treaty allows the association of overseas territories it may be inconsistent with the free trade ideals of the General Agreement on

Tariffs and Trade. However, the reduction in the number of non-self-governing overseas territories and the current suggestions for the revision of the General Agreement on Tariffs and Trade may render this criticism purely historical.

Canadian practice, too, in certain fields is significant as a precedent. For this reason the papers by Professors Morin, LaForest and Patry are relevant from the point of view of the international regulation of waters and should prove of major importance for the International Law Association committee on the subject. At the same time, increasing concern with tortious liability for nuclear accidents brings the *Trail Smelter* arbitration into topical importance and there is probably no better person to examine the dispute than Judge Read. Finally, Dr. Gerald Fitzgerald discusses some of the problems concerning offences and other acts committed on board aircraft.

It is clear from the above that the Canadian Branch of the International Law Association has made a most positive contribution to the science of international law by instituting this new series, and all interested in the subject will look forward to the publication of future volumes of the *Canadian Yearbook of International Law* that promise to hold their place with ease among the established periodicals.

L. C. GREEN*

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The Development of International Law through the Political Organs of the United Nations. By ROSALYN HIGGINS. London: Oxford University Press. 1963. Pp. xxi, 402. ($11.50)

Customary international law is at once the strongest and the weakest of the law-creating forces in public international law; its strength lies in its informality, flexibility and ability to grow dynamically, its weakness rests in the difficulty in determining its content at any particular point in time. It is generally accepted that,

> A customary rule grows out of general practice (*consuetudo*) in which that rule is recognized and observed (*opinio juris*).[1]

Because there is controversy over how much, if any, practice is needed and how long it must continue, the exposition of customary international law is full of pitfalls. A long-established custom can withstand contradictions, but a newly-formed custom is a fragile thing indeed. In putting forward a new customary rule, the prin-

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[1] Reuter, International Institutions (1958, Translated by J. M. Chapman), p. 115.

cipal dangers are giving too much weight to inadequate evidence and disregarding conflicting practice, thereby giving birth prematurely to a new rule.

The emergence more than eighteen years ago of a new comprehensive international organization with near-universal membership has provided "a very clear, very concentrated focal point for state practice".[2] The political organs of the United Nations—particularly the General Assembly—have given international lawyers a new wellspring from which to draw evidence showing the existence of rules of customary international law. Dr. Higgins has made excellent selective use of the vast quantity of material provided by these organs and has, by and large, avoided the many traps awaiting the unwary in this field. She has selected five major areas of United Nations practice to demonstrate how this practice has (or has not) affected customary international law: (1) The Concept of Statehood, (2) The Concept of Domestic Jurisdiction, (3) Recognition, Representation and Credentials, (4) Legal Limits to the Use of Force, and (5) The Law of Treaties.

In a good, but too-short introduction, Dr. Higgins lays the conceptual groundwork for her various theses. She rightly stresses the "necessity of inter-disciplinary co-operation between lawyers and political scientists"[3] and rejects a strict legalistic approach to these subjects. She also rejects narrow positivism and adopts a healthy teleological approach without losing sight of basic law. However, the explanation of the legal effect of resolutions of the General Assembly falls short of giving the readers, especially those not fully conversant with this difficult problem, a complete insight into this tangled web of law and quasi-morality. This is most important since the "hard core" of Dr. Higgins' work is rooted deeply in these resolutions. Here, as in other places throughout the book, fuller use could have been made of recent pronouncements of the International Court of Justice.

The United Nations Charter mentions the term "state" no fewer than thirty-one times and the first part of the book examines the concept of statehood in United Nations practice. Most of the practice here relates to questions of admission of states to the United Nations or its Specialized Agencies. Starting with the classic definition of "state" contained in article 1 of the Convention on Rights and Duties of States, concluded at Montevideo in 1933,[4] the author then examines the additional criteria laid down in article 4(1)[5] of the Charter and concludes that,

[2] P. 2.

[3] P. 9.

[4] "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States." See 49 Stat. 3097, 165 L.N.T.S. 19.

[5] "Membership in the United Nations is open to all other peace-

> Variations in United Nations practice concerning claims of statehood are not a result of an abandonment of traditional legal criteria of statehood but of the proper use of flexibility in interpreting these criteria in relation to the claim in which they are presented.[6]

Dr. Higgins emphasizes that these criteria must be kept at the highest level in the case of "a claim for comprehensive participation" in the United Nations but can be lowered for membership in the Specialized Agencies and in claims for participation in the Statute of the International Court of Justice. She points out that the desire for universality in the membership of the United Nations can, and has, led to some "blackmail" in admissions but concludes that abuse has been remarkably small.

By far the best analysis in the book is contained in the second part on the concept of "domestic jurisdiction". Here, Dr. Higgins considers claims made for and against the jurisdiction of the United Nations in connection with article 2(7) of the Charter.[7] Her conclusion is that United Nations practice shows a tendency to follow the Roman Law maxim which states that it is a sound principle to extend jurisdiction; the political organs of the organization have therefore interpreted article 2(7) in a narrow sense, allowing maximum freedom to the organization. She hastens to add, almost by way of footnote, that article 2(7) is not meaningless and that "its restraint is still to be felt in many areas".[8] No mention is made of *which* areas still feel this restraint—a logical result since the author virtually qualifies the article out of existence.

The part on recognition, representation and credentials is the most orthodox section of this book. In it, Dr. Higgins finds that United Nations practice is rapidly eroding the declaratory theory of recognition; she welcomes this development since a vigorous doctrine of implied recognition would seriously hamper collective discussion in a body such as the General Assembly.

Fully two-thirds of the book concern the vital and interesting problems of the legal limits to the use of force and the law of treaties, both as modified by United Nations practice. A detailed record is made of all cases of the use of force since the founding of the United Nations. Unfortunately, Dr. Higgins is often forced away from the fertile field of United Nations practice and on to other ground, some of it barren. On the thorny question of the

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loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

[6] P. 54.

[7] "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[8] P. 130.

Cuban "quarantine", for instance, she adopts the *ex post facto* reasoning of the United States Department of State without having some of the Department's firmer legal props.[9] In the space of one page she sets out her case and concludes that the American action "probably fell within a reasonable interpretation of the right of anticipatory self-defence".[10] Then, quixotically, she puts in a footnote stating that a good case can be made for Cuba's importation of Soviet missiles on the basis of "anticipatory self-defence".[11] An overanxiety to find a rule, not solidly based in fact and in law, often injures her case throughout this part. The sections on use of force by the United Nations are very good and one cannot help but conclude that, should another Congo situation arise, it would be most desirable for the United Nations itself to become a party before the International Court of Justice under article 34 of its Statute.

Finally, Dr. Higgins considers the law of treaties in United Nations practice and finds that "profound developments have occurred concerning capacity to make treaties, authorization and implied powers".[12] Also, "inroads have been made into the traditional concept of the *pacta tertiis* rule".[13] On the latter point Dr. Higgins is somewhat uncritical especially in her unquestioning acceptance of the validity of article 2(6) of the Charter,[14] an article which undermines the basis of international law, the consent of states. Nevertheless, the examination of the treaty-making powers of the organization is excellent although much of what is written here must be examined in the light of the International Law Commission's Draft Law of Treaties—Part II.[15]

The name of the book (and one hesitates to lengthen it further) would have been more descriptive had it been called: "The Development of *Customary* International Law through the Political Organs of the United Nations". It is most disconcerting in such a specialized book to find so much space[16] devoted to a reprint of the United Nations Charter and the Statute of the International Court of Justice. If the author or publisher feels it is *essential* then could it not be set in *pica* type so that the size of the book will not be unnecessarily enlarged.

Dr. Higgins' propensity to reinforce and restate her points is valuable for the student but it can hardly be necessary, for instance, to repeat the point that self-determination is now an international,

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[9] See Meeker, Defensive Quarantine and the Law (1963), 57 Am. J. Int. L. 515; Christol & Davis, Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962, *ibid.*, at p. 525; Wright, The Cuban Quarantine, *ibid.*, at p. 546.

[10] Pp. 202-203. [11] P. 203. [12] P. 346. [13] P. 346.

[14] "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

[15] See (1964), 58 Am. J. Int. L. 241. [16] Thirty-six pages.

legal right and not subject to article 2(7) four times in five pages.[17] Also, tautologies such as "in actual reality"[18] "at the present moment"[19] and "in actual practice"[20] could be eliminated. Certain inconsistencies in style are annoying, for example, describing the Congolese "*Loi fondamentale*"' in French at one point and then as "Basic Law" almost in the next breath.[21] Magisterial phrases such as "we are of the opinion"[22] add little. Factually, the book seems most admirable; it only remains to note that the Secretary-General is not an "Organ" of the United Nations.[23]

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[17] Pp. 100, 101, 104, 105.
[18] P. 84. [19] P. 116. [20] P. 344.
[21] P. 232. [22] P. 237. [23] P. 251.
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