BOOK REVIEWS
REVUE DES LIVRES

Nationalism and the Multinational Enterprise: Legal, Economic and Managerial Aspects. Edited by H. R. HAHLO, J. GRAHAM SMITH, and RICHARD W. WRIGHT. Leiden and New York: A. W. Sijthoff and Oceana Publications. 1973. Pp. 373. ($21.00)

This is a collection of nineteen essays, seventeen of which are based upon papers originally delivered in 1971 at a conference in Montreal organized by the editors under the joint auspices of the Institute of Comparative Law, the Faculty of Management and the Department of Economics of McGill University. The remaining two papers[1] were specially prepared for publication.

A good conference does not necessarily make a good book, and although the editors apparently recognize this,[2] it is by no means clear that all the essays in the book, however interesting they may have been to listeners, are of equal interest to readers. They vary enormously in quality, depth and scholarship.

Part I of the book consists of a group of essays which attempt to describe the multinational enterprise as seen from various national perspectives. For a Canadian reader, the essays by Professor Vagts on the American view (he denies there is *an* American view) and Ivan Feltham and William Rauenbusch, on the Canadian perspective, are perhaps of greatest interest. Professor Vagts outlines the legal treatment by the United States of American based multinationals operating abroad, and of foreign based multinationals operating within the United States. As to the former, Professor Vagts comments that "it is erroneous to regard the American corporation as simply an arm of the United States",[3] and concludes optimistically that "the ultimate solvent in extra-territoriality problems has been the implicit understanding . . . that while the United States may give instructions to its corporate grandchildren which they must obey if they can, a direct contrary order on the part of the host government will prevail".[4]

[1] By Professors Chudson (Ch. 6) and Kierans (Ch. 8).
[2] "This work is . . . far more than a mere record of the proceedings." Preface, p. v.
[3] P. 6.
[4] P. 19.

The essay by Ivan Feltham and William Rauenbusch[5] reviews in a summary way various aspects of Canadian law and policy concerning the regulation of foreign ownership. It is careful and scholarly and conveys fairly the flavour of Canadian official attitudes. Inevitably, it has been overtaken somewhat by events, but these—such as the enactment of the Foreign Investment Review Act,[6] provincial legislation concerning non-Canadian directors of Canadian companies,[7] legislation concerning foreign land ownership,[8] and so on—merely continue in directions described by the two authors.

Part II, "Costs and Benefits of Multinational Enterprise" is devoted principally to economic matters. Professor Harry Johnston[9] advances the altogether unsurprising view that the multinational corporation was historically inevitable, and suggests that those who "protest" at the development are motivated by greed, or stupidity or a lack of "progressive social understanding"[10] whatever they may mean. He makes the altogether unobjectionable claim that corporations of various kinds have made substantial contributions to social progress, but concedes that we may, through ill-advised policies, pay too high a price for the contribution. All of this may be true, but is not especially interesting. Professor Kierans,[11] on the other hand, sees the "cosmocorporation", as he calls it, as an organization which, having conquered the problem of mortality, now seeks to conquer space, and argues that this ambition is bound to conflict with national goals, and hence be self-destructive, unless something is done in the way of a readjustment of attitudes and policies towards less developed countries. Professor Rotstein[12] thinks that, while the tools to deal with the reassertion of Canadian control over multinationals operating here are readily available, we cannot apply them usefully unless we first "specify clearly the goals and objectives of our society".[13] Just how this is to be done is not made clear. On balance, Part II is disappointing, and much the thinnest part of the book (in size and nourishment).

Part III, entitled "Management of the Multinational Enterprise", is concerned with the mechanisms of controlling them, not

[5] Canada and the Multinational Enterprise (Ch. 3).
[6] S.C., 1973, c. 46.
[7] *E.g.* Ontario Business Corporations Act, R.S.O., 1973, c. 53, ss. 122(3) and 1(1), 23a; B.C. Companies Act, S.B.C., 1973, c. 18, s. 131.
[8] *E.g.* Land Transfer Tax Act, 1974 (Ontario). *Cf.* also, Collection Agencies Act Amendment Act, 1974 (Ontario).
[9] Ch. 7: Economic Benefits.
[10] P. 167.
[11] Ch. 8: The Cosmocorporation: An Unsympathetic View.
[12] Ch. 9: The Multinational Corporation in the National Economy—A Matter of National Survival.
[13] P. 190.

their internal management. It is short, but in many respects summarises the threads of argument and controversy that run through Parts I and II.

Parts IV and V are mainly concerned with legal matters. In Part IV, which deals with litigation, arbitration, securities and industrial relations, the contributions are for the most part routine, dealing with well-known and extensively dismissed problems. The one outstanding exception is the essay by Professor K. W. Wedderburn on Industrial Relations.[14] In a learned and stimulating contribution Professor Wedderburn explores the implications of multinational enterprise for the trade union movement. He tackles serious problems in a serious fashion and provides some fascinating insights into difficult and intriguing questions. All in all, Professor Wedderburn's contribution to the book is the most interesting and useful.

Part V deals with anti-monopoly legislation, with contributions by Wilbur Fugate, on the United States, Dr. Kurt Markert, on Europe, and Mr. (now Mr. Justice) D. W. Henry, on Canada. The law described by the latter in his careful and lucid contribution has not changed since he wrote, but Bill C-256, the Competition Bill, which he does discuss, was withdrawn, and another version substituted. While the new version differs in some respects from its predecessor, the substance of Mr. Justice Henry's comments remains unaffected.

Professor Howard Ross, of McGill University, offers an entertaining summing up of the proceedings, in which he identifies a good many unanswered problems that remain.

It is impossible to discuss, or even refer to each contribution. My overall impression is that while it was doubtless a good idea to have a conference on the subject, there was relatively little in the proceedings of the Conference that warranted their being enshrined in book form.

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The Malpractice of Psychiatrists. By DONALD J. DAWIDOFF. Springfield: Charles C. Thomas. 1973. Pp vii, 145. ($9.75 U.S.)

It must be said that the author, who is a practising New York attorney, does not lack courage for embarking as he has upon the dark and troubled waters of psychiatric practice, assuming that he is aware of the ethical questions which plague the field of psy-

[14] Ch. 15.

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chiatry. There is no explicit acknowledgment of the existence of these ethical issues in the work.

Commencing with a discussion of the physician-patient relationship, the author maps out the essential features of that relationship as it pertains to psychiatry, the obligations imposed upon the parties to the relationship, and the consequences to the psychiatrist of his failure to meet these obligations under varying sets of circumstances. Allegations of failure, are, of course, met with legal obligations of proof, and it is at this point that the courts begin to wrestle with the vague and shifting language of psychiatry to the general frustration of the plaintiff-patients' position. The work's discussion of this activity is provocative and not definitive. The jurisprudence referred to yields a web of most delicate fibre with few discernible patterns. Psychiatry as presented by the author reveals no predictable motif, and can be likened to a very confused spider spinning a random web. The courts wisely view this web as would an experienced fly—keeping clear of it unless no other possible flight path is available.

For those concerned with establishing the boundaries between acceptable and unacceptable psychiatric practice, the discussion of standards of care in psychiatry relating to proof, hospitalization, suicide, and shock therapy will prove useful, if somewhat lacking in economy. Any improved version of this discussion would require extensive references to the evidence upon which the decided cases were based.

The appearance at this time of a work concerning malpractice in psychiatry marks a watershed in the affairs of psychiatry, and is an event which speaks plainly of a need to protect the innocents among us from ill-conceived, authoritarian, and occasionally economically motivated interventions into their lives. The recognition of the need will, hopefully, be followed by the creation of necessary protective legal tools. None of those treated in the work under discussion can be said to possess the measure of effectiveness which the situation demands. The therapeutic state is not a congenial environment for the development of judicial and public attitudes sufficiently critical of the activities of a group with such a commitment as psychiatry to the increase in the therapeutic component of governmental activity.

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Psychoanalysis and the Law. By C. G. SCHOENFELD. Springfield, Illinois: Charles C. Thomas. Pp. ix, 285. ($13.75 U.S.)

Within the general body of Western thought, law as an autonomous field of discourse has been slow to engage in a dialogue with the ideas of the three modern masters who have totally redefined our intellectual landscape: Marx, Freud and Weber. The human sciences have generally left law behind as an intellectual anomaly, obsessed with its purified identity as a separate discipline, healthily skeptical of any attempt to use general theory either sociological or psychological to explore its domain. At times legal thought has attempted to confront the best thought in psychology, to discover how psychological theory can enable the lawyer to better understand human motivation, the concepts of responsibility, guilt, freedom and fault, to understand how law can assist in the long-term resolution of human conflicts. One of the major thrusts of American Legal Realism was to incorporate some of the earlier insights of Sigmund Freud's work into its discussion of judicial decision making, to recognize that both judge and advocate are actors in a very human drama, subject to all the limitations as well as the potentialities of human rationality. Legal thought becomes potentially more rewarding, more directly related to the human sciences, as it contacts the insights of psychology.

Likewise at many significant points in its history, psychoanalysis has touched the law and its concerns. Some of Sigmund Freud's earliest patients were professional lawyers or judges; Freud himself lectured at times on aspects of the law of evidence.[1] There are suggestions scattered throughout his early works, especially in *Totem and Taboo* that law as a mechanism of social control originated in taboos resulting from the Oedipus complex. His later work on the roots of order, power and civilization still offers us much in considering the location of law within our general intellectual order.[2] Perhaps most significantly, Anna Freud reported that Sigmund Freud hoped that one day there would be a major rapprochement between psychiatry and the law.[3] There are signs of renewed interest in this possible alliance: more psychiatrically trained academics are teaching in law schools, there are now three legal periodicals devoted exclusively to exploring law and psychiatry, and lastly a number of new books on the area have been published recently.

[1] Psychoanalysis and the Ascertaining of Truth in Courts of Law, in Sigmund Freud, Collected Papers, Vol. 2.

[2] Ernest Jones, Sigmund Freud, Life and Work (1953), Vol. 2, p. 244 discussing Sigmund Freud, The Claims of Psychoanalysis to Scientific Interest.

[3] Alan A. Stone, Psychoanalysis and Jurisprudence Revisited (1972), 10 Am. Crim. L. Rev. 357.

Psychoanalysis and the Law by C. G. Schoenfeld is the latest contribution to the ongoing discussion; unfortunately it is of extremely limited interest, scarcely confronting Freud's hopes. The book lacks both the elegance and the insight of Freud's own writings, adding little, if anything, to the academic literature in either discipline. It consists of fairly sketchy accounts of some of the basic tenets of Freudian psychoanalysis, unconscious motivation, the superego, unconscious symbolism, aggression, and rationalization, projection and identification, together with limited suggestions about their relevance to law and lawyers. The second half of the work seeks to apply these psychoanalytical concepts to key issues in American constitutional law: judicial review of congressional legislation, judicial activism and self-restraint, literal approaches to constitutional language, and the balancing of a working federalism.

The project is surely an interesting and a fertile one; and Schoenfeld is admirably equipped for the task, being a practising lawyer with a long-standing interest in Freudian psychoanalysis. Much of the book has appeared in earlier versions in law reviews and bar journals, its key ideas tested and refined over a number of years. And yet the work is disappointing, its original insights few and scattered, its bold purpose obscured by a narrow Freudian orthodoxy.

For Schoenfeld is one of that rarest and aging of breeds, an uncompromising orthodox Freudian, looking scarcely beyond the early work of the Viennese master, rejecting all subsequent heresies. At the outset all non-psychoanalytic, all non-Freudian psychology is swept aside with the disarming observation "Let's face it, Freud has won";[4] Edward S. Robinson's comment of 1935 that "a lawyer is likely to conclude that of all contemporary psychologists, the Freudian is the one whose interests are most nearly identical with his own" is used to justify ignoring most of the developments of the subsequent forty years. The mentors of the author remain Sigmund Freud, Ernest Jones, Karl Abraham, J. C. Flugel, Theodore Reik and Paul Reiwald: orthodox Freudians all.

This stress on the older generation of orthodox Freudians tends to lead Schoenfeld away from an immense number of scholars, ideas and suggestions which would have enriched his work. One is amazed that such pioneer scholars in joining psychoanalysis

[4] The authority offered for this statement is John Dollard, New York Times, June 17th, 1956, § 7 (Book Reviews), p. 6, col. 4.

and the law as Franz Bienenfeld,[5] Albert Ehrenzweig,[6] Walter Weyrauch,[7] or Harold Lasswell[8] pass by unnoticed or unmentioned, that Jean Piaget's work on the psychological roots of the sense of justice in *The Moral Judgment of the Child*[9] is missed, that Schoenfeld can devote an entire chapter to "Unconscious Symbolism and the Law" without even noting Carl Gustav Jung.

Of course Schoenfeld's neglect of many contributions in the field could be more than excused if the ideas that he gives us are imaginative, fertile and plausible. The real question that has to be answered is whether his analysis, his distinctions, add anything to our understanding of the legal process or of some of the more troubling issues in American constitutional law. In the first respect the work scarcely goes beyond Jerome Frank's two fascinating flawed works *Law and the Modern Mind*[10] (long and sadly out of print) and *Courts on Trial*.[11] But *Psychoanalysis and the Law* totally lacks the passion, wit, and excitement of Frank's writings: it relies heavily on Frank's work for some of its key ideas, as well as its tendency to assemble a stage army of straw men. Frank's excesses can be accepted if *Law and the Modern Mind* is seen as a polemic, one of the great calls to arms of the Realist movement, a work which for all its exaggerations and simplifications raised legitimate and interesting questions. But Schoenfeld's book comes forty-three years after Frank's; he barely raises any new questions, certainly no new answers.

As for American constitutional law, Schoenfeld scarcely helps to explain anything new. The constitutional dons, the judicial behaviourists, the entire tradition of American legal scholarship have so focussed on the Supreme Court and the constitution that a remarkably sophisticated literature has been produced on Schoenfeld's topics; often this literature has recourse to psychoanalytic explanation, using often difficult concepts with impressive analytic vigour. But they integrate their use of psychoanalysis into a more general theory of the court's role and work. Schoenfeld as much

[5] See Franz Rudolf Bienenfeld, Rediscovery of Justice (1947), and Prolegomena to a Psychoanalysis of Law and Justice (1965), 53 Cal. L. Rev. 957, 1254.

[6] See Albert A. Ehrenzweig, Psychoanalytic Jurisprudence (1971); A Psychoanalysis of Negligence (1953), 47 Northwestern U. L. Rev. 855, and Psychoanalytical Jurisprudence: A Common Language for Babylon (1965), 65 Col. L. Rev. 1331.

[7] See Walter O. Weyrauch, The Personality of Lawyers (1964) and the very recent Taboo and Magic in Law (1973), 25 Stanford L. Rev. 782.

[8] From a vast body of scholarship one might mention Harold D. Lasswell, Psychopathology and Politics (1930); Power and Personality (1948); and (with Abraham Kaplan) Power and Society (1950).

[9] (1932), Compare the use made of Piaget's theories by John Rawls or Philip Selznick.

[10] (1930).

[11] (1949).

as admits the deficiencies of his work when he writes "no attempt will be made to disguise the fact that psychoanalytic explanations of the law are at best partial explanations; and that for completeness, they must be supplemented by social, economic, historical and other explanations".[12]

Perhaps the best way of illustrating the merits and defects of the book is by the tendentious critical device of selective quotation [at times used by Schoenfeld himself]. The following points are taken almost at random and without comment:

". . . there is reason to suspect that some of the persons who today cry 'police brutality' most quickly and most loudly do so not so much out of concern for the victims of police brutality, as out of a secret wish to so hamstring the police as to prevent them from coping successfully with the violence created by society's enemies";[13]

". . . it is the view of many persons who have analyzed the punishment decreed by the criminal law that, to this very day, aggressive and vengeful feelings still affect such punishments greatly";[14]

". . . persons who engage in violent demonstrations for peace . . . may well be motivated by the idealistic motives they frequently espouse. Yet it is certainly possible, if not probable, that this violent conduct is at times not so much a product of these idealistic motives as of powerful, though unconscious, aggressive and hostile urgencies within these persons—urgencies that are as foreign to idealism as violence is to peace";[15]

". . . if legislators project their aggressive and hostile strivings onto big business . . . and then busy themselves with seeking to control the resultant seeming dangers posed by big business, these legislators would inevitably have less time and energy to deal with other agencies and organizations (labor organizations, for example) that may actually pose a greater danger to the public than big business";[16]

"Today, there are political agitators who by making false allegations of legal oppression (by charging, for example, that members of certain minority groups were treated improperly in courts, when, in fact, they were treated with scrupulous fairness or by charging that the police brutalized certain demonstrators, when, in fact, the police acted with great restraint in the face of considerable provocation) seem to be attempting to prepare the ground for a new civil war in the United States";[17]

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[12] P. 194.
[13] P. 61.
[14] P. 69.
[15] P. 73.
[16] P. 82.
[17] P. 96.

"By no means does it follow from all this that aggressiveness and hostility necessarily lead to undesirable results. For example, the 'space race' between the United States and the Soviet Union provides an excellent illustration of how competitiveness and hostility may sometimes result in the most magnificant [sic] of achievements";[18]

"In short, whereas it may be reasonable to suppose (as have Mr. Justice Cardozo, Judge Jerome Frank and other luminaries of the bench and bar) that rationalization (or something akin to it) may play *some* part in the judicial process. It hardly follows—certainly in the absence of convincing proof—that the judicial process is *completely* explicable in terms of rationalization. Whereas some lawyers and legal scholars may err by assuming *a priori* that rationalization plays no role at all in the opinions judges render, it would certainly appear to be a far graver and more fundamental error for them to adopt what is, in effect, the opposite point of view and to conclude, with Schroeder[19] that—contrary to the beliefs of the most astute and most eminent of jurists—logic, reason and other conscious operations of the mind have little or no influence upon the decisions judges reach";[20]

"Few if any responsible students of constitutional law would seriously contend that the text of the Constitution ought to be considered irrelevant when the Supreme Court interprets the Constitution."[21]

The suggestions are marginal, tentative, fragmentary, unsophisticated, often banal. The work offers us neither imaginative theory nor empirically verified detail: Schoenfeld remains throughout within a comfortable armchair. Schoenfeld's claim to "explain" any of the problems he approaches using psychological concepts is at best tenuous. His attempts to illumine labour law, constitutional law or the problems of the juvenile court using parent-child analogies or the concepts of aggression are disappointingly sketchy, unanalytic, and repetitious.

The oppositions he offers us are the same tired overworked ones that have encumbered legal thought for the last century: "justice" versus "certainty"; "reason" versus "emotion"; "judicial activism" versus "judicial restraint"; "law" versus "policy". Most writers have by now found these distinctions crude and unhelpful; they must be developed, refined, re-examined and *Psychoanalysis and the Law* signally fails in this task. It really is the merest be-

[18] Pp. 51-52.
[19] Theodore Schroeder, The Psychologic Study of Judicial Opinions (1918), 6 Cal. L. Rev. 89.
[20] P. 79.
[21] P. 138.

ginning of wisdom to conclude as Schoenfeld does that "one of the great . . . lessons of American constitutional experience may well be that the United States needs *both* its judicial activists and its practitioners of judicial self-restraint: both its John Marshalls and its Felix Frankfurters".[22] What is needed is an analysis of the proper occasions, locations and limits of judicial activism, to separate out the unique institutional contribution that only a court can make.

Likewise when he discusses the interpretation of constitutional language [a discussion that scarcely shows awareness of the contribution that recent linguistic philosophy can make to the analysis of interpretation][23] he offers us sometimes the textual approach, sometimes the teleological, without considering the actual use or the proper place for either. One continually feels the lack of any unified sense of broader perspectives on law into which specific psychoanalytic insights might fit.

The usefulness of the book for a Canadian legal audience may be reduced by the author's total concentration on American law and institutions. Displaced parent-child feelings may account for many Americans inordinate preoccupations with their Supreme Court; however the suggestion does not bear extension to other courts, other countries and is unhelpful in relation to the United States without detailed cultural analysis.[24] Similarly the suggestion that the relationship between federal governments and various state governments may be unconsciously regarded as though it were a parent-child relationship scarcely helps us to understand federal-provincial relations in such differently constituted federalisms as Canada, Australia or Switzerland.

Schoenfeld is intentionally modest about the book and its aims; such modesty is understandable yet it makes the book evade the real issues: "it will be kept in mind that any psychoanalytic explanation adduced is likely to be a partial explanation, which must be supplemented by explanations based upon the data of such other disciplines as history, sociology, economics, and political science".[25] His aim is to point out the significance and potential of the questions raised by an attempt to use psychoanalytic concepts in law and to reduce some of the emotionalism surrounding the issues. With this no one would surely cavil, and one hopes that nothing in this review will reduce the importance as well as

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[22] P. 137.

[23] See, for instance, Gidon Gottlieb, The Logic of Choice (1968).

[24] For attempts to develop such an analysis see F.S.C. Northrop, The Complexity of Legal and Ethical Experience (1959). And A. B. Bozeman, The Future of Law in a Multicultural World (1971).

[25] P. 150.

the difficulty of such a task. But Schoenfeld's contribution is finally unimpressive and deeply disappointing.

For an insight into the potential of building a truly human jurisprudence we must turn to Albert Ehrenzweig's strange troubling work *Psychoanalytic Jurisprudence*;[26] this is a dense *Finnegans Wake* like voyage into legal thought, monumentally and impossibly documented, at times scarcely coherent but always suggestive, intriguing, imaginative. But Ehrenzweig was writing an immensely sophisticated attempt to locate the ideas of law and justice within a general theory of man and society.[27] It is this exasperating work that deserves attention and study, not merely by legal philosophers, but by those active in private practice, in criminal law, in tort law, in conflicts or civil procedure, for the book touches on all these areas in turn. Ehrenzweig's work offers the best basis for a sustained dialogue between law and psychoanalysis, a dialogue that has been on each of their agendas since Freud wrote, that offers the best hope for a more socially relevant psychoanalysis, a more humanly meaningful jurisprudence.

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[26] *Op. cit.*, footnote 6.

[27] See also Harold J. Berman, The Interaction of Law and Religion (1974).

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